SQUIRE SANDERS

AUSTRALIA CORPORATE ALERT

February 2014

1 Listed Companies/ASX

New ASX Guidance Note 33 – Removal of Entities from the Official List

New *Guidance Note 33 -Removal of entities from the official list*, which deals with when and how ASX may delist an entity, commenced on 1 January 2014 (GN33). GN33 aims to clarify ASX's discretionary powers to delist an entity, either at the entity's request or at the instigation of ASX and aims to precisely define the circumstances where it will remove a listed entity upon completion of a successful takeover bid and removal of long-term suspended entities if their securities have been suspended from trading for a continuous period of three years. GN33 specifically discourages listed entities from using the Listing Rule providing for the automatic termination of a listing for non-payment of listing fees to circumvent the controls on voluntarily delisting. GN33 also provides incentives for entities to actively pursue opportunities that will result in the reinstatement of their securities to trading within a reasonable period.

The new GN33 coincides with consequential amendments to section 4.23 of *Guidance Note 8 Continuous Disclosure: Listing Rules 3.1 – 3.1B*, to address the disclosures ASX expects an entity to make if its securities are suspended from quotation. Please contact Carly White or Robert Eastwood if you require assistance with ASX compliance or regulatory advice.

New Timetables for Rights Issues and Dividends

ASX is implementing compressed timetables for traditional rights issues and a new standard timetable for accelerated rights issues, effective from 14 April 2014. To facilitate the changes, the ex period (including reconstructions) for corporate actions will be reduced from five to three business days (but will not apply to calls, conversion or expiries which have an effective date, rather than ex date). ASX-listed entities should be aware that any applicable corporate action announced prior to 14 April 2013, but which provides for an ex date on or after 14 April 2014, will be subject to the shortened new timetable.

In addition, from 14 April 2014, ASX will implement amendments to the dividend timetable with the introduction of a new requirement that the last election date for participation in a dividend reinvestment plan must be set no earlier than the business day after the record date for the dividend will also be introduced on 14 April 2014.

The amended ASX Listing Rules concerning the new timetables for rights issues and the timetable for dividends have received regulatory clearance and will become effective on 14 April 2014. Copies of the amendments to the ASX Listing Rules in mark-up are available here. If you have any queries regarding the operation of the revised ECM timetables, please contact Robert Eastwood or Carly White from our Australia team.

2 Equity Capital Markets

Rights Issues Guidance

The Australian Takeovers Panel (Panel) has provided listed Australian companies with some welcome clarification regarding the role of underwriters in rights issues conducted on the ASX.

On 3 December 2013 the Panel declined to declare unacceptable circumstances in relation to a major rights issue conducted by Virgin Australia Holdings Ltd (Rights Issue). It was fully underwritten by three of Virgin's largest shareholders, Air New Zealand, Etihad Airlines and Singapore Airlines (Foreign Holders). Of these, Etihad and Singapore had entered "synthetic" sub-underwriting agreements, through which they would contribute funds to the shortfall but would not receive any additional voting rights in Virgin's securities (as these companies did not have Treasury approval under FATA to increase their percentage ownership).

The Rights Issue imposed a 40% cap on retail investors subscribing for shortfall shares. It was this restriction that prompted the Australian Shareholders' Association to apply to the Panel for a declaration of unacceptable circumstances, arguing that the Rights Issue was structured in a way to increase the control of the Foreign Holders at the expense of the other shareholders by preventing them from applying for shortfall shares.

The Panel dismissed the application, concluding that any shortfall would be evenly dispersed between the Foreign Holders as a result of the sub-underwriting and synthetic sub-underwriting arrangements would be in a pro-rata basis, in proportion to their existing holdings. Consequently, the Rights Issue would not have any material effect on the control of Virgin Australia Holdings Ltd.

The Panel indicated that in some circumstances it could be unacceptable for a party to "put its foot" on shares through the use of synthetic structures similar to those used by Etihad and Singapore. However, it is likely that this would only be the case if there was a material control effect on the control of a company or the party could acquire a substantial interest. Because this was not the case here and Virgin had disclosed the effect of the synthetic underwriting arrangement of the short-fall, it did not give rise to unacceptable circumstances.

The Panel's decision demonstrates the importance of considering the control implications of any rights issue, and in particular the participation of underwriters. Unacceptable circumstances may exist where a rights issue results in a party receiving a substantial holding which affects control of a company, even if this was not the intended outcome of the action. We expect ASIC, the ASX and the Panel to monitor for this closely. If you have any queries about whether your proposed corporate action may attract the attention of an Australian regulator or require assistance in planning or implementing an ASX or multi-platform cross-border rights issue, please contact Carly White or Robert Eastwood from our Australia team.

3 Foreign Investment

Mixed Signals

FIRB has been very busy since the tail-end of 2013. The Treasurer has made four major decisions, all of which have sent interesting signals to foreign investors.

First, there was the approval of Saputo's (Canadian dairy powerhouse) proposed acquisition of Warrnambool Cheese and the rejection of Archer-Daniel Midland's AU$3.4 billion proposed 100% acquisition of Graincorp on national interest grounds, both examples of contentious investments in the agricultural sector.

There were also approvals of investments by Chinese companies in the telecommunications and resources sectors. State Grid Corporation (the world's biggest state utility) has been granted approval by Treasury to acquire up to 19.9% of electricity supplier SP AusNet, as well as 60% of energy infrastructure company SPI (Australia) Assets. SP AusNet, listed in Australia and Singapore, owns and operates electricity and gas distribution assets in Victoria, including the state-wide electricity transmission network. As a condition of approval for the latest deals, at least 50% of the new board members to be appointed by State Grid Corp to SP AusNet and SPIAA must be Australian citizens who are ordinarily resident in Australia. Similarly, the Treasurer has decided to remove certain foreign investment conditions placed on Yanzhou Coal Mining Company (a Chinese state-owned enterprise) in 2009 to allow it to maintain its ownership stake in Yancoal Australia Limited. These conditions required Yanzhou to reduce its ownership in Yancoal from 100% to less than 70% and its economic interest in Yancoal's former Felix Resources coal mining assets to less than 50% by the end of December 2013; and to reduce its economic interest in the Syntech Resources and Premier Coal mines to less than 70% by 31 December 2014. The Treasurer cited "significant challenges have emerged for the Australian coal industry" and referenced Yanzhou's commitment to" maintaining its position as a major regional employer.

We shall continue to monitor the Treasurer's foreign investment decisions and how "open for business" Australia will be. If you require any assistance navigating the FIRB process, please contact Campbell Davidson or Robert Eastwood from our Australia team for guidance.

4 Tax Developments

Employee Share Schemes and Start-ups

The Federal Government commenced direct consultations with interested stakeholders on 28 January 2014 to review the taxation of Employee Share Schemes for start-up companies, following significant public and political impetus for legal reform in this area.

Early-stage companies that are looking to secure new talent and incentivise personnel will often offer shares or share options to employees, in place of high salaries, because cash can be in short supply. Under the existing tax rules, employees may be taxed upfront on the grant of shares or options, even though there is no market for what they receive, no guarantee that the company will succeed or that there might be a future market for those shares or options . Business groups have been vocal in their demand for reform, arguing that upfront tax is one of the biggest barriers to start-up success.

Recognising that "high tech start-ups are important for Australia to remain globally competitive", the government has invited submissions from industry to discuss concerns in relation to the existing Employee Share Scheme arrangements for start-ups, with the aim of better supporting innovative and entrepreneurial Australian companies.

As experts in this area, Richard Horton and Louise Boyce from Squire Sanders have met with Treasury to put forward proposals for how this area of law could be reformed. If you would like any advice on employee equity issues, please contact Louise Boyce.

Changes to Offshore Fund Taxation

Treasury has recently released an exposure draft in relation to the final elements of the Investment Manager Regime. This regime seeks to remove tax impediments affecting foreign funds (with foreign investors) to ensure that foreign investors are not subject to Australian tax on investments made into or through Australia by foreign funds.

Unfortunately, the Investment Manager Regime exemptions do not extend to Australian resident investors, and does not assist Australian funds with offshore investors. Instead Australian funds may be able to benefit from the Managed Investment Trust (MIT) regime which allows for reduced withholding taxes, and the ability to elect to treat gains on shares, units or land as capital gains in some circumstances.

If you have any queries in relation to either of these regimes, please contact Michelle Segaert or Louise Boyce.

5 Financial Services & Investment Funds

ASIC Releases Report on Financial Services Regulating Complex Products

On 31 January 2014, ASIC published Report 384, Regulating Complex Financial Products, providing information to financial services businesses and advisers involved in the development and distribution of complex products. The report identifies "complex products" as including:

- investments in agribusiness managed investment schemes via individual contracts;
- exchange traded options strategies;
- hedge funds;
- hybrid securities;
- leveraged derivative products (e.g., CFDs and margin FX contracts);
- managed funds with complex non-standard or non-linear payoffs (e.g., capital protected and capital stable funds);
- structured products (e.g., contractual derivatives arrangements providing a return based on the movement in the value of reference assets, such as a share index, securities or other assets);
- non-vanilla warrants.

The report advises of the work undertaken to date by ASIC's Complex Products Working Group and indicates where ASIC is likely to undertake further work and provide further regulatory guidance in the future. One area where ASIC suggests further guidance may be provided in the future is in the disclosure of information to assist investors to determine the relative value of purchasing a complex bundled product, as opposed to the cost of separately purchasing its different components. Please contact Michelle Segaert for more information or if you require assistance navigating regulation of financial products.

See Report 384 Regulating complex products.

Government Announces Changes (and Wind-back) of FOFA Reforms

In late December 2013, the Coalition Government announced changes to the FOFA legislation, winding back certain requirements implemented by the previous government. Some of the key changes are:

- removing the opt-in requirement – advisers will not need their client's agreement every two years;
- amending the annual fee disclosure requirement – it will not apply where clients entered into the fee arrangement before 1 July 2013;
- amending the adviser's statutory best interests duty – to provide greater certainty and to allow for the provision of scaled (or "one-off") advice;
- amending the grandfathering provisions – these provisions will apply to advisers notwithstanding a move to a different licensee;
- amending the ban on conflicted remuneration – the ban will only apply to personal financial advice and not general advice and will only apply to commissions on risk (life) insurance products inside superannuation, where no personal financial advice about these products has been provided; and
- clarifying the volume-based shelf-space fee ban – it will apply to incentive payments between fund managers and platform operators which provide for preferential treatment.

There are further FOFA amendments proposed, some of which are minor and technical in nature. No draft legislation exists at this stage and it is expected that the proposed amendments will be legislated after a consultation process during 2014. ASIC has announced that it will not take enforcement action in relation to any specific FOFA provisions that the Government is planning to repeal. See the Government's announcement and ASIC's announcement. For assistance with financial services or managed fund queries, please contact Michelle Segaert of our office.

ASIC Announces Relief for Units in Simple Managed Funds to be Acquired and Redeemed Through a New ASX Managed Funds Settlement Service

On 8 January 2014, ASIC issued new class order relief for retail clients to apply for, and request redemptions of, units in simple managed investment schemes electronically using the proposed mFund settlement service, without the need to complete a physical application form. ASX argued this prevented mFund from operating efficiently without compromising the ability for investors to receive a product disclosure statement before investing.

mFund is a proposed new settlement service to be operated jointly by ASX and ASX Settlement, to facilitate investors' requests to responsible entities to issue or sell or redeem interests in unlisted simple managed investment schemes – that is, those schemes that are eligible to use the shorter PDS regime under Sch 10E of the Corporations Regulations. ASX is establishing mFund as a result of a number of leading fund managers expressing a strong interest to have at least three or four funds using this proposed new managed fund settlement service. No launch date for mFund has yet been announced, while it is understood mFund is in discussions with AUSTRAC as to the application of the AML/CTF Rules to the service.

See Class Order 13/ 1621.

Investment Funds – Recap of Key Regulatory Issues for 2014

A recap of 3 key regulatory issues for Australian fund managers in 2014:

1. Registered Scheme Constitutions: New Requirements in RG 134	
Responsible entities of registered schemes existing before 1 October 2013 may comply with previous guidance (i.e., guidance provided in RG 134 issued prior to 5 June 2013). However, if a responsible entity proposes to amend the constitution, it should ensure the amendment is in accordance with the revised RG 134 guidance, as applicable.	Responsible entities establishing new registered schemes must ensure that their scheme constitutions comply with the revised RG 134 guidance. The new content requirements relate to, among other things, the powers and rights of responsible entities with respect to the payment of fees, provisions relating to the consideration to acquire an interest in the scheme and withdrawal rights.
2. New Financial Requirements for Responsible Entities and Trustees of Wholesale Unit Trust Funds (as Providers of Incidental Custody Services)	
Responsible entities of registered schemes and trustees of existing wholesale unit trusts established prior to 1 July 2013 (where the trustee is providing an incidental custody service) need to comply, from 1 July 2014, with increased minimum NTA requirements of AU$10 million and AU$150,000, respectively, subject to entering into a compliant custody arrangement with an external custodian. This new NTA requirement is imposed, along with other new requirements regarding preparation of cash flow projections and liquidity from 1 July 2014. See RG 166.	A responsible entity of a registered scheme or a trustee of a wholesale unit trust fund (where the trustee is providing an incidental custody service), if their Australian Financial Services Licence was obtained after 1 July 2013, must comply with these new financial requirements immediately. Responsible entities and trustees should consider the costs and benefits of outsourcing custody versus the cost and benefits of meeting the new NTA requirements. Affected trustees must implement the systems and procedural changes required to enable the preparation of tailored 12 month rolling cashflow projections.

3. New Asset Holding Standards for Responsible Entities and Trustees of Wholesale Unit Trust Funds (as Providers of Incidental Custody Services)

Revised guidance in RG 133 imposes new minimum operational and compliance standards for responsible entities and trustees of wholesale unit trust funds (where the trustee provides an incidental custody service) for holding assets and requires minimum terms in custody agreements. Responsible entities of new schemes or trustees of new wholesale funds must meet these requirements, as applicable, immediately. Responsible entities of primary production schemes have an additional obligation to safeguard the land on which the scheme operates, and must comply with this new obligation by 1 July 2014.

Responsible entities of existing registered schemes and trustees of wholesale unit trust funds (which provide an incidental custody service), being in existence prior to 2 January 2014, must meet the new minimum operational requirements by 2 January 2015 and must ensure their agreements with custodians meet the minimum terms by 1 November 2015.

In the interim, responsible entities and relevant trustees must meet the minimum standards and related requirements in the former version of RG 133 (issued prior to November 2013), which is reproduced as an appendix to RG 133 at RG 133.166 to RG 133.208.

Privacy

If you have not yet updated your Privacy Policy to meet the requirements under the new Australian Privacy Principles, you still have time.

The new requirements come into effect on 12 March 2014. Please see our previous articles from March 2013, June 2013 and August 2013 which explain how the changes to Australian privacy laws will impact your business. If you need assistance with updating your Privacy Policy, please contact Michelle Segaert or Richard Pascoe from our Sydney team.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

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