



**ASIC**

Australian Securities & Investments Commission

## REPORT 159

# Report on submissions to CP 103 Review of share purchase plan threshold

June 2009

### **About this report**

This report highlights the key issues that arose out of the submissions received in response to Consultation Paper 103 *Review of share purchase plan threshold* (CP 103) and details our responses to those issues.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Disclaimer

This does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see Regulatory Guide 125 *Share purchase plans* (RG 125)

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## A Overview/Consultation process

### Key points

In December 2008, we consulted on increasing the monetary limit for share purchase plans from the current amount of \$5000 in any consecutive 12-month period to \$15,000. We also consulted on a proposal to introduce a requirement for a cleansing notice.

While there was widespread support for the monetary limit increase, there were different viewpoints on the cleansing notice requirement. We have made some changes in our final policy in response to the submissions we received.

### About our consultation

- 1 We released Consultation Paper 103 *Review of share purchase plan threshold* (CP 103) on 18 December 2008 to consult on proposals to increase the monetary limit for share purchase plans from the current amount of \$5000 in any consecutive 12-month period to \$15,000, and introduce a cleansing notice requirement.
- 2 The monetary limit increase to \$15,000 reflects CPI increases, the changing profile of retail investors and growing participation levels in the stock market.
- 3 A cleansing notice gives investors information about their investment in a form that is less costly and time consuming for an issuer to prepare than a prospectus or Product Disclosure Statement (PDS).
- 4 This report highlights the key issues that arose out of the submissions we received on CP 103 and our responses to those issues.

### Responses

- 5 We received submissions on CP 103 from a range of stakeholders including companies, industry associations such as the Australian Shareholders' Association and the Securities and Derivatives Industry Association (SDIA), and individual retail investors.
- 6 Responses to our proposal to increase the monetary limit to \$15,000 were overwhelmingly positive.
- 7 Our proposal to introduce a cleansing notice requirement generated mixed views. The main concerns raised by respondents were:
  - (a) a cleansing notice is not currently required for share purchase plans;
  - (b) requiring a cleansing notice may introduce moderate direct costs; and
  - (c) a cleansing notice obligation may risk 'freezing' normal corporate actions.

## B Increase to the monetary limit

### Key points

Overwhelmingly, submissions supported our proposal to increase the monetary limit for share purchase plans from \$5,000 to \$15,000 in any consecutive 12-month period.

### Increase to the monetary limit

- 8 An overwhelming majority of submissions agreed that ASIC should increase the monetary limit to \$15,000.
- 9 Submissions argued that \$15,000 is an acceptable level of risk to retail investors when balanced against the advantages of being able to participate to a greater extent in capital raising initiatives.
- 10 The SDIA and Richard Wilkins (an individual respondent) argued that increasing the monetary limit to \$20,000 would provide a more meaningful level of investment for retail investors. The SDIA also suggested incorporating an indexation mechanism to avoid the future need to regularly review the monetary limit.
- 11 All submissions that supported the increase also agreed that the monetary limit should not be restricted to certain types of companies. This was on the basis that to limit relief selectively might provide an unfair advantage to some issuers in their ability to access equity.
- 12 Submissions agreed that relief should be extended to include offers for the issue of interests in a listed managed investment scheme (i.e. interest purchase plans).
- 13 We consider the increase to \$15,000 to be an appropriate limit at this time.

## C Cleansing notice requirement

### Key points

Submissions were divided on our proposal to introduce a cleansing notice requirement for share purchase plans.

### Should a cleansing notice be required?

- 14        Approximately two-thirds of respondents to CP 103 agreed with a cleansing notice requirement. Respondents agreed that increasing the monetary limit for share purchase plans suggests that greater investor protection is required.
- 15        The Australian Financial Markets Association (AFMA) agreed that investors should be fully informed about the entity and its business at the time they are offered the opportunity to make a further investment in the entity.
- 16        Respondents also agreed that information is not lost to investors and the market by relying on the continuous disclosure regime and a cleansing notice.
- 17        Further, all submissions that supported introducing a cleansing notice requirement agreed that this should be required for all share purchase plans and interest purchase plans, regardless of the offer amount.
- 18        Those opposed to the cleansing notice requirement included the Law Council of Australia and the Australian Bankers' Association.
- 19        Submissions opposed to the cleansing notice requirement argued that a cleansing notice is as burdensome as complying with the prospectus requirements of s713 of the *Corporations Act 2001* (Corporations Act). They also argued that there has been no history of abuse of the existing disclosure relief under the current arrangements that justifies ASIC's proposal to introduce cleansing notices as a condition of increasing the monetary limit to \$15,000.
- 20        Some submissions noted that there will always be times when a company is engaged in corporate actions that have not had to be disclosed under the relevant Australian Securities Exchange (ASX) Listing Rules due to the carve-out exemptions. If a cleansing notice obligation is introduced, it was argued that some directors might feel constrained from initiating a corporate action because of the disclosure obligations imposed by a live cleansing notice. This would undermine the policy objective of promoting low-cost, efficient and accessible capital raising.

- 21 Submissions also argued that the current continuous disclosure regulation works well to keep the market informed of new price-sensitive information. Respondents pointed out that investors acquiring shares through a share purchase plan have no better or worse access to information than investors acquiring shares on the market and, given the average trade in 2006 was \$14,200, retail investors are already making an investment of this size without the benefit of a cleansing notice.
- 22 We have decided to introduce a cleansing notice requirement. We believe this approach strikes the right balance between facilitating capital raising and providing an appropriate level of protection to investors.

### **Should a share placement be concurrent with a share purchase plan?**

- 23 Respondents generally agreed there should be no requirement for a concurrent share placement with a share purchase plan.
- 24 Respondents argued that raising capital is largely a commercial decision, which should be left to the issuer's discretion and that an issuer should not be restricted from offering shares to its existing investors because it does not intend to also carry out a placement.
- 25 It was also argued that obliging an issuer to make a placement at the same time as offering securities or financial products under a purchase plan would remove the flexibility that currently exists to raise meaningful amounts of equity at low cost.
- 26 We accept that there should be no requirement for a concurrent share placement with a share purchase plan.

### **Should relief be available where the securities have been suspended for more than 5 days in the last 12 months?**

- 27 Respondents generally agreed that issuers should not be able to rely on our relief where the securities have been suspended for more than 5 days in the 12 months preceding the offer.
- 28 However, some submissions argued that there should be a mechanism to waive this limitation where there were legitimate reasons for suspension (e.g. to meet trading halt requirements).
- 29 We accept that issuers should generally not be able to rely on our relief where the securities have been suspended for more than 5 days in the 12 months preceding the offer. However, we will make it clear in the

relevant regulatory guide that ASIC may provide case-by-case relief to issuers where this condition has not been satisfied in certain circumstances.

## Other conditions

- 30 Submissions generally agreed that our relief should be on condition that the issuer or directors or auditors of the issuer have not been covered at any time during the shorter of the period during which the class of securities were quoted, and the period of 12 months before the day on which the relevant securities were issued, by:
- (a) an exemption under s111AS or 111AT; or
  - (b) an order under s340 or 341.
- 31 This condition brings our relief in line with the commensurate requirement on rights issues in s708AA(2)(d) and 709AA(e). It means that investors can be more confident that the market is fully informed about the relevant securities and that there is a reliable market price for them.

## Other issues raised

### Extension of relief to holders of market licences other than ASX

- 32 National Stock Exchange of Australia (NSX) Limited submitted that the scope of the share purchase plan relief should be extended beyond companies listed on ASX to all listed disclosing entities.
- 33 Although we decided not extend the class order relief to cover holders of market licences other than ASX, ASIC will consider individual applications for relief based on an assessment of each market's liquidity, supervision and disclosure regime.

### Pricing

- 34 Relief should be conditional on retail shareholders being given equal treatment to institutional shareholders in terms of discount to market price.
- 35 We are satisfied that where share purchase plans are conducted with share placements, retail holders are generally being offered a comparable subscription price to institutional holders.
- 36 We acknowledge that being offered the same share price as an institutional investor is not the same as receiving the same discount to market price (for example, if the share price decreases between the time of the offer and the



time of the issue, the discount to market price will be less than institutional investors received). However, recent market volatility demonstrates that such a pricing requirement could place significant downward pressure on an issuer's share price.

- 37 We will continue to monitor the price being offered to retail investors so that we are satisfied that retail investors are not being significantly disadvantaged in comparison to institutional investors.

### **Scaling back allotments**

- 38 A number of respondents raised the concern that where share purchase plans are oversubscribed, allotments to holders are scaled back. This generally occurs because issuers only want to raise a certain amount of money in this way, and where an offer is over-subscribed, the issuer scales back the allotments to shareholders so that only the target amount is raised.

- 39 To require that there be no scale-back of applications may in fact discourage share purchase plans from being offered and result in even less opportunity for small investors to participate in capital raising.

- 40 However, we will make it clear in the relevant regulatory guide that issuers must clearly disclose in the offer document if they reserve the right to scale back. We will also monitor how scale backs are applied in practice.

### **Entitlement of beneficiaries to participate in share purchase plans**

- 41 We received a number of queries about the eligibility of the underlying beneficiary holders of nominee shareholders to receive offers under a share purchase plan.

- 42 Under the existing Class Order [CO 02/831] *Share purchase plans*, where underlying beneficial holders of nominee shareholders are expressly noted on the issuer's register at the time the offer is made, they are able to receive an offer under a share purchase plan.

- 43 However, we accepted that there was some uncertainty about the operation of the relevant provisions in the class order. We also agreed that it was a legitimate concern that beneficiaries, who would otherwise be eligible to receive share purchase plan offers, were unable to participate in share purchase plans unless they were expressly recorded on the register at the time the offer was made.

- 44 We will revisit this provision in the class order to allow some beneficial holders to participate in share purchase plans provided certain conditions are met.

### **Calculation of 12-month period**

- 45 One respondent suggested that there should be express clarification around the calculation of the 12-month consecutive period. This issue was not raised as a source of concern by other respondents so we did not address the point in the class order or regulatory guide.

### **ASX Listing Rules**

- 46 ASX recently consulted on amendments to its Listing Rules relating to share purchase plans. ASX proposed to amend its Listing Rules to require companies offering a share purchase plan to ensure that the offer is open to all shareholders on the company register the day before it is made.
- 47 The proposed amendments to the Listing Rules are intended to remove any current incentive and ability for sellers to fail to deliver their shares so that they remain on the share register and are then eligible to receive a share purchase plan offer.
- 48 The class order now includes provision for the issuer to set a 'record date' for determining shareholders who are eligible to receive a purchase plan offer.
- 49 We will continue to liaise with ASX about the proposed Listing Rule amendments.