VERDIPAPIRFORETAKENES FORBUND

NORWEGIAN SECURITIES DEALERS ASSOCIATION

RECOMMENDATION NO. 13

Assessments and Documentation in Capital Raising Processes

This translation is provided for informational purposes only and may not be entirely accurate or complete. In the event of any discrepancies with the original Norwegian text, the Norwegian version shall prevail and take precedence over the English translation.

Adopted by the Board of the Norwegian Securities Dealers Association on January 24, 2023, with effect from the same date.
Audited by the Board of Directors. April 24, 2024.

Background

When investment firms act as financial advisors/manager (hereinafter referred to as "manager") for issuers in a capital raising process, this must be carried out in accordance "conduct of business rules". Furthermore, the investment firm must ensure that the integrity of the market is safeguarded in the best possible manner.

The starting point in a capital increase is the principle of equal treatment of shareholders, and rights issues will, in principle, uphold the requirement of equal treatment. According to the Limited Liability Companies Act (LLCA) (No. Aksjeloven) and the Public Limited Liability Companies Act (PLLCA) (No. Allmennaksjeloven) Section 10-4, shareholders have a pre-emptive right to subscribe for new shares in proportion to their existing shareholdings when share capital is increased through cash contributions. Furthermore, the Securities Trading Act (STA) (No. Verdipapirhandelloven) stipulates in Section 5-14 specific provisions regarding equal treatment of holders of financial instruments issued by companies listed on a regulated market.

Section 10-5 of the LLCA/PLLCA provides exceptions to the main rule in Section 10-4, allowing for so-called private placements. In order to waive shareholders' pre-emptive rights, a resolution must be passed by the general meeting with the same majority required for amendments to the company's articles of association.

With such authorization from the general meeting and shareholder majority, the issuer may waive pre-emptive rights, provided that the deviation does not result in an unreasonable advantage for certain shareholders or others at the expense of other shareholders or the company, cf. LLCA/PLLCA Section 5-21. Furthermore, the waiver must be objectively justified in the interests of the company.

Rights issues involve higher timing risks, as the process from the decision to issue shares until the transaction is completed generally takes significantly longer. The price in a rights issue is almost always set nominally lower than in a private placement, leading to greater dilution for shareholders who are unable to exercise their subscription rights or sell any transferable subscription rights. The reason for pricing a rights issue nominally lower than a private placement is to ensure a positive value for the subscription rights. Additionally, the long period between announcement and pricing may create uncertainty or downward pressure on the share price, resulting in an additional "discount" at pricing.

Another consideration when comparing different forms of issuance is that experience has shown inefficient trading in subscription rights in less liquid companies. Furthermore, costs related to a rights issue are generally higher due to increased documentation requirements and administrative expenses, as well as the need to establish an underwriting syndicate with associated underwriting commissions.

It is the general meeting/board of the issuer that decides whether to conduct a rights issue or a private placement. It is also the issuer's responsibility to ensure that any unequal treatment of holders of its financial instruments, resulting from a private placement, is objectively justified and that any disadvantage to the shareholder community is

proportionate. This assessment is usually conducted in consultation with legal counsel and must be documented in accordance with corporate law requirements.

In the Norwegian capital market, a significant proportion of capital raisings are private placements. A fast, flexible, and cost-effective method of raising capital through private placements is often considered to be in the best interests of both the issuer and the shareholder community, thereby meeting the requirements to deviate from pre-emptive rights.

Situations that may give rise to a private placement rather than a rights issue are, for example, if:

- A company has an acute liquidity need or requires balance sheet strengthening to avoid breaching covenants associated with bank or bond debt.
- A company needs capital at short notice to finance a business opportunity or remove uncertainty regarding the financing of such an opportunity.
- A company wishes to offer shares as consideration to a seller in connection with an acquisition.
- A company does not have a shareholder base capable of fully subscribing to a rights issue.
- A company lacks shareholders or other parties willing to underwrite a rights issue.
- Underwriting or other costs associated with a rights issue are expected to be disproportionately high.
- There is an opportunity to take advantage of a market window for rapid capital raising at a favorable price.
- A company has a legitimate desire or need to bring in one or more specific investors who can contribute value to the company and its shareholders.
- A company intends to conduct a small-scale capital raise at a price that results in limited dilution, making a private placement particularly appropriate from a time and cost perspective.
- Other legitimate reasons exist.

A private placement requires the issuer to consider whether a subsequent repair issue should be implemented. The purpose of a repair issue is to “compensate” for the dilution caused by the private placement for existing shareholders who did not receive allocations. It is the issuer that decides whether to implement a repair issue and determines its size.

This recommendation provides overarching guidelines for the role the manager should play when an issuer is choosing the transaction structure.

Guidelines:

The manager shall inform and advise the issuer on alternative issuance forms in a balanced and clear manner to ensure that decisions are based on adequate information.

When selecting the issuance structure, it must be assessed whether the statutory starting point of a rights issue should be followed, or whether circumstances justify exceptions. A specific assessment must consider the advantages and disadvantages of each issuance form, including the degree to which they safeguard equal treatment, time sensitivity, expected costs, transaction risks, and the target audience.

The weighting of the various considerations may further be influenced by several factors, including the size of the issuance in relation to the outstanding share capital, the size of the deviation between the issue price and the market price (discount or any premium), the degree of participation from existing shareholders, and the characteristics of the current shareholder base (e.g., the proportion of non-professional shareholders and the proportion of shareholders where a pro-rata subscription would not have exceeded the minimum subscription amount).

The manager shall present the advantages and disadvantages of the various issuance alternatives to the issuer, along with its assessment of the trade-offs between the different considerations that are relevant.

The scope of the manager's responsibility for the above will, however, depend on the point in time at which the manager is involved in the process, as well as the manager's area of responsibility and tasks as outlined in the mandate agreement.

Stricter requirements are imposed on the issuer, and consequently on the extent of the manager's advice and documentation thereof, in cases involving:

- larger issuances with significant dilution, and particularly when there is a change in the balance of power in ownership;
- larger deviations between the issue price and the market price (discount).

Although the assessment of deviations from pre-emptive rights or equal treatment falls under the issuer's responsibility, there may be circumstances where the manager should advise against a private placement if it is not deemed to sufficiently safeguard the principle of equal treatment of the issuer's shareholders. This follows from the statutory duty applicable to investment firms to ensure that market integrity is safeguarded in the best possible manner in their operations.

If the issuer has decided to carry out a private placement, the manager shall assist in assessing whether a subsequent repair issue is appropriate, including the size of such a transaction. In this assessment, several of the factors mentioned above in relation to the weighting of the different considerations are relevant. Should the market price remain below the issue price for some time following a private placement and where there is sufficient liquidity in the shares, this is also a factor that may influence whether or not a repair issue is conducted.

The manager shall provide clear and balanced advice to the issuer on key aspects of any potential repair issue, which may contribute to ensuring a greater degree of equal treatment of shareholders.

Advice related to the allocation in the private placement shall ensure that no unreasonable discrimination occurs. Existing shareholders who subscribe in a private placement should, as far as practically possible and appropriate, receive at least their pro-rata allocation.

The manager shall document the assessments made and the advice provided to the issuer related to the issuance structure, pricing, allocation, as well as any subsequent repair issue.

This also applies in cases where the issuer has not followed any advice against the manager's recommendation or where the manager has recommended a repair issue, and the

issuer has chosen not to follow such advice.