
Corporate Finance Activity – Recent Insights from ASIC

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In brief

The Australian Securities and Investments Commission (ASIC) has released its latest report on the regulation of corporate finance for the period 1 January 2015 to 30 June 2015. The report provides some useful insights into ASIC's supervision of recent public fundraising and mergers and acquisitions activity, and serves as a useful reminder of companies' legal obligations when implementing major transactions.

In detail

On 21 August 2015, ASIC issued report 446 *ASIC regulation of corporate finance: January to June 2015*. The report includes information about ASIC's surveillance activities and regulation of the market for the first half of this year, specifically in relation to fundraising, mergers and acquisitions, corporate governance and other areas of corporate finance. The report highlights the corporate regulator's current focus and offers the following insights:

- Over the period, ASIC raised concern with almost a quarter of prospectuses lodged with the regulator. This resulted in almost 80 per cent of those prospectuses being revised. ASIC issued 24 interim stop orders in relation to 17 offers.
- Key areas of concern in relation to prospectuses included inappropriate disclosure of financial information and improper disclosure of financial forecasts. Other focus areas included insufficient disclosure of control issues, relationships with related parties, funding or financing arrangements and compliance with the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (the JORC Code) in prospectuses for mining entities.
- Other problem areas with prospectus disclosure involved:
 - insufficient disclosure of business models, capital structure and substantial holders
 - poor quality information on directors' interests, benefits and employment history and their relationship with the company

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- insufficient risk disclosure – either because it was not prominent enough or included without being sufficiently tailored to the company concerned.
 - Given the issues around insufficient or improper disclosure of financial information, ASIC has flagged that it is considering clarifying its policy on prospectuses and possibly updating its Regulatory Guide 228 ‘Prospectuses: Effective disclosure for retail investors’. ASIC has stated that it is likely to heavily scrutinise prospectuses that include less than 2.5 to 3 years’ audited financial information where the entity has a relevant operating history.
 - Where a prospectus includes financial forecasts and contains EBIT or EBITDA multiples, the ‘investment overview’ section of the prospectus should include all forecast periods in respect of the multiples.
 - ASIC is focusing on foreign companies based in emerging markets that conduct public fundraising activities in Australia. The regulator has identified defective disclosure and risks around inadequate governance practices, lack of verification of operations, potential fraud, related party transactions, conflict of laws issues and regulatory non-compliance. As a result, in those cases there is a renewed focus by ASIC on due diligence surveillance, review of fundraising documents and ongoing compliance such as continuous disclosure under the ASX listing rules.
 - The report emphasises the need for rigorous due diligence and verification of prospectuses to ensure the public receive informed and proper disclosure and to ensure issuers, directors and others involved in the offer can take advantage of the ‘due diligence’ defence.
 - As part of its review of takeover documents during the period, ASIC noted the following concerns:
 - Scale back arrangements – In a scale back, shareholders of a target company can elect to receive a form of consideration (e.g. shares in the acquirer) subject to a limited cap. Where the cap is reached, the acquirer scales back the chosen consideration and will substitute it with the alternative (e.g. cash). Such arrangements may cause uncertainty for investors and result in a significant difference between the consideration an investor elects and the consideration the investor actually receives. In these cases arrangements need to be structured appropriately in accordance with the Corporations Act 2001 (Cth) and ASIC policy.
 - Last and final statements – ASIC considers bidders who make a last and final statement should be held to the same to ensure certainty for investors and the market. If a bidder wants the flexibility to depart from its statement, then it must be clearly stated by an appropriate qualification.
 - Currency of independent expert reports – If a target statement includes an independent expert’s report, the target should ensure the report is based on the latest financial information. In a recent case, ASIC stepped in to make sure a target arranged a supplementary independent expert’s report due to the subsequent release of material financial information. If a significant change occurs affecting the information in an expert’s report, then it may be necessary to revise the original report particularly where it may affect the expert’s valuation or recommendation.

The takeaway

ASIC's report is a useful reminder of key risk areas for companies engaging in corporate finance transactions and indicates the regulator's current areas of focus. Companies considering any corporate finance activity should take advice early on in the process to manage compliance with the Corporations Act and having due regard to current ASIC policy.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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