

# ASIC CLASS ORDER [CO 08/35]

## EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (ASIC) makes Class Order [CO 08/35] under subsections 741(1) and 1020F(1) of the *Corporations Act 2001* (the Act).

Subsection 741(1) provides that ASIC may declare that Chapter 6D of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Subsection 1020F(1) provides that ASIC may declare that Part 7.9 of the Act applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.

### **1. Background**

#### **Disclosure exemption for rights issues**

Chapter 6D regulates the making of offers for the issue or sale of securities and sets out when an offer needs disclosure to investors in a disclosure document. Part 7.9 regulates the making of offers for the issue or sale of financial products (other than securities) and sets out when an offer needs disclosure to investors through a Product Disclosure Statement (PDS). These provisions also set out certain categories of offers that do not need disclosure.

Sections 708AA and 1012DAA of the Act permit an entity to make an offer of quoted securities and quoted interests without a disclosure document or PDS where the offer is a rights issue (as defined in section 9A), provided that certain conditions are satisfied (disclosure exemption). These provisions were introduced by the *Corporations Legislation Amendment (Simpler Regulatory System) Act 2007* to encourage this kind of fundraising in which retail holders can participate as opposed to forms of fundraising that exclude retail holders (e.g. institutional placements).

The provisions reflect the traditional rights issue structure in which the issuer offers existing holders the opportunity to subscribe for new securities or interests in proportion to their holding of securities or interests in that class and the offer is made to all holders on the same terms. For the disclosure exemption to apply, a rights issue must satisfy the following conditions:

- (a) the offer must be made to all existing holders in a particular class;

- (b) the offer must be made to existing holders in proportion to their holdings;
- (c) the terms of the offer must be the same; and
- (d) the issuer must give the market operator a cleansing notice containing certain prescribed information.

Without ASIC relief, a rights issue that does not comply with all of these requirements would need to be made under a disclosure document or PDS.

### **Features of non-traditional rights issues that do not comply with the conditions of the disclosure exemption**

The market has adapted the traditional rights issue structure in various ways to meet different fundraising needs. A key example of a non-traditional rights issue is an accelerated rights issue where offers to institutional holders are accelerated to enable the issuer to raise funds more quickly. The offer proceeds in two tranches: institutional and retail.

Certain features of these non-traditional rights issues do not technically comply with the requirements of the disclosure exemption.

#### ***Differences in timing of offer and allotment***

Accelerated rights issues may have a different offer period and timing of allotment of the securities or interests to retail and institutional holders. This means that offers will not be made on the same terms and the issuer will not be able to rely on the disclosure exemption.

#### ***Disposal of shortfall***

Not all securities or interests may be taken up under the initial pro rata offer. Disposal of the resulting shortfall may fall outside the disclosure exemption for technical reasons because the offers are not pro rata and not on the same terms as the initial offer.

#### ***Offer to convertible securityholders***

Where the rights issue is an offer of ordinary shares, an offer to holders of convertible securities (eg convertible noteholders) would fall outside the disclosure exemption because it is not a pro rata offer to holders in the class of ordinary shareholders.

#### ***Multiple cleansing notices***

Due to the structure of accelerated rights issues with multiple tranches of offers, it is possible that an issuer will have to lodge a number of cleansing notices with a market operator within a short period of time to comply with the disclosure exemption. There is also a further requirement for a cleansing notice under the on-sale exemption in sections 708A and 1012DA for on-sales of the securities or interests issued under the rights issue. Finally, the market operator may require a cleansing notice before the time for lodgement under section 708AA or 1012DAA.

## 2. Purpose of the class order

The purpose of Class Order [CO 08/35] is to provide relief to enable an issuer to rely on the disclosure exemption for a non-traditional rights issue that gives existing holders an equal opportunity to participate and does not compromise investor protection.

Class Order [CO 08/35] also gives technical relief in relation to the treatment of foreign holders, offers of stapled securities and rounding of entitlements.

## 3. Operation of the class order

### Definition of rights issue

Class Order [CO 08/35] modifies the definition of rights issue in section 9A to:

- (a) permit issuers to exclude only some of the holders outside Australia and New Zealand;
- (b) give issuers greater flexibility in selling rights or securities for the benefit of foreign holders who do not participate in a rights issue (including clarifying that the procedure for sale of rights or securities by a nominee on behalf of foreign holders in section 615 under the takeover exemption for rights issues may be followed in relation to foreign holders);
- (c) permit differences in the offer period and timing of allotment to institutional investors and retail investors, provided that the retail allotment occurs within two months after the institutional allotment;
- (d) permit separate bookbuilds to be conducted for the shortfalls arising from the institutional and retail tranches of a rights issue. It also allows an offer of the shortfall to be made to existing holders who participated in the offer; and
- (e) permit differences attributable to rounding of fractional entitlements to the nearest whole number.

Class Order [CO 08/35] also inserts notes to the definition of rights issue in section 9A to clarify that:

- (a) the fact that offers may also be made to convertible securityholders does not affect whether an offer to securityholders is a rights issue; and
- (b) where a rights issue is non-renounceable, the issuer may undertake a sale process for the benefit of foreign holders without impacting on whether the offer satisfies the definition of rights issue in section 9A.

### Offer of shortfall

Class Order [CO 08/35] modifies sections 708AA and 1012DAA so that shortfall offers will come within the disclosure exemption provided that the initial rights issue itself complied with the disclosure exemption. The shortfall offer may be made to existing holders who were offered securities or interests under the initial rights issue or to persons for whom a disclosure document or PDS is not required.

The offer of the shortfall to existing holders must be made no later than two months after the first offer under the rights issue.

### **Offers to convertible securityholders**

Class Order [CO 08/35] modifies sections 708AA and 1012DAA so that offers to convertible securityholders will come within the disclosure exemption provided that the rights issue itself complied with the disclosure exemption. Offers to convertible securityholders will only fall within the disclosure exemption where the offers are required under the terms of the convertible securities. Holders of convertible securities may only participate to the extent necessary to prevent their holdings being diluted.

### **Cleansing notices**

Class Order [CO 08/35] modifies sections 708AA and 1012DAA so that a cleansing notice must be given within 24 hours before the first offer is made under a rights issue or by any earlier time required by the market operator.

Class Order [CO 08/35] also modifies sections 708A and 1012DA so that the securities or interests that were issued under the rights issue disclosure exemption can be on-sold without the requirement to give the market operator a further cleansing notice that would otherwise be required by paragraphs 708A(5)(e) and 1012DA(5)(e). The issuer will need to comply with the requirements that the securities or interests were quoted securities at all times in the 3 months prior to issue, consistent with paragraphs 708A(5)(a) and 1012DA(5)(a).

The effect of these modifications is that an issuer will generally only need to lodge one cleansing notice, unless new information emerges or a defect in the notice is discovered.

If the issuer becomes aware of any excluded information that would have been required to be disclosed in the cleansing notice or a material change to the potential effect of the issue on control of the issuer or to the consequences of that effect, the issuer is required to give the market operator a cleansing notice that sets out the detail of the information or material change. This requires notices to be updated for new information.

### **Stapled securities**

Class Order [CO 08/35] modifies sections 708AA and 1012DAA so that the disclosure exemptions apply to quoted securities that are stapled together. This is necessary because the disclosure exemptions provided by sections 708AA and 1012DAA apply to 'quoted securities', which are defined by section 9 as 'a security that is quoted on a prescribed financial market'. This definition does not include stapled securities and, therefore without relief, sections 708AA and 1012DAA would not apply.

#### **4. Consultation**

The declarations in [CO 08/35] were the subject of public consultation in Consultation Paper 91 *Non-traditional rights issues* (CP 91) (released for comment on 28 September 2007), which foreshadowed this relief. In addition to publishing CP 91 on our website (at [www.asic.gov.au](http://www.asic.gov.au)), we sought comments from several major law firms who had acted for clients in relief applications relating to non-traditional rights issues, the ASX, the Australian Shareholders Association and the Law Council of Australia. Submissions received were generally supportive of the proposed relief in CP 91. Further details of the submissions received are contained in REP 128 *Report on submissions to CP 91 Non-traditional rights issues*, which is also available on our website.