

Addisons FocusPapers

ASIC Issues New Class Order and Regulatory Guide on Accelerated Rights Issues

The Australian Securities & Investments Commission has recently issued Class Order 08/35 (“**Class Order**”) and Regulatory Guide 189 in relation to disclosure relief for accelerated rights issues. The relief is intended to allow entities to raise funds more quickly than by way of traditional rights issues and without requiring a prospectus or product disclosure statement.

Accelerated or “non-traditional” rights issues typically involve the issue of securities by an entity in two tranches: first, to institutional investors and second, to retail investors. Given that issuing securities to institutional investors can generally be completed faster than issues to retail investors, accelerated rights issues enable entities to raise funds in less time than traditional rights issues.

However, until recently, accelerated rights issues did not fall within the disclosure exemption in section 708AA of the Corporations Act. That section permits pro-rata rights issues without accompanying disclosure to investors. This relief is subject to a number of conditions including that the offer to each investor is on the “same terms”. Because offers under an accelerated rights issue are by definition not on the same terms, prior to the Class Order, the benefit of the disclosure exemption in section 708AA did not apply. The Class Order now extends the disclosure relief, on the basis that accelerated rights issues can be undertaken without compromising the ‘equal opportunity principle’ associated with rights issues or the investor protection features of the disclosure exemption. The Class Order relief applies to rights issues involving the issue of both (i) quoted securities and (ii) interests in a managed investment scheme.

Under the Class Order, in order to gain advantage of the disclosure relief, if an entity wishes to issue securities under a “non-traditional” rights issue to institutional investors before retail investors, it must do so within two months of the second mentioned issue. In addition to extending the disclosure exemption, the Class Order modifies sections 9A and 708AA of the Corporations Act so that an entity can:

- issue only one cleansing notice in respect of all offers i.e. both institutional and retail under a “non-traditional” rights issue, unless the cleansing notice requires updating or becomes defective;
- issue the shortfall of the rights issue to original offerees without disclosure; and

Addisons FocusPapers

- extend a rights issue to holders of convertible securities provided that the terms of the convertible securities require the offer to be made to convertible securityholders.

Cleansing Notice

Previously, entities may have been required to provide multiple cleansing notices in relation to rights issues to satisfy the different requirements under the Corporations Act and the rules of the relevant market operator such as, in the case of securities quoted on the Australian Securities Exchange, ASX Limited.

An issuer can now satisfy the cleansing notice requirements under the Corporations Act by giving the relevant market operator a cleansing notice within 24 hours before the first offer is made under the rights issue *or* by an earlier time required by the market operator. However, multiple cleansing notices will need to be given if new “excluded” or material information arises after the date of the first cleansing notice.

Issuing Shortfall Securities

Entities were previously only permitted to issue shortfall securities from a rights issue, without disclosure, to persons that do not require disclosure under the Corporations Act – such as “sophisticated” and “professional” investors. The Class Order permits entities to issue the shortfall securities without disclosure to *any* investor who was originally offered, but did not accept, that investor’s entitlement under that rights issue. However, the shortfall offer must be made no later than two months after the first offer under the rights issue.

Convertible Securities

Convertible securities are often issued on terms that require the issuer to extend, to holders of those convertible securities, offers of ordinary shares under a rights issue made to shareholders. This is intended to protect convertible securityholders from dilution of their holdings. An offer of ordinary shares to convertible securityholders would normally require a prospectus because, prior to the Class Order, the rights issue disclosure exemption only applied if the offer of ordinary shares was to existing shareholders. The Class Order modifies this position so that convertible securityholders can be offered and issued with ordinary shares (as well as other securities or interests) under a rights issue, without disclosure, if the terms of their convertible securities require such offers to be made to them.

Technical Amendments

Other modifications brought about by the Class Order involve technical amendments including:

- providing flexibility to issuers when dealing with foreign holders’ entitlements under a rights issue, for example, by using a sale nominee to sell their entitlements;
- automatic relief from disclosure for the on-sale of securities issued under a rights issue; and
- extending disclosure relief to stapled securities and allowing rounding of fractional entitlements.



Addisons FocusPapers

Warning – No relief for acquisition of Relevant Interests

The Class Order does not modify section 611 of the Corporations Act which sets out exceptions to the prohibition in section 606 on certain acquisitions of relevant interests in voting shares. Therefore, shareholders who acquire shares under an accelerated rights issue may not be entitled to rely on Item 10 of Section 611 (the “rights issue” exception) if the acceptance of their entitlements under that rights issue would result in an increase in their voting power in contravention of section 606. The reason for this is that paragraph (e) in Item 10 of section 611 provides that, in respect of a rights issue, the terms of all the offers must be the same in order for the exception to apply.

For more information please contact:

David P. Selig, Partner

Telephone: +61 2 8915 1010

Facsimile: +61 2 8916 2010

Email: david.selig@addisonslawyers.com.au

Nathan Greenfield, Solicitor

Telephone: +61 2 8915 1042

Facsimile: +61 2 8916 2042

Email: nathan.greenfield@addisonslawyers.com.au