



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 49

# Employee incentive schemes

November 2013

### About this guide

This guide sets out our guidance on when we will give relief from the disclosure, licensing, managed investment scheme, advertising, hawking and on-sale provisions of the *Corporations Act 2001* (Corporations Act) for an employee incentive scheme.

It explains:

- who can make offers;
- who can receive offers;
- what financial products can be offered;
- specific conditions of our relief relating to how offers are made; and
- the general conditions of our relief.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This draft guide was issued in November 2013 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 49, reissued on 1 May 2003 and amended on 4 February 2004.

### Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview

### Key points

We give conditional relief from the disclosure and licensing provisions of the *Corporations Act 2001* (Corporations Act) for employee incentive schemes if:

- the offer enhances the interdependence between an employer and its employees for their mutual benefit;
- there are adequate protections for employees; and
- the objective of the offer is not fundraising.

Class Order [CO 14/xx] *Employee incentive schemes* provides relief for offers made under employee incentive schemes that meet the conditions of the class order.

We may also grant case-by-case relief if our policy objectives for employee incentive schemes are met.

### Our approach to facilitating employee incentive schemes

- RG 49.1 Traditionally, employee incentive schemes have provided employees with an ownership interest in their employer, and participation in such a scheme may be an important component of the employer–employee relationship. Research indicates that ongoing ownership interests can lead to greater employee engagement and improved business outcomes.
- RG 49.2 Employee incentive schemes may also involve financial products that aim to give employees a financial benefit based on their employer’s performance but without giving them an ownership interest. Depending on their structure, these schemes may also be designed to align the interests of employees with the interests of their employer for their long-term mutual benefit.
- RG 49.3 If our policy objectives are met, we consider it is appropriate to reduce the compliance burden for bodies offering eligible products under employee incentive schemes by providing conditional relief from a number of requirements in the *Corporations Act 2001* (Corporations Act): see RG 49.15.
- RG 49.4 The main policy objectives that must be satisfied to qualify for our relief are that:
- (a) the offer sufficiently supports the long-term interdependence between the employer and its employees—for example, by giving employees an ownership interest in their employer and/or a financial benefit derived from the employer’s performance;

- (b) there are adequate protections for participants, including appropriate disclosure and a means of providing a reliable market price for the products they are being offered; and
- (c) the objective of the offer is not fundraising.

RG 49.5 Class Order [CO 14/xx] *Employee incentive schemes* covers a range of financial products that can be offered to participants. We are also prepared to give case-by-case relief for other schemes that do not meet the conditions of our class order, provided that they meet our policy objectives. This will generally be demonstrated by satisfying the criteria in RG 49.4 and explaining why there are appropriate substitutes for the class order conditions in the circumstances.

## How the Corporations Act applies to employee incentive schemes

### Disclosure

RG 49.6 The offer of securities and other financial products to investors, including to employees, is regulated under Ch 6D of the Corporations Act (for securities) and under Ch 7 (for other financial products). The Corporations Act requires that, unless an exemption applies, offers must be made under a disclosure document. The purpose of these provisions is to ensure that investors have adequate information to make an informed investment decision.

RG 49.7 There are limited disclosure exemptions that may apply for offers to employees of securities and other financial products. We consider that the ‘no consideration’ exemptions (s708(15), 708(16), 1012D(5) and 1012D(6)) generally do not apply if the offer has any connection with the offeree’s employment situation, because the offeree is providing services to the employer and this non-monetary consideration is referable to the offer. Therefore, the only disclosure exemptions available for offers to employees are the senior manager exemption (s708(12) and 1012D(9B)) and the small-scale offers exemption (s708(1) and 1012E).

RG 49.8 We also consider that the exclusion from the definition of a ‘derivative’ in s761D of a contract for the future provision of services in s761D(3)(b) is not intended to apply to employee incentive schemes. Therefore, this exemption is not generally available to employee incentive schemes.

RG 49.9 Even if an offer can be made without disclosure under one of these exemptions, the employee incentive scheme may involve conduct that requires compliance with the licensing, advertising, hawking and/or on-sale provisions: see RG 49.10–RG 49.11.

## Licensing

RG 49.10 The Corporations Act imposes licensing requirements on the provision of financial services. The licensing requirements may apply to an employee incentive scheme, particularly if the scheme involves a trust structure.

### Other provisions that may apply to an employee incentive scheme

RG 49.11 The following provisions may also apply to an employee incentive scheme:

- (a) the prohibitions in s734, 1018A and 1018B on advertising an offer or intended offer;
- (b) the prohibitions in s736, 992A and 992AA (often referred to as the 'hawking provisions') on the issue or sale of financial products arising out of unsolicited contact with investors;
- (c) the provisions in Pt 5C requiring the registration of a managed investment scheme;
- (d) the restrictions in s707 and 1012C on the on-sale of financial products issued without disclosure within 12 months of their issue; and
- (e) the prohibitions in s1041E and 1041H against misleading or deceptive statements and conduct.

### Exemptions for eligible employee share schemes

RG 49.12 The Corporations Act provides some limited exemptions from the licensing and hawking provisions for 'eligible employee share schemes'. These exemptions only apply to offers made with a disclosure document or in reliance on the disclosure exemption for senior managers in s708(12). They also only apply to offers of a limited range of financial products and to certain employees.

## Our relief for employee incentive schemes

RG 49.13 If our policy objectives are met, we are prepared to give more extensive relief for employee incentive schemes than is provided for under the concept of 'eligible employee share scheme' in the Corporations Act. In deciding what relief to grant for employee incentive schemes, we take into account the commercial benefit and the net regulatory detriment that would be expected to flow from granting such relief.

RG 49.14 We consider that some of the requirements in the Corporations Act, such as the disclosure and licensing provisions, are disproportionately burdensome if an employer is making the offer to promote its relationship with employees. It is likely that the need to comply with these provisions would deter many

employers from providing an employee incentive scheme. We also consider that an employment relationship may reduce some of the risk that the disclosure and licensing provisions were intended to address.

RG 49.15 [CO 14/xx] reduces the compliance burden for listed bodies offering 'eligible products' to 'participants' under employee incentive schemes by providing conditional relief from the following provisions of the Corporations Act:

- (a) the requirement to give a disclosure document to participants in the circumstances set out in Sections B to G;
- (b) the requirement to hold an Australian financial services (AFS) licence for the incidental provision of financial services in connection with the scheme;
- (c) the requirement to register a managed investment scheme for a contribution plan;
- (d) the advertising and hawking provisions; and
- (e) the on-sale provisions in s707 and 1012C.

Note 1: ASIC has no power to provide relief from the liability provisions contained in Pt 7.10 of Ch 7, including s1041E and 1041H.

Note 2: See Section C for the meaning of 'participants' and Section D for the meaning of 'eligible products' in this guide.

**Table 1: Overview of our relief in [CO 14/xx] for employee incentive schemes**

Topic	Description	Issuer	Section
Who can make offers?	[CO 14/xx] enables offers to be made by:	Listed bodies	Section B
	<ul style="list-style-type: none"> <li>• bodies listed on ASX or an approved foreign market and their associated bodies corporate; and</li> <li>• unlisted bodies and their wholly owned subsidiaries.</li> </ul>	Unlisted bodies	Section G
Who can receive offers?	[CO 14/xx] enables offers to be made to: <ul style="list-style-type: none"> <li>• full-time and part-time employees (including executive directors);</li> <li>• certain contractors and casual employees;</li> <li>• prospective employees; and</li> <li>• non-executive directors under specific, separate offers.</li> </ul>	Listed and unlisted bodies	Sections C and G
What financial products can be offered?	[CO 14/xx] permits listed bodies to offer: <ul style="list-style-type: none"> <li>• shares;</li> <li>• certain depository interests;</li> <li>• stapled securities;</li> <li>• options over and units in any of these products; and</li> <li>• performance rights.</li> </ul>	Listed bodies	Section D

Topic	Description	Issuer	Section
	[CO 14/xx] permits unlisted bodies to offer fully paid voting ordinary shares (ordinary shares), and options and performance rights where the underlying securities are ordinary shares.	Unlisted bodies	Section G
What structures can be used when making offers?	[CO 14/xx] provides relief for listed bodies to make offers through the following structures: <ul style="list-style-type: none"> <li>• trusts, with products held on trust on an allocated or unallocated basis;</li> <li>• contribution plans; and</li> <li>• certain types of loan arrangements.</li> </ul>	Listed bodies	Section E
	[CO 14/xx] provides relief for unlisted bodies to make offers through the following structures: <ul style="list-style-type: none"> <li>• shares valued at up to \$1,000 per employee per year;</li> <li>• options over or performance rights relating to ordinary shares, provided that, at the time of exercise or vesting, the body is listed, provides a prospectus or offer information statement, or provides an independent expert report on a 100% disposal.</li> </ul>	Unlisted bodies	Section G
What general conditions apply?	The general conditions for relying on [CO 14/xx] are: <ul style="list-style-type: none"> <li>• the relevant quotation period is three months;</li> <li>• the objective of the offer is not fundraising and includes a 5% share capital limit;</li> <li>• at least 25% of products must be held for a minimum of 12 months;</li> <li>• bodies relying on our class order relief need only notify us of offers using ASIC Form XX <i>Notification of reliance on [CO 14/xx] Employee incentive schemes</i>;</li> <li>• offer documents must be clear, concise and effective; and</li> <li>• we may exclude a body from relying on our relief.</li> </ul>	Listed and unlisted bodies	Section F
What other relief is available?	[CO 14/xx] provides relief in relation to: <ul style="list-style-type: none"> <li>• licensing, managed investment schemes, advertising, hawking, and the on-sale provisions, where there is disclosure relief because the conditions of [CO 14/xx] are met; and</li> <li>• the disclosure and on-sale provisions for issues to trustees in certain circumstances.</li> </ul>	Listed and unlisted bodies	Section H



## B Who can make offers?

### Key points

[CO 14/xx] gives general disclosure and licensing relief so that the following bodies can make offers under an employee incentive scheme:

- bodies listed on ASX or an approved foreign market;
- associated bodies corporate of these listed bodies; and
- unlisted bodies and their wholly owned subsidiaries (see Section G).

### Listed bodies and their associated bodies corporate

#### Bodies listed on ASX or an approved foreign market

RG 49.16 Our general disclosure relief for employee incentive schemes is focused on bodies that are listed on ASX or an approved foreign market. This ensures that the listed body will be subject to the continuous disclosure regime and supervision in a well-regulated financial market. Listed bodies are also required to comply with listing rules that provide a range of protections to investors. In these circumstances, we consider there is less risk associated with reduced disclosure tailored to an employee incentive scheme.

RG 49.17 [CO 14/xx] contains a list of approved foreign markets that we consider to be comparable to ASX in terms of being fair, efficient, well-informed and internationally competitive. We have had particular regard to whether the market:

- (a) is a member of the World Federation of Exchanges;
- (b) is internationally recognised;
- (c) has rules that meet ASX's listing and quotation, market information, regulatory, and trading and settlement principles;
- (d) is a key world trading centre; and
- (e) is overseen by a government regulatory authority.

Note: These criteria are set out in Regulatory Guide 72 *Foreign securities prospectus relief* (RG 72). See the 'Key terms' list for our definition of 'approved foreign market'.

RG 49.18 Our relief applies only to the main board of the markets listed in the class order definition of 'approved foreign market', unless otherwise stated. We will continue to consider applications for relief on a case-by-case basis in relation to other markets, including any other Australian markets.

### Associated bodies corporate of listed bodies

- RG 49.19 It is relatively common for a body to offer an employee incentive scheme to employees of a related body corporate because they are part of the same corporate group. Bodies may also wish to offer a scheme to employees of a body they have a close connection with (e.g. where an issuing body has a significant investment in the employer body or the employer body has a significant investment in the issuing body such as may arise in a joint venture arrangement).
- RG 49.20 We are prepared to grant relief for employee incentive schemes that are offered by a body that has a sufficient connection with the employer so that the offer will enhance the interdependence between the employer and its employees.
- RG 49.21 [CO 14/xx] therefore extends to offers made by associated bodies corporate of bodies listed on ASX or an approved foreign market. Our class order defines an ‘associated body corporate’ to mean:
- (a) a body corporate that is a related body corporate of the issuer;
  - (b) a body corporate that has voting power in the issuer of not less than 20%; or
  - (c) a body corporate in which the issuer has voting power of not less than 20%.
- Note: In this regulatory guide, unless we need to distinguish between the employer body and an associated body corporate, we just refer to the employer.
- RG 49.22 To rely on our general relief and meet the quotation condition, the body issuing the eligible products must be listed. However, the associated bodies corporate do not have to be listed.

### Unlisted bodies

- RG 49.23 [CO 14/xx] also gives limited relief to unlisted bodies for employee incentive schemes: see Section G.

## C Who can receive offers?

### Key points

[CO 14/xx] provides relief for offers under employee incentive schemes made to 'participants'. This term is defined to include:

- full-time or part-time employees (including executive directors);
- contractors or casual employees who meet the conditions relating to their hours worked and length of service;
- prospective employees if the offer is made as part of an offer of full-time or part-time employment; and
- non-executive directors who participate in an offer that meets the conditions relating to the terms of such an offer.

### Who can participate in an employee incentive scheme?

RG 49.24 We are prepared to grant relief for employee incentive schemes if the offer is likely to support the interdependence between the employer and its employees for their long-term mutual benefit. The nature of the working relationship (past, current and future) is a key factor in determining whether these policy objectives are satisfied.

RG 49.25 Under [CO 14/xx], offers may be made to a broad range of participants, including current employees and other personnel who meet criteria that relate to the length of service and hours worked. In general, our class order does not draw any distinction based on the employee's role—however, we give more restricted relief for non-executive directors to avoid concerns that an employee incentive scheme may impose conditions that undermine their independence.

RG 49.26 For the purposes of our class order relief, 'participants' are:

- (a) full-time or part-time employees (including executive directors);
- (b) contractors and casual employees who meet the conditions relating to hours worked and length of service;
- (c) prospective employees who are offered a full-time or part-time position; and
- (d) non-executive directors.

RG 49.27 Offers may be made to participants of the listed body or of its associated bodies corporate. For unlisted bodies, offers may be made to the participants of the body or of its wholly owned subsidiaries.

- RG 49.28 There may also be rare instances where we grant case-by-case relief for offers to people who do not meet our definition of ‘participant’, if the offer satisfies our policy objectives. The employer may be able to show that the failure to meet our criteria is not material in the circumstances, or that the failure to meet these criteria may be compensated for by other indicators of an interdependent working relationship.

## Employees

### Full-time and part-time employees

- RG 49.29 [CO 14/xx] permits an offer under an employee incentive scheme of eligible products to persons who are full-time or part-time employees at the time of the offer. This includes executive directors and other senior managers through to junior employees.

### Casual employees

- RG 49.30 [CO 14/xx] permits an offer of eligible products to casual employees if:
- (a) they have been in employment with the body for the 12 months before the date of the offer; and
  - (b) during that time, they have worked the number of hours that are the pro-rata equivalent of 40% or more of a full-time position and continue to work on this basis.
- RG 49.31 We consider that these criteria indicate a relationship of sufficient interdependence to justify class order relief. For case-by-case relief applications, we may be prepared to consider different indicators. For example, the casual employee may work fewer hours per week but over a longer timeframe.

### Prospective employees

- RG 49.32 [CO 14/xx] permits bodies to make offers to prospective employees if the offer:
- (a) is made at the same time as the offer of full-time or part-time employment;
  - (b) can only be accepted if that offer of employment is also accepted; and
  - (c) is made under an existing employee incentive scheme.
- RG 49.33 It is a condition of our relief that the person is offered full-time or part-time employment rather than casual employment or a contractor role. This aims to ensure there will be the requisite level of interdependence in the future.

Consistent with our relief for existing full-time and part-time employees, we do not consider it necessary to impose any length of employment requirement on prospective employees.

## Contractors

- RG 49.34 We are prepared to give relief to a range of contractors who have a sufficient level of interdependence with the body. Our class order relief covers contractors who enter into service arrangements with the employer:
- (a) directly in their personal capacity;
  - (b) through a service company that employs the contractor, all of whose members or directors perform work under a contract for the employer; or
  - (c) through a company that employs the contractor, whose business is to provide the services of many individuals to various companies.
- RG 49.35 The individual contractor providing the services must have performed such services for the body for 12 months before the offer is made; and, during that time, must have worked the pro-rata equivalent of 80% or more of a full-time position. The employer must have an ongoing intention to continue employing the contractor on an equivalent basis for at least the next 12 months.

## Non-executive directors

- RG 49.36 One of the roles of non-executive directors is to provide oversight of management. For this reason, the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations state that non-executive directors should not normally participate in schemes designed for the remuneration of executives: Box 8.2 of Recommendation 8. In addition, the Investment and Financial Services Association Limited (IFSA), in its Blue Book of June 2009 at Guideline 11.12, states:

Non-executive directors should acquire equity participation independently and from their own resources. In particular, non-executive directors should not participate in a share or option scheme designed for the executives whose role is to manage the company on a daily basis. The non-executive directors' role is to assess effectively the performance of the company and its executives, and a conflict of interest would be created if directors participated in a similar scheme to the executives.

- RG 49.37 [CO 14/xx] provides relief in relation to employee incentive schemes offered to executive directors and, to a more limited extent, to schemes offered to non-executive directors. We do not consider it is appropriate to facilitate non-executive directors' participation in a general employee incentive scheme, because this participation would be contrary to good corporate

governance standards. However, we do recognise that non-executive directors' participation in a more limited scheme may be beneficial for both parties. For example, an ownership interest may help to align a non-executive director's interests with the interests of shareholders.

RG 49.38 [CO 14/xx] therefore permits non-executive directors to participate in an employee incentive scheme which does not impose conditions that undermine their role in the oversight of executives. The class order relief that applies to non-executive directors provides that:

- (a) the director may only be offered shares, depository interests or stapled securities (not performance rights or options);
- (b) the director's acquisition of products under the scheme must not be subject to performance conditions;
- (c) the director must contribute their own funds to acquire the products (which can be done under a contribution plan); and
- (d) the scheme must not involve a loan or other financial assistance to the director.

RG 49.39 We do not consider that a director who holds securities with conditions linked to the body's performance is independent and, in these circumstances, the body may need to disclose against ASX Corporate Governance Principle 2.1.

RG 49.40 [CO 14/xx] also does not provide relief from the remuneration-related approval and reporting obligations under the Corporations Act (e.g. s300 and 300A) and the Corporations Regulations 2001, and directors and bodies will need to continue to comply with these obligations.

## D What financial products can be offered by listed bodies?

### Key points

[CO 14/xx] provides relief for offers of the following 'eligible products':

- fully paid shares quoted on ASX and fully paid shares or stock quoted on an approved foreign market;
- CHESS Depository Interests (Australian CDIs) quoted on ASX, and CREST Depository Interests (UK CDIs) and American depository receipts (ADRs) quoted on an approved foreign market, with a share or stock as the underlying security;
- fully paid stapled securities quoted on ASX;
- options over, or units in, the above financial products; and
- certain performance rights relating to the above financial products.

### Main criteria for eligible products

- RG 49.41 When determining whether to provide relief for an offer of financial products to employees, we focus on the following criteria:
- (a) whether the financial product is likely to foster interdependence between an employer and its employees—either because of the nature of the product or the terms on which it is offered (see RG 49.43–RG 49.44);
  - (b) whether there is adequate information about the financial product to justify removing the requirement for a disclosure document (see RG 49.45–RG 49.46); and
  - (c) whether the financial product, or the terms on which it is offered, are likely to expose the employee to additional liability (see RG 49.47–RG 49.48).

- RG 49.42 These criteria are reflected in [CO 14/xx], as explained in this section. If an employee incentive scheme does not satisfy one or more of these criteria, we may be prepared to give more limited relief subject to compensating conditions. The limited relief in [CO 14/xx] for offers by unlisted bodies is one example: see Section G.

### Financial products that foster interdependence

- RG 49.43 [CO 14/xx] covers a range of financial products that have the potential to foster interdependence between an employer and its employees. The primary forms of financial products covered by our relief are those that give the employee an ownership interest in their employer (or the economic equivalent). This includes shares and depository interests, but does not include debt products because the price of a debt interest may not reflect the performance of the issuer, and holding a debt interest may not enhance the interdependence between the employer and its employees.
- RG 49.44 We also give relief for offers of options and performance rights that may ultimately result in the employee receiving an ownership interest or a financial benefit, the value of which is derived from underlying eligible products. This relief is given on condition that the terms and conditions of the employee incentive scheme are structured to foster long-term interdependence between the employer and its employees: see RG 49.62 and RG 49.103.

### Quoted eligible products

- RG 49.45 Our general disclosure relief applies to:
- (a) eligible products that are in a class that has been quoted, at the time of the offer, on ASX or an approved foreign market for at least three months without suspension for more than five trading days in the shorter of the period in which the financial products have been quoted or the 12 months before the offer is made; and
  - (b) options and performance rights where the underlying eligible products meet this quotation condition.
- RG 49.46 The quotation requirement means that employees can assess the offer by reference to a reliable market price: see RG 49.86–RG 49.88.

### Financial products that may expose the employee to liability

- RG 49.47 We have not given relief for offers of partly paid securities because of the risk that employees might be exposed to additional liability (other than the loss of the financial products that are the subject of the arrangement). Particular risks associated with these offers mean that reduced disclosure will not always be appropriate.
- RG 49.48 For this reason, we also do not give relief for employee incentive schemes that involve loans to employees, unless the loan is on terms that are limited or no recourse: see RG 49.82–RG 49.83.



## Depository interests

RG 49.49 Foreign bodies may want to offer depository interests to their employees—for example, because these provide exposure to a more liquid market, or to address regulatory and administrative issues with offering electronic holdings in a number of jurisdictions. [CO 14/xx] facilitates offers of depository interests that are Australian CDIs, UK CDIs and ADRs, where the underlying security is a share or stock.

Note: Our relief for ADRs is limited to Level II and Level III ADRs. This is because Level I ADRs are not able to be traded on a recognised exchange and there are very limited filing requirements. Levels I, II and III are defined under the Rules of the US Securities and Exchange Commission.

RG 49.50 We are prepared to give relief for these depository interests because:

- (a) they allow for the alignment of employer and employee interests in a similar way to shares, because they provide an economic equivalent of ownership in a body;
- (b) without our relief, employees in Australia may be excluded from international offers because of the disproportionate cost of complying with the disclosure and licensing requirements of the Corporations Act (often for a relatively small number of employees).

RG 49.51 Our relief applies to quoted depository interests and shares or stock that can be converted into such depository interests (i.e. whether or not the shares or stock are quoted). This is because the depository interest is the economic equivalent of the underlying security and employees can readily convert the underlying security into a depository interest if they wish to trade their interests.

RG 49.52 Our relief does not cover depository interests over bonds because these are not the economic equivalent to underlying shares or stock.

## Stapled securities

RG 49.53 [CO 14/xx] permits employers to offer ASX-quoted, fully paid stapled securities.

RG 49.54 We also give relief for options over and performance rights relating to these stapled securities.

RG 49.55 We will consider, on a case-by-case basis, offers of stapled securities that include an interest in a foreign collective investment scheme.

## Options over, and units in, underlying eligible products

- RG 49.56 [CO 14/xx] gives general relief for offers of options over, or units in, the following underlying eligible products:
- (a) fully paid shares quoted on ASX;
  - (b) fully paid shares or stock quoted on an approved foreign market;
  - (c) Australian CDIs quoted on ASX, and UK CDIs and ADRs quoted on an approved foreign market, with a share or stock as the underlying security; and
  - (d) fully paid stapled securities quoted on ASX.
- RG 49.57 In accordance with the definition of ‘underlying eligible product’ above, [CO 14/xx] does not give relief for options over options, or options over performance rights.
- RG 49.58 The options do not need to be quoted on ASX or an approved foreign market but the underlying eligible product must be in a class that meets the quotation condition. If the options are not in a class that is quoted, they must be offered to employees for no more than nominal monetary consideration. This is because the value of unquoted options is more difficult to ascertain without full disclosure.

## Performance rights

- RG 49.59 Employers often want to offer employees the right to receive a financial product or a cash amount (the value of which is determined by reference to a financial product) that is conditional on the employee meeting specified performance criteria. This is partly for tax and other commercial reasons, such as the difficulties in offering shares in multiple jurisdictions.
- RG 49.60 We are prepared to grant relief for such offers, provided that we are satisfied that the rights promote the interdependence between the employer and its employees, and the features of the offer are similar to offers of options (excluding an exercise mechanism).
- RG 49.61 Under our class order, a body can offer the following performance rights to employees for no more than nominal monetary consideration:
- (a) rights to underlying eligible products;
  - (b) rights to a cash amount that is equivalent to the value of underlying eligible products and/or any increase in the value of these products;
  - (c) rights to a cash amount that is equivalent to the dividends or distributions paid to holders of underlying eligible products; and/or

- (d) rights to the number of underlying eligible products that is equivalent to the value of the dividends or distributions paid to holders of underlying eligible products.

RG 49.62 The product or cash amount must vest automatically for no monetary consideration on the satisfaction of conditions that relate to:

- (a) the employee's length of service; and/or
- (b) the performance of the employee, the issuer or an associated body corporate of the issuer.

RG 49.63 We do not consider that a cash payment, offered in the context of employment or employment-like remuneration arrangements, is intended to be caught by the disclosure and licensing provisions of Ch 7, where the amount of cash payable is determined by a measure other than an underlying eligible product. Our proposed definition of 'performance right' would therefore not encompass cash payments, where the amount of cash payable is determined by reference to such measures as sales, profits or production targets.

RG 49.64 Accordingly, for the avoidance of doubt, we have issued a separate class order under s765A(2) of the Corporations Act, which declares that employment or employment-like arrangements, under which such cash commissions or bonuses may be payable, are not arrangements that are derivatives for the purposes of Ch 7.

RG 49.65 We will generally not provide relief for offers of performance rights that require the employee to pay more than nominal monetary consideration. This is because we consider that the payment of more than nominal monetary consideration is incompatible with the requirement to meet performance criteria. Also, the value of performance rights is more difficult to ascertain because they are unquoted: see RG 49.58.

## Other financial products

RG 49.66 [CO 14/xx] does not extend to interests in a managed investment scheme or a foreign collective investment scheme because such offers to employees are not common. We may be prepared to grant case-by-case relief for these offers if our policy objectives are satisfied.

## E What structures can be used by listed bodies when making offers?

### Key points

[CO 14/xx] provides relief for arrangements that bodies often use to manage their offers and to facilitate employee incentive schemes. This includes relief for:

- trust structures;
- contribution plans; and
- loan arrangements.

### Our approach to the features of offers

- RG 49.67 We consider that employers should have the flexibility to structure their offers in ways that are more efficient or beneficial for employers and employees, provided that those structures do not undermine our policy objectives for employee incentive schemes.
- RG 49.68 [CO 14/xx] gives relief from a number of the requirements in the Corporations Act so that employers can:
- (a) use a trust structure to manage their obligations under an employee incentive scheme; and
  - (b) offer a range of payment options to participants, such as contribution plans and loan arrangements.
- RG 49.69 We may be prepared to give case-by-case relief for other offer structures if an employer can demonstrate why a particular feature is required, and we are satisfied that it is consistent with our policy objectives. We may need to design particular conditions to address the structure.

### Trust structures

- RG 49.70 Bodies often use trusts to help manage their obligations to have sufficient underlying eligible products available for participants on the vesting of performance rights or the exercise of options. A trustee may hold eligible products that are allocated to specific employees, who may direct the trustee as to the exercise of voting rights and may receive dividends; or in a pool for employees generally, on an unallocated basis, where employees do not acquire any voting rights or rights to dividends.

- RG 49.71 Accumulating products in a trust allows the issuer to spread the timing of acquisitions to take advantage of open trading periods and to avoid the pricing implications of having to make larger on-market acquisitions at a particular point in time.
- RG 49.72 If an employee incentive scheme involves a trust, relief from the requirement to hold an AFS licence may be required for providing a custodial or depository service and for dealing in a financial product in the course of providing such a service. [CO 14/xx] provides conditional relief from this requirement for bodies if the financial service is merely incidental to the operation of an employee incentive scheme.

Note: If the trustee is a body controlled by the issuer, it must also comply with the self-acquisition provisions in Pt 2J.2 of the Corporations Act: see Regulatory Guide 233 *Indirect self-acquisition: Relief for investment funds* (RG 233).

- RG 49.73 Many bodies use professional trustees to assist them to manage their offers. Our relief does not apply to bodies that provide professional trustee services because they are required to have the appropriate AFS licence authorisations.

### Conditions for trust structures

- RG 49.74 Our licensing relief in [CO 14/xx] for trust structures is subject to conditions that provide certain investor protections, including that:
- (a) the sole purpose of the trust must be to hold underlying eligible products for participants who become entitled to those products under an employee incentive scheme;
  - (b) the trustee must have audited financial records available for inspection by beneficiaries; and
  - (c) the trustee must not levy any fees for operating the trust that are payable by beneficiaries or out of the trust assets (other than reasonable brokerage and taxes).

### Specific conditions for allocated and unallocated products

- RG 49.75 The other conditions that apply specifically to trust structures depend on whether the eligible products are allocated to specific participants or held in a pool on an unallocated basis.
- RG 49.76 If the products are held on trust for specific participants, the trustee must keep written records of the products it holds for each beneficiary and the beneficiary must have substantially the same rights relating to the products as if they were the legal owner. This includes the right to direct any voting rights, to receive income deriving from the products and to direct the trustee to sell the products at or above the current market price.

RG 49.77 If a trustee holds the eligible products in a pool for participants generally, on an unallocated basis, the trustee must not exercise any voting rights attaching to the eligible products, and the number of unallocated products with voting rights held on trust must not exceed 5% of the total voting rights attaching to the products. This condition limits the distortion of voting power caused by the trustee holding a parcel of financial products that is effectively quarantined from voting. This policy is also reflected in our guidance for self-acquisitions at RG 233.22.

## Contribution plans

RG 49.78 Employee incentive schemes often include a contribution plan, whereby the participant makes payments, or forgoes income, to contribute to their acquisition of interests. These contribution plans may take various forms. For example, contributions may be post-tax dollars (i.e. in the form of deductions from each month's earned remuneration) or pre-tax dollars (i.e. in the form of an upfront election to take a portion of future remuneration as underlying eligible products).

RG 49.79 [CO 14/xx] facilitates these arrangements by providing relief from the requirement in Ch 5C to register a managed investment scheme if the scheme exists only in connection with operating a contribution plan offered as part of an employee incentive scheme. We also give relief from the licensing provisions in Ch 7 for any dealing in these interests.

RG 49.80 Our relief is granted subject to conditions designed to ensure that contributions by participants are safeguarded. For example, the conditions require that:

- (a) the notice period for discontinuing participation in the contribution plan must not exceed one month; and
- (b) post-tax contributions must be held on trust for the participant with an authorised deposit-taking institution (ADI) regulated by the Australian Prudential Regulation Authority (APRA) until eligible products are allocated to the participant.

RG 49.81 [CO 14/xx] does not extend to contribution plans involving the offer of options or performance rights. This is because our relief for options and performance rights is given on the condition that they are offered for no more than nominal monetary consideration: see RG 49.58 and RG 49.65.

## Loan arrangements

- RG 49.82 [CO 14/xx] provides disclosure and licensing relief for offers that involve a loan or other financial assistance to facilitate participation in an employee incentive scheme, provided that the arrangements are:
- (a) either no recourse or the recourse is limited to forfeiture of the eligible products issued under the loan arrangement;
  - (b) not repayable during the life of the loan; and
  - (c) interest free.
- RG 49.83 These conditions are consistent with our policy objective that participants should not risk any additional liability (other than forfeiture of the financial products acquired under the loan). Being interest free is consistent with the policy of interdependence, rather than an agreement that confers a commercial benefit in favour of the employer.
- RG 49.84 [CO 14/xx] also provides relief for an offer to be structured using both a contribution plan and a loan arrangement. We consider that the class order conditions applying to contribution plans—together with the requirement that loan arrangements be limited or no recourse, and not be repayable during the life of the loan—provide sufficient protections to enable these arrangements to be offered together under our class order.
- RG 49.85 We also note that, in establishing loan arrangements for employee incentive schemes, bodies need to consider their obligations relating to financial assistance in Pt 2J.3 of the Corporations Act. In particular, the exemption under s260C(4) for approved employee share schemes does not apply to employee incentive schemes relying on [CO 14/xx].

## F What general conditions apply?

### Key points

The conditions that we generally impose on relief for employee incentive schemes reflect the key elements of our policy objectives, which aim to ensure that:

- employees have adequate information—we therefore impose a quotation condition and disclosure requirements;
- the objective of the offer is not fundraising and does not materially prejudice creditors' interests—we therefore impose a 5% share capital limit on the financial products that will or may be issued under an employee incentive scheme, and the number of underlying eligible products used to calculate any cash payment; and
- the offer facilitates the interdependence between the employer and its employees—we therefore impose a 12-month holding restriction for a proportion of the financial products issued under an employee incentive scheme.

We have also reduced the administrative requirement of having to provide copies of the offer document and contribution plan rules (or summary), and replaced this with the requirement to notify ASIC of key information (using Form XX).

Subject to affording procedural fairness, we may exclude a body from relying on [CO 14/xx] where we have substantial concerns about the body's compliance or conduct.

### Quotation condition

- RG 49.86 Our class order relief applies most widely to financial products that are in a class that is quoted on either ASX or an approved foreign market. The financial product must be in a class that has been quoted, at the time of the offer, for at least three months without suspension for more than five trading days in the shorter of the period in which the financial products have been quoted or the 12 months before the offer is made.
- RG 49.87 This condition is intended to ensure that there is a reliable alternative market price for the relevant eligible product, and that the product is issued by a listed body that is subject to appropriate market supervision and continuous disclosure requirements.
- RG 49.88 Offers of unquoted options and performance rights must be issued for no more than nominal monetary consideration, and the underlying eligible products must be quoted on ASX or an approved foreign market.



Note: [CO 14/xx] gives more limited relief for offers of unquoted financial products by unlisted bodies: see Section G.

### **Relief from the quotation condition in exceptional circumstances**

- RG 49.89 We may grant case-by-case relief for employee incentive schemes involving financial products that have been quoted for less than three months, consistent with our policy in Regulatory Guide 188 *Disclosure in reconstructions* (RG 188). Relevant circumstances may include a merger, where the merged body cannot meet the quotation condition but the individual bodies comprising the merged body would have met the quotation condition on a 'stand-alone' basis (RG 49.86), or where we are satisfied that the disclosure is adequate and investor protections are in place so that an offer under a prospectus is not required: see s708(17) and RG 188.19–RG 188.21.
- RG 49.90 We may also consider granting case-by-case relief from the five trading day suspension condition if it appears that the financial products are adequately priced and the market is fully informed. For the factors we take into account, see Regulatory Guide 189 *Disclosure relief for rights issues* (RG 189) at RG 189.64–RG 189.68.

### **Share capital limit of 5%**

- RG 49.91 Our relief for employee incentive schemes is not intended to facilitate fundraising or create a significant exposure which may then materially prejudice creditors' interests. We have therefore imposed a 5% share capital limit on eligible products that may be issued, or the cash amount that may be payable, to employees in reliance on [CO 14/xx] or on individual relief for an employee incentive scheme. This 5% share capital limit is calculated with reference to all offers of eligible products made in reliance on relief in the past five years.

#### **Products included in calculating the 5% share capital limit**

- RG 49.92 [CO 14/xx] provides two methods for calculating the 5% limit. The first is relevant for offers of shares, stapled securities, options and performance rights. The second relates to depository interests and reflects the fact that depository interests may be converted into the underlying shares at any time.

#### **Shares, stapled securities, options and performance rights**

- RG 49.93 For offers of shares, stapled securities, options and performance rights under our relief, the aggregate of the following must be no more than 5% of the total number of the relevant type and class of eligible product on issue at the time of the offer:

- (a) the number of shares or stapled securities that have been issued (or could be issued) in reliance on relief under the current offer or any offer in the previous five years; and
- (b) the maximum number of these underlying eligible products that could be issued on the exercise of options or vesting of these products on the satisfaction of performance rights conditions under the current offer or any offer in the previous five years.

RG 49.94 The second limb of this calculation must take into account the maximum number of underlying eligible products (shares or stapled securities) that could be issued, regardless of whether the employee will or may ultimately receive cash in lieu of the underlying eligible product. It will also include the number of underlying eligible products that are used to determine the cash amount where the performance rights are only able to be cash settled.

### **Depository interests and their underlying eligible products**

RG 49.95 If an issuer has depository interests quoted on ASX or an approved foreign market, an offer may be made for the depository interest or the underlying eligible product. The 5% calculation for the purposes of our class order relief is designed to take into account the characteristics of depository interests, including that:

- (a) the depository interests may be held either as depository interests or converted to, and held directly as, the relevant underlying eligible products at any time; and
- (b) the ratio of depository interests to the underlying securities may not always be 1:1.

RG 49.96 For depository interests and the underlying eligible products offered under our relief, the aggregate of the following must be no more than 5% of the total of the relevant type of underlying shares or stock on issue (whether or not represented by depository interests):

- (a) the shares or stock, or corresponding depository interests, that were issued in reliance on our relief under the current offer or any offer in the previous five years, and any such products that could be issued under offers that are outstanding (if accepted); and
- (b) the maximum number of the same type and class of underlying shares or stock on issue (whether or not represented by depository interests) that could be issued on the exercise of options or vesting of these products on the satisfaction of performance rights conditions under the current offer or any offer in the previous five years, and any such products that could be issued under offers that are outstanding (if accepted).

RG 49.97 Again, the second limb of this calculation must include the maximum number of underlying shares or stock that could be issued, regardless of whether the employee will or may ultimately receive cash in lieu of the

underlying products on exercise or vesting. It will also include the number of underlying shares or stock that are used to determine the cash amount where the performance rights are only able to be cash settled.

### Exclusions from 5% share capital limit

RG 49.98 Eligible products issued to employees without our relief are not included in the numerator in the calculation of the 5% share capital limit. These products may be issued without our relief because:

- (a) the offer is received outside Australia (e.g. employees in another jurisdiction);
- (b) the offer is made in reliance on s708 or 1012D and therefore does not need a disclosure document; or
- (c) the offers are made in a disclosure document.

RG 49.99 These exclusions mean that only the financial products offered in Australia in reliance on our relief need to be included in the 5% calculation.

#### Example

Company X has:

- (a) 10,000 shares to be issued under current offer;
- (b) 30,000 shares issued under offers in the past five years;
- (c) 5,000 shares that could be issued under offers that are outstanding and not yet accepted or rejected;
- (d) 40,000 shares that could be issued on the exercise of options and 10,000 shares that could be issued if the performance conditions are met in relation to the current performance rights on issue;
- (e) one million shares issued under a prospectus in the past year;
- (f) 200,000 shares issued two years ago to a sophisticated investor under s708; and
- (g) three million shares currently on issue.

The total number of shares that Company X has or could issue under permissible offers over the past five years:	= (a) + (b) + (c) + (d)
	= 10,000 + 30,000 + 5,000 + 50,000
	= 95,000 shares

The total number of shares that Company X has on issue:	= (a) + (b) + (e) + (f) + (g)
	= 10,000 + 30,000 + 1,000,000 + 200,000 + 3,000,000
	= 4,240,000 shares

The number of shares that could be issued under offers in reliance on our class order relief as a percentage of the total number of shares on issue at the time of the offer:	$= \frac{95,000}{4,240,000} \times 100$ $= 2.24\%$
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## Nominal monetary consideration

- RG 49.100 We do not consider that offers under an employee incentive scheme are generally for ‘no consideration’ because the participant is providing continued services and, in some cases, may consider that the products offered under the scheme are part of their remuneration or are a reason for not moving to another employer.
- RG 49.101 To ensure that participants are not disadvantaged by our employee incentive scheme relief, we require that offers involving options and performance rights are made only where they involve ‘no more than nominal monetary consideration’. We consider that ‘nominal monetary consideration’ represents a ‘token or trivial’ amount but does not require a specific value to be ascribed to the option or performance right.

## 12-month holding condition

- RG 49.102 One of our policy objectives is to facilitate offers that will enhance the interdependence between employers and employees. We consider that an employee incentive scheme is likely to foster this interdependence for as long as the employee:
- (a) holds a share, depository interest, or stapled security in the employer (or associated body corporate);
  - (b) holds an option over, unit in, or performance right for such an underlying eligible product of the employer (or associated body corporate);
  - (c) holds an entitlement to cash, the value of which is determined by eligible products of the employer (or associated body corporate).
- RG 49.103 Our relief in [CO 14/xx] therefore requires that 25% or more of the participant’s entitlement under an employee incentive scheme is subject to a restriction on vesting or disposal, and the participant must not receive that portion of their entitlements (cash or otherwise) on an unrestricted basis until a period of at least 12 months has expired.

## Disclosure provided to employees and ASIC

- RG 49.104 Our relief significantly reduces the compliance burden for bodies by removing the need for a disclosure document. However, employees need adequate information about the terms of an employee incentive scheme. [CO 14/xx] therefore requires employees to be given the information set out at: RG 49.106–RG 49.109. Our relief requires this information to be worded and presented in a ‘clear, concise and effective’ manner and to include appropriate risk disclosure.

Note: See also Section C of Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* (RG 228) for guidance on ‘clear, concise and effective’ disclosure and for guidance on how to approach risk disclosure.

- RG 49.105 A failure to comply with this condition will not mean that our relief ceases to apply to the offer. However, we may exclude a body from relying on our class order relief for future offers if it fails to provide this information: see RG 49.114.

### Offer document and scheme rules

- RG 49.106 Employees must be given an offer document that includes, or is accompanied by, the rules or a summary of the rules of the employee incentive scheme. If a summary is provided, the employer must make a copy of the rules available to the employee on request, and provide this copy free of charge within a reasonable time before the offers are made.
- RG 49.107 The offer document must also provide information on any special features (e.g. the terms of any loan or contribution plan offered and information on trust arrangements).

### Pricing information

- RG 49.108 Employers must provide the current market price of the financial products offered and the offer price (in Australian dollars) to employees during periods when they can obtain financial products under an employee incentive scheme. The offer document must provide this information and must explain how it will be made available at other times (which may include the employer’s website).
- RG 49.109 This requirement helps employees to decide whether to accept the offer. Employees should be able to compare the price of the financial products on offer under an employee incentive scheme with the prevailing market price of the products (or underlying products in the case of options or performance rights).

## What must be provided to ASIC?

- RG 49.110 A body must provide specified information to ASIC, using Form XX, within seven days of first making offers under an employee incentive scheme in reliance on [CO 14/xx]. Form XX requires the following information to be provided:
- (a) the identity of the issuer;
  - (b) the identity of the employer (if not the issuer);
  - (c) the date of the first offer under the employee incentive scheme;
  - (d) the duration, and tranches (if any), of the employee incentive scheme;
  - (e) whether there are performance hurdles;
  - (f) the type(s) of eligible product being offered;
  - (g) the type(s) of participant to whom the offers are made;
  - (h) the identity of the trustee, if any, and the trust structure used (allocated or unallocated);
  - (i) whether a contribution plan is offered;
  - (j) whether a loan facility is offered; and
  - (k) an acknowledgement of compliance with the relevant conditions of [CO 14/xx].
- RG 49.111 Form XX provided to ASIC is not a public document but is to provide ASIC with a meaningful summary of key information about the employee incentive scheme. It will also require an acknowledgement of compliance with the relevant conditions of our class order relief. This information allows us to monitor reliance on our class order and compliance if necessary.
- RG 49.112 Further notification to ASIC using an additional Form XX will only need to be provided if the terms of the employee incentive scheme are substantially amended. Where Form XX has previously been given to ASIC for an employee incentive scheme, notification is not required for new offers made under the same, or substantially the same, terms.
- RG 49.113 On written request from us, a body must also provide us with a copy of the offer document and all other documentation given, or made available, to employees in connection with the employee incentive scheme.

## Excluded bodies

- RG 49.114 We may exclude a body from relying on [CO 14/xx] by notice in writing to that body. We may give an exclusion notice if it appears that, in the previous 12 months, the body has failed to comply with the class order, or other provisions of the Corporations Act—including, for example, Ch 2M, s674(2)

or 675(2). This exclusion notice is analogous to our powers under s708AA(3), 708A(2) and 713(6). A body will be notified, and will have an opportunity to make submissions, before we make a decision about whether to issue an exclusion notice under [CO 14/xx]. We may revoke the exclusion notice if we consider our concerns have been addressed.

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## G What relief is available for unlisted bodies?

### Key points

We give unlisted bodies relatively limited relief for employee incentive schemes. This relief is subject to more restrictive conditions to ensure that employees have adequate information in the circumstances.

Our relief for unlisted bodies permits offers of:

- ordinary shares up to a value of \$1,000 for no monetary consideration to each participant per year; and
- options over and performance rights relating to ordinary shares that are offered for no more than nominal monetary consideration in some circumstances.

### Our approach to offers by unlisted bodies

- RG 49.115 We are only prepared to give unlisted bodies relatively limited relief for employee incentive schemes. This is because participants are unlikely to be able to assess an unlisted body's offer of securities by reference to a reliable market price. Unlisted bodies are also subject to a lower level of supervision and disclosure than listed bodies.
- RG 49.116 [CO 14/xx] therefore only permits unlisted bodies to offer a limited range of securities under an employee incentive scheme, and imposes more extensive conditions than apply to offers by listed bodies. These conditions are intended to ensure that there are adequate protections for participants. Our relief permits offers of:
- (a) ordinary shares up to a value of \$1,000 for no monetary consideration to each participant per year (see RG 49.119–RG 49.122); and
  - (b) options or performance rights where, at the time that participants may be issued the underlying ordinary shares, there will be adequate information for them to assess the offer (see RG 49.123–RG 49.132).
- Note: Offers by unlisted bodies must also comply with the general requirements set out in Section F, other than the quotation condition.
- RG 49.117 We may also give case-by-case relief for offers by unlisted bodies that do not meet the specific conditions in [CO 14/xx], if our policy objectives are satisfied. Applications for such relief should focus on why employees will have adequate information to assess the offer in the circumstances. For example, the unlisted body:



- (a) may be able to show there is adequate information because the offer complies with another jurisdiction's disclosure requirements for employee incentive schemes; and
- (b) may be restricting the offer to a limited number of senior managers who are likely to have a good understanding of the body's business and financial position, and who have sufficient information in these circumstances to assess the offer.

RG 49.118 Employee incentive schemes have the potential to increase the number of members of an unlisted body. We note that, while it is permissible for proprietary companies to have more than 50 members, where these are employees (s113(1)), the definition of 'employee' under s113(2) is narrower than under CO [14/xx]. In addition, we note that unlisted companies with more than 50 members (regardless of whether or not they are employees) are subject to the takeover provisions in Ch 6.

## Annual offers of shares valued at \$1,000 by unlisted bodies

- RG 49.119 [CO 14/xx] allows an unlisted body to make offers of ordinary shares valued at up to \$1,000 per offer to each participant once a year for no monetary consideration. We consider this low dollar value balances the risk of participants not receiving disclosure with the benefits associated with an employee incentive scheme.
- RG 49.120 The value of ordinary shares offered in reliance on this relief must be determined using:
- (a) the body's net tangible assets (NTA), as set out in the audited accounts (with a balance date no later than six months before the offer), divided by the total number of shares on issue in the same class at the time of the offer; or
  - (b) the price per share, as determined by an independent expert—the report of the expert must be provided to participants at the time of the offer.
- RG 49.121 Although there are other methods for valuing ordinary shares, the NTA per share method is relatively simple. If the NTA method is not appropriate (e.g. because the body has a high proportion of intangible assets), an independent expert valuation can be obtained.
- RG 49.122 The offer document for these annual offers of ordinary shares by unlisted bodies must include a prominent warning that the \$1,000 valuation may not accurately reflect the price that the participant would be able to obtain if they were able to sell the shares at some future time.

## Offers of options or performance rights by unlisted bodies

- RG 49.123 [CO 14/xx] provides unlisted bodies with disclosure, licensing, advertising and hawking relief for offers of options over or performance rights relating to ordinary shares. To rely on this relief:
- (a) the options or performance rights must be offered to employees for no more than nominal monetary consideration; and
  - (b) the unlisted body must have only one class of voting shares on issue and the underlying shares offered must be in that class.
- RG 49.124 Our relief means that unlisted bodies do not need to provide a disclosure document at the time they offer the options or performance rights to employees. The body will need to provide such disclosure when participants are due to be issued the underlying shares unless one of the following applies:
- (a) the body's securities meet the quotation condition (see RG 49.127); or
  - (b) participants are able to participate in a sale of the body's shares (see RG 49.129).
- RG 49.125 Similar to our relief for listed bodies, [CO 14/xx] requires unlisted bodies to give participants an offer document. This offer document must contain the information set out at RG 49.106–RG 49.109. It must also:
- (a) contain a prominent warning that the holder may not be able to dispose of the body's shares, and that the shares are likely to have limited liquidity and may not result in any financial benefit for the participant; and
  - (b) prominently state that a disclosure document will be provided to participants unless the body's shares satisfy the quotation condition (RG 49.127) or the share sale requirement (RG 49.129).
- RG 49.126 Where a disclosure document is required, this must be provided to participants at least 14 days before vesting or exercise, and be current at the time of vesting or exercise: see RG 49.132.

### Exercise or vesting where the issuer becomes listed

- RG 49.127 [CO 14/xx] provides that a body does not have to give participants a disclosure document at the time that the options may be exercised, or the performance rights vest, if the body's shares have been quoted for at least three months at that time and have not been suspended for more than five trading days in the shorter of the period in which the financial products have been quoted or the 12 months before the exercise or vesting.
- RG 49.128 In this situation, participants do not need a disclosure document to decide whether to exercise their options or to assess the value of their vested performance rights because the body will have prepared a prospectus for

listing and provided continuous disclosure for at least a three-month period. The body's shares should have a reliable market price at that time.

### **Exercise or vesting where there is a share sale**

- RG 49.129 [CO 14/xx] gives relief from the obligation to provide a disclosure document at the time the options may be exercised, or the performance rights vest, if all of the body's shares will be disposed of in a single transaction and participants are able to participate in that sale on the same terms as the body's substantial holders.
- RG 49.130 An independent expert report on the value of the body's shares must be given to participants and a copy provided to ASIC at least 14 days before the underlying shares may be issued to participants (on exercise of the options or vesting of the performance rights). The expert should use its skill and judgement and must have a reasonable basis for choosing its valuation methodology. ASIC expects that experts will generally use one of the methodologies discussed in Regulatory Guide 111 *Content of expert reports* (RG 111) at RG 111.69.
- RG 49.131 This is to ensure that participants will have enough information to assess the offer (i.e. the value of the shares they will be selling, any exercise price they need to pay to acquire those shares and the consideration they will obtain under the disposal transaction).

### **Exercise or vesting if an offer information statement or prospectus is provided**

- RG 49.132 If the body does not become listed, or is not sold in the manner described in our conditions, the body must provide an offer information statement or prospectus to participants at least 14 days before the options can be exercised or the performance rights vest. The disclosure document must be current at this time. It must also contain a prominent warning that there may be limited or no liquidity in the shares and that there is no certainty that the participant will receive any financial benefit from them.

## H Incidental relief from licensing, managed investment scheme, advertising, hawking and on-sale provisions

### Key points

If an employee incentive scheme qualifies for disclosure relief, we are generally prepared to give relief from:

- the AFS licensing requirements in Ch 7;
- the requirements in Ch 5C for registration of a managed investment scheme as they apply to contribution plans;
- the advertising and hawking provisions in Chs 6D and 7; and
- the on-sale requirements in Chs 6D and 7.

### Our approach to licensing and other relief

RG 49.133 If an offer made under an employee incentive scheme qualifies for disclosure relief (under either [CO 14/xx] or case-by-case relief based on [CO 14/xx]), we will generally give relief for the incidental provision of financial services that are associated with the employee incentive scheme. This includes:

- (a) relief from the licensing requirements in Ch 7 (see RG 49.135–RG 49.141); and
- (b) relief from the requirements in Ch 5C for managed investment schemes (see RG 49.142–RG 49.143).

RG 49.134 We will also grant relief from the advertising, hawking and on-sale provisions where the body has made an offer to participants in reliance on our class order, or we may give case-by-case relief.

### Licensing relief

RG 49.135 It is a condition of our licensing relief for employee incentive schemes that the provision of any financial services is incidental to the operation of the scheme. Our relief is only available to a listed body and its associated bodies corporate, and an unlisted body and its wholly owned subsidiaries. Where issuers use a professional trustee to manage their employee incentive schemes, the trustee should have an AFS licence for their business.

## Providing general advice

- RG 49.136 The Corporations Act may require an employer to hold an AFS licence when providing information and general advice about participation in its employee incentive scheme. We consider that this is a disproportionate burden and we therefore provide relief from the requirement to hold an AFS licence.
- RG 49.137 Our relief requires the body to give participants a warning that the advice provided is general advice, and that they should consider obtaining their own financial product advice.

## Dealing

- RG 49.138 A body will be exempt from the requirement to hold an AFS licence if the employee incentive scheme involves an offer of the body's own securities: see the self-dealing exemption in s766C(4). However, there is no equivalent exemption for:
- (a) issuers of financial products (other than securities); or
  - (b) an employee incentive scheme that involves the offer of another body's securities (e.g. where the body offers the securities of an associated body corporate to participants).
- RG 49.139 If the employee incentive scheme involves the purchase or sale of financial products on market by a person appointed by the issuer, we will grant relief from the need to hold an AFS licence for dealing if there appear to be adequate protections for participants. For example, under [CO 14/xx], the dealing must be carried out by a person authorised to do so, which for products quoted on ASX will be a licensed securities dealer or AFS licensee.

## Custodial or depository services

- RG 49.140 If an employee incentive scheme involves a trust structure, relief from the requirement to hold an AFS licence may be required for providing a custodial or depository service, and for dealing in a financial product in the course of providing that service.
- RG 49.141 [CO 14/xx] provides relief from the need to hold an AFS licence where the provision of financial services is an incidental part of the operation of an employee incentive scheme, and there appear to be adequate protections for participants. We have therefore imposed as conditions of relief that:
- (a) the custodial service is provided by the issuer or its associated bodies corporate; and
  - (b) the custodian performs its duties lawfully and in good faith, and has sufficient resources to perform its role.

## Operating a managed investment scheme

- RG 49.142 If an employee incentive scheme involves a contribution plan, it may involve the incidental operation of a managed investment scheme as a result of the pooling or use of contributions in a common enterprise. In certain circumstances, such a scheme is required to be registered under s601ED.
- RG 49.143 We have granted relief in [CO 14/xx] from the registration and licensing requirements for persons who operate a contribution plan in the context of an employee incentive scheme.

## Advertising relief

- RG 49.144 [CO 14/xx] gives relief from the advertising restrictions in s1018A that may apply to an offer. We have not given relief from the prohibition on advertising for small-scale offers in s734(1) and 1018B, because to permit advertising in these circumstances may be inconsistent with the policy objectives of the small-scale offer exemptions in s708(1) and 1012E.
- RG 49.145 If an offer is made to participants, as defined in our class order, at the same time as an offer that is not limited to such participants, we will not give advertising relief to permit pre-prospectus publicity except in accordance with our guidance in Regulatory Guide 158 *Advertising and publicity for offers of securities* (RG 158).

## Hawking relief

- RG 49.146 We have given relief from the prohibitions on hawking in s736, 992A and 992AA, where an employee incentive scheme is offered in reliance on our relief in [CO 14/xx] or on case-by-case relief. The hawking provisions may otherwise apply to prohibit unsolicited meetings or telephone calls reasonably held or made in connection with the offer. To rely on our class order relief from these provisions, the offer must be for eligible products and made to participants only.

## On-sale relief

- RG 49.147 The on-sale provisions in s707 and 1012C may apply if eligible products are acquired by participants under an employee incentive scheme without disclosure. These anti-avoidance provisions are not warranted for an employee incentive scheme because the eligible products are issued to enhance the relationship between the employer and its employees, rather than to avoid the disclosure requirements in the Corporations Act.
- RG 49.148 We have therefore given relief from the on-sale provisions for employee incentive schemes that rely on [CO 14/xx] or case-by-case relief.

## Key terms

Term	Meaning in this document
ADR	An American depositary receipt, with a share or stock as the underlying security
advertising relief	Relief from the prohibition in s734 of the Corporations Act on advertising or publicity before an offer or intended offer under an employee incentive scheme
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services  Note: This is a definition contained in s761A.
allocated product	A specific underlying eligible product held on trust for, and allocated to, specific participants
approved foreign market	Any of the following financial markets: Borsa Italiana, Bourse de Paris, Bursa Malaysia Main Board and Bursa Malaysia Second Board, Eurex Amsterdam, Frankfurt Stock Exchange, Hong Kong Stock Exchange, Johannesburg Stock Exchange, London Stock Exchange, NASDAQ Global Market, New York Stock Exchange, New Zealand Stock Exchange, NYSE MKT, Singapore Exchange, SIX Swiss Exchange, Tokyo Stock Exchange or the Toronto Stock Exchange
ASIC	Australian Securities and Investments Commission
associated body corporate (of an issuer)	Means: <ul style="list-style-type: none"> <li>• a body corporate that is a related body corporate of the issuer;</li> <li>• a body corporate that has voting power in the issuer of not less than 20%; or</li> <li>• a body corporate in which the issuer has voting power of not less than 20%</li> </ul>
ASX	The exchange market operated by ASX Limited
ASX Principles and Recommendations	The ASX Corporate Governance Council's Corporate Governance Principles and Recommendations
Australian authorised deposit-taking institution (ADI)	Has the meaning given in s9 of the Corporations Act
Australian CDI	A CHESS Depositary Interest traded on ASX, with a share or stock as the underlying security
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7)

Term	Meaning in this document
[CO 14/xx]	ASIC Class Order [CO 14/xx] <i>Employee incentive schemes</i>
contribution plan	A plan under which a participant may make monetary contributions towards the acquisition of eligible products (other than performance rights or options) offered under an employee incentive scheme from earned, or future entitlements to, wages, salary or bonus payments or from their own funds
Corporations Act	<i>Corporations Act 2001</i> , including any regulations made for the purposes of the Act
depository interest	Means: <ul style="list-style-type: none"> <li>• Australian CDIs, quoted on ASX, where the underlying security is a share or stock; or</li> <li>• UK CDIs and ADRs, quoted on an approved foreign market, where the underlying security is a share or stock</li> </ul>
disclosure document	Means a prospectus, offer information statement or PDS
disclosure relief	Relief from the requirement in Ch 6D of the Corporations Act to provide a disclosure document for offers of securities to employees and from the requirement in Ch 7 to provide a PDS for offers of financial products to employees
eligible products	Means: <ul style="list-style-type: none"> <li>(a) fully paid shares quoted on ASX;</li> <li>(b) fully paid shares or stock quoted on an approved foreign market;</li> <li>(c) depository interests;</li> <li>(d) fully paid stapled securities quoted on ASX;</li> <li>(e) options over, or units in, any financial product in paragraphs (a)–(d); and</li> <li>(f) performance rights relating to any financial product in paragraphs (a)–(d)</li> </ul>
employee incentive scheme	A scheme under which offers of eligible products may be made to participants, where the objective of the offer is not fundraising, but to support the interdependence between employees and their employer
employee share scheme	Has the meaning given in s9 of the Corporations Act
expert	Has the meaning given in s9 of the Corporations Act
Form XX	ASIC Form XX <i>Notification of reliance on [CO 14/xx] Employee incentive schemes</i>



Term	Meaning in this document
hawking relief	Relief from the prohibition in s736, 992A and 992AA of the Corporations Act on the issue or sale of financial products arising out of unsolicited contact with employees for the purposes of an employee incentive scheme
issuer	Means the body issuing the eligible product
licensing relief	Relief from the requirement in the Corporations Act to hold an AFS licence for the incidental provision of financial services in connection with an employee incentive scheme
offer document	Means the document used by the body to make offers of eligible products under an employee incentive scheme
offer information statement	An offer information statement that is lodged with ASIC
on-sale relief	Relief from the on-sale provisions in s707(3)–(4) and 1012C(6)–(7) of the Corporations Act for the on-sale of certain financial products issued under an employee incentive scheme
ordinary shares	Fully paid voting ordinary shares
participant	<p>Means:</p> <ul style="list-style-type: none"> <li>• full-time or part-time employees (including executive directors);</li> <li>• contractors and casual employees who meet the conditions relating to hours worked and length of service;</li> <li>• prospective employees who are offered a full-time or part-time position; and</li> <li>• non-executive directors.</li> </ul> <p>Where the issuer is listed on ASX or an approved foreign market, participants can be employed by either the issuer or its associated bodies corporate.</p> <p>Where the issuer is an unlisted body, participants can be employed by either the issuer or its wholly owned subsidiaries</p>
PDS (Product Disclosure Statement)	<p>A document that must be given to a retail client for the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act</p> <p>Note: See s761A of the Corporations Act for the exact definition.</p>

Term	Meaning in this document
performance right	<p>A right to receive:</p> <ul style="list-style-type: none"> <li>(a) underlying eligible products;</li> <li>(b) a cash amount that is equivalent to the value of such eligible products and/or any increase in value of such eligible products;</li> <li>(c) a cash amount that is equivalent to the dividends or distributions paid to holders of such eligible products; and/or</li> <li>(d) eligible products equivalent to the value of the dividends or distributions paid to holders of such eligible products,</li> </ul> <p>which automatically vests in the recipient for no monetary consideration if conditions are met which relate to:</p> <ul style="list-style-type: none"> <li>(e) the length of service of the recipient; and/or</li> <li>(f) the performance of the recipient, the issuer or an associated body corporate of the issuer; or, in the case of an unlisted body, the unlisted issuer or a wholly owned subsidiary of the issuer</li> </ul>
prospective employee	A person to whom an offer of full-time or part-time employment is made
related bodies corporate	Has the meaning given in s50 of the Corporations Act
RG 72 (for example)	An ASIC regulatory guide (in this example numbered 72)
s708A (for example)	A section of the Corporations Act (in this example numbered 708A)
stapled securities	Two or more financial products quoted on ASX (at least one of which is a fully paid ordinary share) which, under the terms on which each is traded, must be transferred together
UK CDI	A CREST Depository Interest traded on the London Stock Exchange or another approved foreign market, with a share or stock as the underlying security
unallocated product	An underlying eligible product held on trust in a pool for participants generally
underlying eligible products	Eligible products other than options, units or performance rights
unit	Means a right or interest, whether legal or equitable, in the share or other interest (by whatever term called), and includes an option to acquire such a right or interest in the future
unlisted body	Means a body that is not listed on ASX or an approved foreign market

## Related information

### Headnotes

allocated products, associated bodies corporate, contribution plan, depository interests, derivatives, disclosure, employee incentive scheme, employee share scheme, financial product, listed bodies, loan, managed investment scheme, non-executive director, options, participants, performance rights, Product Disclosure Statement, prospectus, securities, stapled securities, trusts, unallocated products, unlisted bodies

### Class orders

[CO 03/184] *Employee share schemes*

[CO 04/671] *Disclosure for on-sale of securities and other financial products*

[CO 14/xx] *Employee incentive schemes*

### Regulatory guides

RG 72 *Foreign securities prospectus relief*

RG 111 *Content of expert reports*

RG 158 *Advertising and publicity for offers of securities*

RG 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)*

RG 188 *Disclosure in reconstructions*

RG 189 *Disclosure relief for rights issues*

RG 228 *Prospectuses: Effective disclosure for retail investors*

RG 233 *Indirect self-acquisition: Relief for investment funds*

### Legislation

Corporations Act, Chs 2L, 5C, 6D, 7, Pts 6D.2, 6D.3, 7.6, 7.8, 7.9, 7.10, s45A,50, 283GA, 601ED, 707, 708(1), 708(5), 708(15), 708(16), 734, 736, 741(1), 761D, 761D(3)(b), 765A(2), 766B, 766C, 766E, 911A, 992A, 992AA, 1012C, 1012D(5), 1012D(6), 1012E, 1018A, 1018B, 1020F(1), 1041E, 1041H

## **Media and other releases**

IR 03-14 *Policy Statement 49: Employee share schemes*, 1 May 2003

## **ASIC forms**

Form XX *Notification of reliance on [CO 14/xx] Employee incentive schemes*

## **Other documents**

ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*, 2nd edition

Investment and Financial Services Association Limited, *Blue Book*, June 2009

Australian Council of Superannuation Investors, *Governance guidelines: A guide for superannuation funds to monitor listed Australian companies*, July 2013