

# ASIC Class Order [CO 08/35]

## Disclosure relief for rights issues

*Issued 12/5/2008*

*Registered on Federal Register of Legislative Instruments 16/5/2008*

*Effective 16/5/2008 (date of registration)*

*Related documents: [CO 08/171], [RG 189]*

*Class Order [CO 08/35] provides 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.*

This instrument has effect under subsections 741(1) and 1020F(1) of the *Corporations Act 2001*.

Prepared by the Australian Securities and Investments Commission.

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### **Australian Securities and Investments Commission Corporations Act 2001 — Subsections 741(1) and 1020F(1) — Declaration**

#### **Enabling legislation**

1. The Australian Securities and Investments Commission (*ASIC*) makes this instrument under subsections 741(1) and 1020F(1) of the *Corporations Act 2001* (the *Act*).

#### **Title**

2. This instrument is ASIC Class Order [CO 08/35].

#### **Commencement**

3. This instrument commences on the date it is registered under the *Legislative Instruments Act 2003*.

Note: An instrument is registered when it is recorded on the Federal Register of Legislative Instruments (*FRLI*) in electronic form: see *Legislative Instruments Act 2003*, s 4 (definition of *register*). The FRLI may be accessed at <http://www.frli.gov.au/>.

#### **Declaration — Meaning of “rights issue”**

4. Chapter 6D of the Act applies to all persons as if subsection 9A(1) were modified or varied as follows:

- (a) omit subparagraph (b)(ii), substitute:

“(ii) if the conditions in subsection (3) are met—such an offer is made to:

- (A) every person with a registered address in Australia or New Zealand; and
- (B) every other person (if any) with a registered address outside Australia and New Zealand to whom the body decides to make offers, who holds securities in that class;” and

- (b) at the end of subsection (1) insert:

“Note: Paragraph (b) covers offers made to persons because they hold securities in the relevant class. It does not cover offers made to persons in some other capacity, for example, because they hold securities which are convertible into securities in the relevant class. Accordingly, these other offers do not affect whether the conditions in paragraph (b) or (c) are met.”.

5. Part 7.9 of the Act applies in relation to all persons as if subsection 9A(2) were modified or varied as follows:

- (a) omit subparagraph (b)(ii), substitute:

“(ii) if the conditions in subsection (3) are met—such an offer is made to:

- (A) every person with a registered address in Australia or New Zealand; and
- (B) every other person (if any) with a registered address outside Australia and New Zealand to whom the responsible entity decides to make offers, who holds interests in that class;” and

- (b) at the end of subsection (2) insert:

“Note: Paragraph (b) covers offers made to persons because they hold interests in the relevant class. It does not cover offers made to persons in some other capacity, for example, because they hold financial products which are convertible into interests in the relevant class. Accordingly, these other offers do not affect whether the conditions in paragraph (b) or (c) are met.”.

6. Chapter 6D and Part 7.9 of the Act respectively apply to, and in relation to, all persons as if section 9A were modified or varied as follows:

- (a) omit paragraph (3)(c), substitute:

“(c) if the invitation to apply for, or the right to be issued with, the securities or interests is able to be assigned—the body or responsible entity:

- (i) advises each non-resident in that place that a process will be conducted under which the securities or interests that would otherwise have been offered to the non-resident, or the invitations to apply for or rights to be issued with the securities or interests, will be offered for issue or sale to other persons; and
- (ii) advises each non-resident of the main features of the process; and
- (iii) advises each non-resident that they will be sent any net proceeds to which they are entitled from the issue or sale of the securities, interests, invitations or rights under the process.

Note: Paragraph (c) has no application where the invitation to apply for, or the right to be issued with, the securities or interests is not able to be assigned. In such a case, there is no failure to meet the conditions in this subsection merely because the body or responsible entity decides to conduct a process of the kind described in that paragraph, whether in whole or in part. ”.

(b) omit subsection (4), substitute:

“(4) For the purpose of determining whether an offer of a body’s securities or an offer of interests in a managed investment scheme (as the case requires) satisfies the conditions in subsection (1) or (2), disregard the following matters:

- (a) some or all persons who are offered securities or interests as an exempt investor may:
  - (i) receive the offer before other persons to whom offers are made; or
  - (ii) be given a period of time to accept the offer which is less than the period of time given to other persons to whom offers are made;
- (b) the securities or interests may be issued to a person as an exempt investor before securities or interests are issued to other persons under the offer, provided that any such issue to an exempt investor occurs no earlier than 2 months before the issue of securities or interests to other persons who are not exempt investors;
- (c) in relation to any securities or interests offered to but not accepted by some or all of the persons to whom the offers were first made:
  - (i) processes are conducted at different times under which the securities or interests, or the invitations to apply for or rights to be issued with those securities or interests, are offered for issue or sale to exempt investors; and

- (ii) payments are made at different times of any net proceeds of issues or sales under those processes to the persons to whom the securities, interests, invitations or rights were first offered;
  - (d) an offer made in the circumstance referred to in paragraph 708AA(13)(a) or 1012DAA(13)(a);
  - (e) the rounding up or down of the number of securities or interests offered to a person to a whole number.
- (5) For the purposes of this section:

- (a) **exempt investor** means a person:
  - (a) offered securities in circumstances that do not need disclosure under Part 6D.2 because of subsections 708(8) to (12); or
  - (b) offered interests as a wholesale client (as defined in section 761G);

**process**, in relation to an offer of securities or interests or invitations to apply for or rights to be issued with the securities or interests, includes:

- (a) the appointment of a nominee:
  - (i) to whom the securities, interests, invitations or rights are issued;
  - (ii) who sells the securities, interests, invitations or rights; and
- (b) persons or classes of persons being invited to make offers to acquire:
  - (i) the securities or interests;
  - (ii) the invitations or rights on the condition that an application is made under the invitation or the rights are exercised;

Note: The issue and sale of securities or interests under the terms of an offer referred to in section 615 is a process for the purposes of this section.

- (b) a reference to an offer of securities or interests includes a reference to an invitation to apply for the issue of securities or interests; and
- (c) a reference to accepting an offer of securities or interests includes a reference to making an application for the securities or interests.”.

**Declaration — Rights issues and related issues that do not need disclosure**

7. Chapter 6D of the Act applies to all persons as if section 708AA of the Act were modified or varied as follows:
- (a) in paragraph (2)(a) omit “rights issue;”, substitute “rights issue or related issue;”; and
  - (b) in paragraph (2)(f) omit “offer is made.”, substitute “first offer is made under the rights issue or by any earlier time required by the market operator.”; and
  - (c) omit paragraph (10)(a), substitute:
    - “(a) a notice given under subsection (2) or (12) is defective; and”;
  - (d) in paragraph (10)(b) omit “within 12 months after the relevant securities are issued;”, substitute “within the period commencing on the date the notice is given under paragraph (2)(f) and ending 12 months after the last issue of securities that occurs under the rights issue or any related issue;”; and
  - (e) in subsection (11) omit “the notice under subsection (2)”, substitute “a notice under subsection (2) or (12)”; and
  - (f) omit paragraph (11)(a), substitute:
    - “(a) does not comply with paragraph (2)(f) or subsection (12); or”;
  - (g) after subsection (11), insert:
    - “(12) If, at any time in the period (*relevant period*) between the date the notice was given under paragraph (2)(f) and the last issue of securities made under the rights issue or a related issue, the body becomes aware of:
      - (a) any information that would be excluded information that would need to be included in the notice if the notice had been given at that time and that has not been included in the notice or otherwise provided to the relevant market operator; or
      - (b) a material change to:
        - (i) the potential effect the issue of the relevant securities will have on the control of the body; or
        - (ii) the consequences of that effect,
- the body must, as soon as practicable but in any event

before the end of the relevant period, give the relevant market operator a notice that sets out details of the information or material change.

(13) In this section, *related issue* means, in relation to a rights issue, an offer of securities in the same class as the securities offered under the rights issue in any of the following circumstances:

- (a) all of the following are satisfied:
  - (i) either:
    - (A) the securities had first been offered to, but not accepted by, a person under the rights issue; or
    - (B) the offer is made on the condition that the securities to which the offer relates may only be issued to the person where an offer of the securities has first been made to, but not accepted by, another person under the rights issue;
  - (ii) the offer is made to persons to whom offers were made under the rights issue;
  - (iii) the offer is made no later than 2 months after the first offer is made under the rights issue;

Note: Nothing in this paragraph:

- (a) prevents an offer being made to a person other than a person mentioned in subparagraph (ii) and which does not need disclosure under this Part; or
  - (b) implies that a particular process must be carried out in making any such offer.
- (b) an offer made to a holder of securities (*convertible securities*) that are convertible, whether or not at the option of the holder, into securities in the class offered under the rights issue where:
- (i) the terms (the *convertible terms*) of, or the rights (the *convertible terms*) attaching to, the convertible securities require the offer to be made to the holder (other than a holder with a registered address in a place outside Australia or New Zealand to whom the body decides that it is unreasonable to offer securities);
  - (ii) each holder:
    - (A) to whom the body is required to make an offer under the convertible terms; and
    - (B) with a registered address in a place outside Australia or New Zealand and to

whom the body decides offers will be made,

is made such an offer; and

- (iii) the number of securities offered to each holder is no greater than the number of securities that would have been required to be offered to the holder if all of those convertible securities had been converted into securities in the class being offered under the rights issue immediately before the date (*record date*) on which a person needs to be recorded on the register of members in order to receive an offer under that issue.

(14) For the purposes of paragraph (13)(a), a reference to accepting an offer of securities includes a reference to making an application for the securities.

(15) For the purposes of paragraph (13)(b), if under the convertible terms the price at which the securities are traded on a prescribed financial market is relevant to determining the number of securities that are to be issued on the conversion of the convertible security, then the number is to be determined by reference to the price at which the securities were traded:

- (a) where under the convertible terms the relevant price is to be determined by reference to trading over a period of time—over the period ending on the record date; or
- (b) where under the convertible terms the relevant price is the price at a particular time—as at that time on the record date.

(16) For the purposes of this section, if under the terms on which a security (the *component security*) is traded on a prescribed financial market it can only be transferred together with one or more other securities or other financial products (together the *stapled security*) then:

- (a) the component security is taken to be in a class of quoted securities that is different from any other class of quoted securities it is in, or is taken to be in, when at any other time it is able to be transferred on the market by itself or as part of a different stapled security; and
- (b) trading in the class of quoted securities that the component security is taken to be in on the market is taken to be suspended when trading in the class of stapled securities on the market is suspended.”.

### Declaration — Rights issues and related issues for which PDS is not required

8. Part 7.9 of the Act applies in relation to all persons as if section 1012DAA of the Act were modified or varied as follows:
- (a) in paragraph (2)(a) omit “rights issue;”, substitute “rights issue or related issue;”; and
  - (b) in paragraph (2)(f) omit “occurs.”, substitute “first occurs under the rights issue or by any earlier time required by the market operator.”; and
  - (c) omit paragraph (10)(a), substitute:
    - “(a) a notice given under subsection (2) or (12) is defective; and”;
  - (d) in paragraph (10)(b) omit “within 12 months after the relevant product is issued;”, substitute “within the period commencing on the date the notice is given under paragraph (2)(f) and ending 12 months after the last issue of the relevant product that occurs under the rights issue or any related issue”; and
  - (e) in subsection (11) omit “the notice under subsection (2)”, substitute “a notice under subsection (2) or (12)”; and
  - (f) omit paragraph (11)(a), substitute:
    - “(a) does not comply with paragraph (2)(f) or subsection (12); or”;
  - (g) after subsection (11), insert:
    - “(12) If, at any time in the period (*relevant period*) between the date the notice was given under paragraph (2)(f) and the last issue of the relevant product under the rights issue or a related issue, the issuer of the relevant product becomes aware of:
      - (a) any information that would be excluded information that would need to be included in the notice if the notice had been given at that time and that has not been included in the notice or otherwise provided to the relevant market operator; or
      - (b) a material change to:
        - (i) the potential effect the issue of the relevant product will have on the control of the registered scheme in which the relevant product is an interest; or

(ii) the consequences of that effect,  
the issuer must, as soon as practicable and in any event before the end of the relevant period, give the relevant market operator a notice that sets out details of the information or material change.

(13) In this section, *related issue* means, in relation to a rights issue, an offer of the relevant product in the same class as the products offered under the rights issue in any of the following circumstances:

- (a) all of the following are satisfied:
- (i) either:
    - (A) the relevant product had first been offered to, but not accepted by, a person under the rights issue; or
    - (B) the offer is made on the condition that the relevant product to which the offer relates may only be issued to the person where an offer of the product has first been made to, but not accepted by, another person under the rights issue,
  - (ii) the offer is made to persons to whom offers were made under the rights issue;
  - (iii) the offer is made no later than 2 months after the first offer is made under the rights issue;

Note: Nothing in this paragraph:

- (a) prevents an offer being made to a person other than a person mentioned in subparagraph (ii) and which does not require a Product Disclosure Statement to be given to the person; or
  - (b) implies that a particular process must be carried out in making any such offer.
- (b) an offer made to a holder of a financial product (*convertible product*) that is convertible, whether or not at the option of the holder, into the relevant product in the class offered under the rights issue where:
- (i) the terms (the *convertible terms*) of, or the rights (the *convertible terms*) attaching to, the convertible product require the offer to be made to the holder (other than a holder with a registered address in a place outside Australia or New Zealand to whom the issuer decides that it is unreasonable to offer the relevant product);

- (ii) each holder:

- (A) to whom the issuer is required to make an offer under the convertible terms; and
- (B) with a registered address in a place outside Australia or New Zealand and to whom the issuer decides offers will be made,

is made such an offer; and

- (iii) the number of products offered to each holder is no greater than the number of products that would have been required to be offered to the holder if all of those convertible products had been converted into products in the class being offered under the rights issue immediately before the date (*record date*) on which a person needs to be recorded on the register of members in order to receive an offer under that issue.

(14) For the purposes of paragraph (13)(a), a reference to accepting an offer of products includes a reference to making an application for the products.

(15) For the purposes of paragraph (13)(b), if under the convertible terms the price at which the products are traded on a prescribed financial market is relevant to determining the number of products that are to be issued on the conversion of the convertible product, then the number is to be determined by reference to the price at which the products were traded:

- (a) where under the convertible terms the relevant price is to be determined by reference to trading over a period of time—over the period ending on the record date; or
- (b) where under the convertible terms the relevant price is the price at a particular time—as at that time on the record date.

(16) For the purposes of this section, if under the terms on which a financial product (the *component product*) is traded on a prescribed financial market it can only be transferred together with one or more securities or other financial products (together the *stapled security*) then:

- (a) the component product is taken to be in a class of quoted securities that is different from any other class of quoted securities it is in, or is taken to be in, when at any other time it is able to be transferred on that market by itself or as part of a different stapled security; and

- (b) trading in the class of quoted securities that the component product is taken to be in on the market is taken to be suspended when trading in the class of stapled securities on the market is suspended.”.

### Declaration – Sale offers that do not need disclosure

9. Chapter 6D of the Act applies to all persons as if section 708A were modified or varied as follows:
  - (a) in paragraph (1)(a) omit “(11) or (12),”, substitute “(11), (12) or (12A),”; and
  - (b) omit paragraph (1)(b), substitute:
 

“(b) except where the securities were issued under a related issue as defined in paragraph (12B)(c), the securities were not issued by the body with the purpose referred to in subparagraph 707(3)(b)(i); and”;
  - (c) after subsection (12) insert:
 

*“Sale offer of quoted securities issued under rights issue—  
case 4*

(12A)The sale offer does not need disclosure to investors under this Part if:

    - (a) the relevant securities were issued under a rights issue or a related issue; and
    - (b) the relevant securities are in a class of securities that were quoted securities at all times in the 3 months before the day on which the relevant securities were issued; and
    - (c) the rights issue or the related issue did not need disclosure to investors under this Part.

(12B)For the purposes of subsection (12A), *related issue* means, in relation to a rights issue:

    - (a) an offer relating to the rights issue which satisfies subparagraph 708AA(13)(a)(i) and (iii), whether or not the offer is made to persons to whom offers were made under the rights issue;
    - (b) an offer relating to the rights issue made in the circumstance referred to in paragraph 708AA(13)(b);
    - (c) an offer relating to the rights issue made:
      - (i) in accordance with the information given under paragraph 9A(3)(c); or

- (ii) if the invitation to apply for, or the right to be issued with, the securities is not able to be assigned and the body gives the information specified in subparagraphs 9A(3)(c)(i) to (iii)—in accordance with that information.”.

### **Declaration – PDS not required for sale amounting to indirect issue**

10. Part 7.9 of the Act applies in relation to all persons as if section 1012DA were modified or varied as follows:
  - (a) in paragraph (1)(a) omit “(11) or (12),”, substitute “(11), (12) or (12A),”; and
  - (b) omit paragraph (1)(c), substitute:
 

“(c) except where the relevant product was issued under a related issue as defined in paragraph (12B)(c), the relevant product was not issued by the issuer with the purpose referred to in subparagraph 1012C(6)(c)(i); and”; and
  - (c) after subsection (12) insert:
 

“*Transfer or sale of quoted securities issued under rights issue—case 4*

(12A)The regulated person does not have to give the client a Product Disclosure Statement if:

    - (a) the relevant product was issued under a rights issue or a related issue; and
    - (b) the relevant product is in a class of financial products that were quoted securities at all times in the 3 months before the day on which the relevant product was issued; and
    - (c) a regulated person did not have to give the client a Product Disclosure Statement under the rights issue or related issue.

(12B)For the purposes of subsection (12A), ***related issue*** means, in relation to a rights issue:

    - (a) an offer relating to the rights issue which satisfies subparagraph 1012DAA(13)(a)(i) and (iii), whether or not the offer is made to persons to whom offers were made under the rights issue;

- (b) an offer relating to the rights issue made in the circumstance referred to in paragraph 1012DAA(13)(b);
- (c) an offer relating to the rights issue made:
  - (i) in accordance with the information given under paragraph 9A(3)(c); or
  - (ii) if the invitation to apply for, or the right to be issued with, the product is not able to be assigned and the issuer gives the information specified in subparagraphs 9A(3)(c)(i) to (iii)—in accordance with that information.”.

Dated this 12th day of May 2008

Signed by Brendan Byrne

as a delegate of the Australian Securities and Investments  
Commission