Are you a sophisticated investor? And why this is important

Unless you have been living under a rock (and a well disinfected one, at that!), you will know that the economy has been given a major challenge in the shape of the COVID-19 pandemic. External cash injections have become a lifeline for many companies.

Public funds have been made available by governments through measures granting cash-flow assistance or assistance for wages.

Private funding has been made more accessible for listed companies, due to temporary regulations allowing "low docs" offers to be made to investors and raising thresholds requiring shareholder approval.

So what about the businesses that fall through the cracks and cannot benefit from the various measures cited above and still need funding for the operations or for their growth? How to obtain funding without going through the costly exercise of issuing a disclosure document?

Under Australian law, a company cannot make a public offer of securities (i.e. raising cash by issuing shares) without issuing a substantial information document (PDS, prospectus, information statements) providing all disclosures necessary for an investor to make an informed decision about investing. This applies to all offers exceeding 20 investors or 2 million dollars over the last 12 months.

This is where the concept of "sophisticated investor" comes in. This is not a new concept, but, in the light of the COVID measures screening and restricting access to foreign investment from the first dollar, it may be the key to accessing private funding from the domestic market to ensure the survival of a business. It may also provide some unique opportunities for investors looking to place their available cash in the private unlisted sector.

An offer made to "sophisticated investors" comes as an exception to capital raising rules. An exception which comes with a dollar tag specified in the Corporations Act 2001 (Cth) which is satisfied under any of those alternative conditions:

(a) The minimum investment under the offer is $500,000; or

(b) The minimum investment by a person in the same class of shares in the same company, inclusive of any past investments and the offer, adds up to $500,000; or

(c) The investor (or their company/trust) produces a certificate by a qualified accountant showing that he or she (or their company/trust) has net assets of at least $2.5 million or has a gross income over the last 2 years of minimum $250,000 per annum.

These measures were, at the time, specifically designed to assist fundraising by small and medium-sized enterprises. This rationale is still true, especially in this after-COVID world.

It now remains to be seen how businesses will use these provisions to fulfil their post-COVID business plans, as an add-on to private placements or to place rights issue shortfalls. In the meantime, if you are a sophisticated investor, these provisions may allow you to seize opportunities where businesses need funding in excess of the 20/2/12 thresholds.

Veronique Morgan-Smith

Principal
Legal Corporate Services and Company Secretary

www.morgansmithlegal.com

Morgan-Smith Legal