



ASIC

Australian Securities & Investments Commission

Employee incentive schemes: ASIC class order changes

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CHECK AGAINST DELIVERY

Introduction

ASIC recognises the importance of facilitating employee incentive schemes. These schemes play an important role in promoting mutual interdependence between employers and employees and appropriately incentivising employees. At the same time, the challenge for ASIC is that we must balance this against the need to ensure the appropriate protections for employees are in place.

ASIC has had in place longstanding legal waivers ('relief') to allow employee incentive schemes to be offered without employers needing to comply with all of the disclosure and financial services obligations that normally arise under the law. In other words, over and above what the law allows, ASIC provides additional exemptions to facilitate employee incentive schemes.

In October 2014 ASIC updated and expanded our relief for employee incentive schemes following extensive consultation through a public consultation process.

We wanted to ensure that our relief remained relevant and valuable to the market, particularly given the changes in the way employee incentive schemes operate. The aim of our updated relief is to enhance the relationship between an employer and its employees, with the objective of improving business performance, engaging employees and strengthening employee commitment.

Overview of ASIC relief

ASIC's relief is now contained in two legal instruments known as class orders – one for listed bodies, Class Order [CO 14/1000] *Employee incentive schemes: Listed bodies*, and one for unlisted bodies, Class Order [CO 14/1001] *Employee incentive schemes: Unlisted bodies*. This reflects the fact that our approach to listed and unlisted bodies differs, due to the different risks involved, depending on whether an employer is a listed or unlisted body.

ASIC has updated our policy and expanded our class order relief to enable employers to offer a broad range of financial products to their employees without having to incur the costs of preparing a prospectus or other disclosure document and to facilitate schemes without the need to comply with all of the financial services obligations associated with an offer to the public.

The class orders provide disclosure, onsale, licensing, advertising and hawking relief in respect of certain employee incentive schemes.

While we have broadened the scope of our relief, our fundamental policy settings in relation to employee incentive schemes remain the same. The key policy objectives behind our conditional class order relief for employee incentive schemes are:

- that the employee incentive scheme supports the interdependence between the employer and its employees for their long-term mutual benefit by seeking to align their interests
- there are adequate protections for participants, including appropriate disclosure and pricing information for the products offered, and
- the objective of the offer is not fundraising.

As part of work in updating our policy we looked last year at our records about reliance on ASIC relief. They showed that:

- in the past seven years, more than 4,910 employee share scheme notifications have been lodged with ASIC
- in the past 10 years, more than 6,160 employee share scheme notifications have been lodged with ASIC, and
- in the past 20 years, more than 7,910 employee share scheme notifications have been lodged with ASIC.

We expect that ASIC relief will continue to be important for ensuring that employee share schemes are offered to Australian employees.

Key changes to broaden ASIC relief

As I mentioned before, the law itself has a number of legal exemptions relevant to employee incentive schemes. However, ASIC gives extra exemptions over and above this and we have recently broadened the scope of our relief by including additional categories

of participants in the schemes, structures that can be used, and types of financial products that can be offered.

Some examples include:

- *participants* – offers can be made to casual employees, contractors and persons who will become but are not yet employees, and
- *products* – CHESS Depository Interests and incentive rights that are derivatives are now covered by our standard relief.

This saves time and money because it means that the employer no longer needs to approach ASIC for special individual relief to cover these situations. Instead, the employer can just rely on our class order.

Listed bodies

The greater price transparency and market information about listed employers means that there is better value information about what is being offered for employees. This means we have provided more relief to listed employers than to unlisted employers.

Some key conditions of ASIC relief under [CO 14/1000] for listed bodies include:

- the requirement to be listed and the availability of market pricing – the quotation condition
- the idea that the offer is not for fundraising purposes – the 5% limit, and
- information for employees – there must be an offer document, which includes, for example, the terms of any loan, an advice warning and a general product risk warning.

A notice of reliance on ASIC relief must be given to ASIC no later than one month after first relying on the class order. No longer is there a requirement to lodge the actual documents with ASIC.

Unlisted bodies

Our relief for unlisted bodies is more limited than that for listed bodies.

This is because we are balancing the benefits of providing relief for employee incentive schemes against the information needs of participants where there is difficulty in establishing a reliable market price for products of unlisted bodies.

We consider that employees must be able to assess the value of what they are receiving. This is because they may consider it to be part of their remuneration or part of the benefits of being an employee of the particular body.

Some key conditions of ASIC relief under [CO 14/1001] for unlisted bodies ensure that:

- only certain types of products are covered (shares, units and options, but not preference shares)

- a minimum level of information is provided to employees relevant to value – an offer document must be provided and must include audited financials and a directors' valuation resolution, and
- the complexities and risks associated with this kind of offer are reduced – all offers must be made for no more than nominal monetary consideration, offers must not exceed \$5,000 per employee per year in value, and no loans or contribution plans are involved.

An explanation of the \$5,000 limit

The \$5,000 limit is imposed to balance the desire to facilitate employee incentive schemes with the need for employees to understand the value of what they are being offered when there is no reliable market price.

The \$5,000 limit may be attractive for many start-ups because their securities often have a very low value in the first few years.

For unlisted companies, we feel we have pushed the boundaries for disclosure relief as far as possible at the present time. We have balanced the benefits of providing relief for employee incentive schemes against the information needs of employees where there is difficulty in establishing a reliable market price for unlisted bodies.

To be clear, it would not be appropriate to remove all obligations imposed by the *Corporations Act 2001* because to do so would be going substantially beyond our remit as the body that administers the law rather than makes the law.

Taxation changes

As you might be aware, the government has announced as part of its small business tax package that it proposes to implement sought after changes to taxation law that will make it easier for unlisted start-up companies to set up an employee incentive scheme.

The changes will allow equity issued to employees of start-ups to be taxed when shares are sold, rather than on issue of an option or even exercise of an option.

The Australian Taxation Office (ATO) is also proposing to produce draft standard offer documents that will be available for use by employers seeking to implement an employee incentive scheme.

Standard offer documents that ASIC is assisting to develop

Consultation has now closed in respect of both the ATO consultation on the proposed production of standard offer documents for employee incentive schemes and Treasury consultation on exposure draft taxation legislation amendments.

The ATO is developing standard offer documents for employee incentive schemes that qualify for the proposed concessional treatment afforded to start-ups.

We are assisting by working with the ATO to develop a simple guide to assist start-ups to understand their Corporations Act requirements.

We will and continue to work with the ATO and Treasury to ensure a whole of Government approach wherever that is possible and appropriate.

Conclusion

ASIC recognises the importance of employee incentive schemes in both the listed and unlisted space as a way of incentivising employees and creating a relationship of interdependence between employer and employee. We view this interdependence as valuable, and we have made these changes to our policy and class orders in order to better facilitate the use by businesses of employee incentive schemes.

We hope our new class orders will be useful in reducing the costs and difficulties for employers in making employee incentive schemes available in the future.