COVID-19: (AUSTRALIA) ASIC AND ASX ANNOUNCE TEMPORARY FUNDRAISING RELIEF FOR ASX-LISTED ENTITIES

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Australia Corporate Alert

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**This information is accurate as of 2.00pm (Sydney time) Thursday 2 April 2020 and is subject to change as this situation evolves.*

In an attempt to provide publicly listed entities with enhanced fundraising flexibility in the light of current financial market and economic conditions, ASIC and ASX have recently announced a number of temporary modifications to certain key fundraising provisions in the *Corporations Act 2001* (Cth) (Corporations Act)[1] and ASX Listing Rules (Listing Rules)[2].

We welcome these temporary relaxations to assist companies with distressed raisings particularly where the entity has had to go into suspension to assess the impact of COVID-19 but subsequently needs to raise capital urgently to address liquidity concerns or repair its balance sheet. Of course, a key issue will be ensuring that retail shareholders are not disadvantaged (either because they are not offered an opportunity to participate at a low valuation, or even if they are, are not given sufficient time to take advantage of the opportunity).

In summary, the key fundraising modifications are:

ASIC RELIEF

"Low doc" capital raisings may now be conducted by entities that have been suspended for no more than a total of 10 trading days (rather than the usual 5 trading day limit) – so long as the entity has not been suspended for more than 5 trading days in the 12 months prior to 19 March 2020[3].

ASX CLASS WAIVERS

- Entities may now place up to 25% of their existing issued equity capital provided that they combine their upsized placement with an accelerated entitlement offer or a security purchase plan (SPP).
- The underwritten portion of the follow-on entitlement offer may be added to the "base" when calculating an entity's available Listing Rule 7.1 placement "capacity".
- The 30% issuance limit and 80% issue price floor for SPPs have, subject to certain conditions, now also been waived.

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- The 1 for 1 cap for non-renounceable entitlement offers has been waived allowing non-renounceable entitlement offers to be conducted on a greater than 1 for 1 ratio.
- Entities are now able to apply for a 4 day trading halt (rather than the usual 2 day trading halt) when conducting a material fundraising.

ASIC Corporations (Trading Suspensions Relief) Instrument 2020/289

An entity needs to ensure that it satisfies each of the applicable limbs in section 708A(5) or section 1012DA(5) (in relation to a placement) and section 708AA(2) or 1012DA(2) (in relation to an entitlement offer) in each case of the Corporations Act in order to permit the secondary sale on ASX of the securities it issues to investors without a disclosure document. As most entities are aware, however, one of the key requirements is, essentially, that the issuer's existing securities must not have been suspended from official quotation on ASX for more than a total of 5 trading days in the preceding 12 months.

ASIC has granted relief to permit all entities which have been suspended for no more than 10 trading days to avail themselves of the "low doc" fundraising provisions provided that the entity's securities have not been suspended for more than a total of 5 trading days in the 12 months to 19 March 2020 (and that each of the other limbs[4] in the above noted sections are also satisfied). This is so that any such entity may now conduct a capital raising (such as a placement, an entitlement offer or SPP) to investors without issuing a disclosure document (such as a prospectus prepared in accordance with section 713 of the Corporations Act).

ASX Class Waiver

Listing Rule 7.1 relief when the placement is combined with an accelerated entitlement offer

ASX has increased the 15% limit in Listing Rule 7.1 to 25% for placements so long as the listed entity concerned combines its placement with either:

- an accelerated entitlement offer to all eligible shareholders; or
- an SPP to all eligible shareholders.

Listed entities should note however that the above noted relief is subject to the following important requirements:

- ASX's temporary modification of Listing Rule 7.1 may only be utilised by a listed entity once without it having to seek an individual waiver from ASX;
- the issue price for new securities under the SPP must be at a price which is no greater than the issue price for the securities issued under the preceding placement;
- entities which have available Listing Rule 7.1A placement capacity may choose whether to utilise their Listing Rule 7.1A capacity or the new increased Listing Rule 7.1 capacity[5]; and
- entities which have already utilised some (or all) of their available Listing Rule 7.1 or 7.1A placement capacity will need to deduct the amount already utilised when calculating their new available capacity (meaning that the aggregate capacity is still 25%).

Very helpfully, entities may now also include the number of securities the subject of their follow-on entitlement offer when calculating their available Listing Rule 7.1 placement capacity without having to apply for a separate

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waiver from ASX to allow for this to occur.

It remains to be seen however whether ASX will entertain further amendment from the Class Waiver to permit entities to conduct a "traditional" (rather than an "accelerated") entitlement offer to all security holders when conducting their "upsized" placement.

Amendment to Exception 5 of Listing Rule 7.2

ASX's Class Waiver also permits entities to conduct an SPP which is no longer subject to the 30% issuance threshold (which prevented an entity from issuing more than 30% of their issued capital under the SPP) and the 80% issue price limitation (which prevented an entity from issuing securities under its SPP at an issue price which was less than 80% of the relevant 5 day VWAP) in each case in Exception 5 of Listing Rule 7.2.

While the $30,000 per holder limit (which limit is set out in *ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547*) still applies, the issue price for new securities to be issued under the SPP may now be determined by the entity's board.

Amendment to Listing Rule 7.11.3

ASX has also modified Listing Rule 7.11.3 to the extent necessary to allow listed entities to conduct a non-renounceable entitlement offer on a ratio that is greater than 1 for 1. Under the pre-modified iteration of Listing Rule 7.11.3, entitlement offers which had an offer ratio of greater than 1 for 1 were required to be structured as "renounceable" entitlement offers either with rights trading or which allowed for "renounced" rights to be sold in a process managed by the broker to the offer (with any premium generated from that sale remitted to the renouncing security holder).

While companies will likely welcome the enhanced fundraising flexibility that this broad ASX relief instrument provides, companies must still ensure that their offering is structured appropriately having regard, for example, to the guidance given by the Takeovers Panel in Guidance Note 17 and of course to their overarching duties to the company as a whole. This is particularly relevant where their non-renounceable offering is highly dilutive to existing security holders who may not, in the light of current financial market and economic conditions, have sufficient financial resources to take up their entitlements in full or at all.

Notes:

[1] See ASIC Corporations (Trading Suspension Relief) Instrument 2020/289.

[2] See https://www.asx.com.au/resources/newsletters/listed_at_asx/listed-at-asx-20200331_0320.html

[3] Each of the other usual "enabling" provisions in the section 708A, 708AA, 1012DA and 1012DAA in each case of the Corporations Act must still be satisfied.

[4] These other 'limbs' essentially relate to the entity's compliance with the continuous disclosure, financial reporting and audit provisions of the Corporations Act.

[5] For example, if an entity (which is eligible to issue securities under Listing Rule 7.1A) has already utilised all of its Listing Rule 7.1 capacity, it may issue a further 10% of its existing equity capital and may decide whether it will do so from its existing Listing Rule 7.1A capacity or the new 10% Listing Rule 7.1 capacity (but not both).

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