

DENTONS

Equity fundraising

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2024

Equity fundraising

The Corporations Act regulates all issues of financial products in Australia. Financial products include shares, options, interests in managed investment schemes, debentures and other securities.

Importantly, the Corporations Act requires Australian and foreign issuers to, in some circumstances, provide prospective investors with a disclosure document (such as a prospectus, offer information statement (to raise up to AU\$10 million), or a product disclosure statement), before issuing financial products. This is to assist them to make an informed decision about their investment. These documents also need to be lodged with ASIC.

Australia has a crowd funding regime permitting eligible Australian registered proprietary and unlisted public companies with less than A\$25 million in assets and annual turnover, meeting certain conditions and with the assistance of a licensed intermediary who is required to hold an AFSL with an authorisation to provide a crowd funding service, to raise up to A\$5 million in any 12 month period and where a reduced level of disclosure applies. Retail investors have an investment cap of A\$10,000 per company in any 12-month period.

Exceptions

There are a number of exceptions to the disclosure document requirement, including in relation to offers to:

- Sophisticated investors who have a gross income of at least A\$250,000 for the last two financial years, net assets of at least A\$2.5 million or are paying at least A\$500,000 for the financial products.
- Professional investors, which includes a person who:
 - Holds an Australian Financial Services Licence authorising them to advise on financial products.
 - Controls at least A\$10 million (including any amount held by an associate or under a trust that the person manages).
 - Is a listed entity, or a related body corporate of a listed entity.
- Investors where a maximum of 20 such offers are accepted in any 12-month period and a maximum of A\$2 million is raised. When counting the number of offers accepted, and amounts raised, offers accepted by and amounts raised from the investors referred to in the dot points above can be excluded.
- Employees under certain employee share plans. Employee share plans may fall within the scope of Division 1A of Part 7.12 which took effect on 1 October 2022 and replaced the ASIC class orders in relation to employee share schemes for listed and unlisted bodies.
- Certain offers by ASX listed companies where the conditions entitling an issue without full prospectus type disclosure are met.

Even where one of these exceptions applies, the issuer still has obligations with which it must comply, including that any documents or other information provided must not be misleading or deceptive or contain false statements.

The tests for determining whether an investor qualifies under an excluded offer as a sophisticated investor or a professional investor is currently under review by the Treasury. Potential changes to the tests include increasing the current test thresholds which would restrict access to riskier investments by investors.

Requirements

In certain circumstances, entities offering existing financial products for sale in Australia may be required to prepare a disclosure document, particularly where a sell down of those financial products is occurring within 12 months after the issue of those financial products.

The law regulating disclosure documents is complex and the preparation of these documents usually involves substantial due diligence to be undertaken in accordance with accepted market methodology. The ASX Listing Rules provide guidance on continuous disclosure obligations, including guidance in relation to the expectation of when to engage regulators and publish market announcements following a data breach.

In addition to disclosure requirements, the Corporations Act imposes restrictions on unsolicited offers of financial products and advertisements regarding offers of financial products.

Entities listed on the ASX should also bear in mind that the ASX Listing Rules have specific provisions dealing with the issue of financial products by ASX-listed entities. For example, there are restrictions on the percentage of capital an ASX-listed entity can issue in a 12 month period- broadly speaking a listed company can issue up to 15 per cent of its capital in any 12 month period without shareholder approval, and in some cases a further 10 per cent during any 12 month period where the company's shareholders have granted pre-approval to that process in an annual general meeting.

Notably, following recent high profile cyber breaches in Australia, ASX Guidance Note 8 has been updated to include cyber incident disclosure examples and continuous disclosure requirements.

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