



## CORPORATE

## FAST TRACK FOR CAPITAL RAISING: SIMPLIFIED DISCLOSURE PROSPECTUS

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The Ministry of Economic Development (MED) has released the draft regulations outlining the requirements for the contents of the simplified disclosure prospectus (SDP). Submissions on the draft regulations close on 27 May.

In this update we outline the basic regime contemplated by the draft regulations and note some areas that may need further consideration by MED to assess whether the draft regulations achieve the SDP's objective of reducing the costs of raising capital.

The objective of the SDP is to streamline the disclosure documents required by a listed issuer seeking to raise further capital: one of the recommendations of the Capital Market Development (CMD) Taskforce. The SDP seeks to reduce the level of duplication between forms of disclosure by enabling listed issuers to refer to (and rely on) information previously disclosed under their continuous disclosure obligations.

When the idea of a "term sheet" offering document was first promulgated by the CMD Taskforce, some suggested that its use should be confined to a narrow range of offers only suitable for existing investors and not able to be renounced (transferred or sold) to other members of the public. This suggestion has been dropped in favour of

limits on the types of security that may be offered by means of an SDP. These limits are outlined under the heading "general provisions".

Judging by the limits set, an SDP could be used not only for rights issues of equity securities to existing investors, but also for a range of other offers of equity and debt securities to existing and new investors. However, one of our initial concerns is that the draft regulations are likely to require an issuer to undertake reasonably extensive due diligence. This would undermine one of the primary objectives of the CMD Taskforce: to improve businesses' access to capital and reduce the costs of raising capital.

MED has noted that it would particularly welcome submissions on four specific issues:

- a) the extent to which the regulations meet the objective of streamlining the capital raising process whilst meeting investor protection objectives;
- b) whether an issuer of debt securities using the SDP should be required to provide financial statements for the "borrowing group" or just those of the "issuing group" where the net assets of the issuing group are largely the same as those of the borrowing group;

- c) whether the use of an SDP should be restricted to “vanilla” securities or should be also available for more complex products; and
- d) whether listed unit trusts should be entitled to issue equity under an SDP

### General provisions

Only listed issuers that already comply with the continuous disclosure obligations of NZX will be able to use an SDP to make an offer of securities. The securities to be offered by means of an SDP must be either:

- a) listed; or
- b) unlisted equity securities which rank equally with or in priority to other listed equity securities of the issuer; or
- c) unlisted debt securities (not being securities that may be converted into equity) which rank equally with or in priority to one or more other listed debt securities of the issuer; or
- d) unlisted convertible securities which meet two requirements:
  - on a liquidation, they must rank equally with or in priority to one or more other listed debt securities of the issuer; and
  - for distributions, they must rank equally with or in priority to other listed equity securities of the issuer.

An issuer seeking to make an offer of further (listed) securities by means of an SDP must also:

- make the information referred to as having been disclosed under its continuous disclosure obligations available on an internet site, as well as ensuring that it is available for inspection (and copying); and
- file with the copy of the SDP lodged

with the Companies Office for registration copies of all such (reference) disclosure information identified in the SDP as being material to the securities or the offer – as though that information was a “material contract”.

In Australia, the requirement to make available information previously disclosed under an issuer’s continuous disclosure obligations has often been achieved by including in the disclosure document a “wrap up” disclosure statement summarising relevant material disclosures.

### Content requirements

The detailed disclosure obligations for an SDP (which will form additional schedules to the Securities Regulations 1983) indicate that MED (as the drafter) wants to have a foot in both camps by requiring both:

- a) some prescriptive information about the securities being offered (including the terms of the securities offered, relationship with other listed securities of the issuer, preliminary and issue expenses, details of any charges payable by the subscriber, information about returns to subscribers from the securities, and a statement whether or not the subscriber is entitled to sell their interest in the securities) in what is simply a hybrid of the existing prescriptions for prospectus and investment statement disclosure; and
- b) all information that investors and their professional advisers would reasonably require to make an informed assessment of the offer (including references to all information disclosed by the issuer under its continuous disclosure obligations, any information required to update or correct those disclosures,



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and a reference to the latest financial statements of the issuing group).

The first limb also introduces several new disclosure requirements for SDPs which are not currently required to be included in an investment statement or prospectus. The most significant of these is the requirement that where securities are issued to finance capital projects, the SDP must include an indication of the expected financial benefits of the project. This is in addition to being required to disclose information about returns on a basis which has been taken directly from the prescriptive disclosure requirements for an investment statement.

The second limb uses the standard of disclosure applied for prospectus disclosure in Australia but without the corresponding qualifications that the information must be provided only:

- to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the prospectus; and
- if a person whose knowledge is relevant (i.e. the issuer and its directors) actually knows the information, or in the circumstances ought reasonably to have obtained it by making inquiries.

### **Drawbacks**

The addition of such “catch-all” provisions, without the corresponding qualifications, is likely to preclude any significant reduction in the due diligence required to ensure that the issuer’s directors can still rely on the due diligence defence provided by the Securities Act 1978. As a result, the use of an SDP may not significantly streamline the process of capital raising for a listed issuer.

These provisions also impose some additional disclosure requirements that are not currently required to be included in an

investment statement or prospectus - one of which is forward looking in that it requires an indication of the expected financial benefits of a project.

In addition, the directors of the issuer must state whether, after due enquiry, the issuer is in compliance with its continuous disclosure obligations.

These matters may seriously detract from the SDP achieving the objective of a more efficient capital raising.

### **Next steps**

The proposals to introduce the SDP regime are a welcome streamlining of the securities issue process. However, on first reading, the draft regulations have a number of significant shortcomings that will limit the usefulness of the SDP regime. It is hoped that dialogue with MED over the contents of the regulations will result in a sensible balance between the twin objectives of streamlining the capital raising process and ensuring that adequate standards of disclosure information are available for investors.

The circulation of the draft regulations and the speed with which a host of interested parties have worked to produce both the enabling legislation and the regulatory detail that supports it further signals the responsiveness to the pressures being imposed by the existing financial climate and the need for New Zealand businesses to raise capital efficiently.

If you would like to discuss making a submission on the draft regulations, please contact your usual Bell Gully adviser or the authors - Andrew Brown and Stephen Layburn.

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