

[CO 03/184] Employee share schemes

Issued 30/4/2003

Class Order [CO 03/184] provides conditional relief from disclosure and licensing provisions of the Corporations Act for certain offers involving shares made to full time or part time employees under an employee share scheme. It also provides conditional relief from the advertising, hawking and managed investment provisions for some employee share schemes.

<i>Amended by Class Order</i>	<i>Date of operation</i>
[CO 03/806]	30/9/2003
[CO 05/770]	7/10/2005

For details of amendments see historical notes in this class order.

Australian Securities and Investments Commission
Corporations Act 2001 — Paragraphs 283GA(1)(a), 601QA(1)(a),
741(1)(a), 911A(2)(l), 992B(1)(a) and 1020F(1)(a) — Exemption and
Revocation

First Exemption: disclosure relief for offers of shares, units of shares, options and stapled securities

1. Under paragraphs 741(1)(a) and 1020F(1)(a) of the *Corporations Act 2001* (the “Act”) the Australian Securities and Investments Commission (“ASIC”) exempts:
 - (a) a person from Parts 6D.2, 6D.3 (except section 736) and 7.9 where the person:
 - (i) makes an eligible offer;
 - (ii) offers to arrange for the issue of financial products under an eligible offer;
 - (iii) issues a financial product under an eligible offer,that does not involve a contribution plan, on the conditions set out in the Schedule and for so long as the conditions are met; and
 - (b) a person (other than a person covered by paragraph (a)) from Part 7.9 where the person makes a recommendation to acquire financial products under an eligible offer that does not involve a contribution plan, except where the person is aware, or ought reasonably to be aware, that any of the conditions set out in the Schedule have not been met.

Second Exemption: disclosure and other relief for offers involving a contribution plan

2. Under paragraphs 283GA(1)(a), 741(1)(a) and 1020F(1)(a) ASIC exempts:
 - (a) a person from:
 - (i) Parts 2L.1, 2L.2, 2L.3, 2L.4 and 2L.5; and
 - (ii) Parts 6D.2 and 6D.3 (except section 736); and
 - (iii) Part 7.9,
 where the person:
 - (iv) makes an eligible offer;
 - (v) offers to arrange for the issue of financial products under an eligible offer;
 - (vi) issues a financial product under an eligible offer,
 that involves a contribution plan but does not involve the issuer or any associated body corporate offering any eligible employee of the issuer a loan or similar financial assistance for the purpose of, or in connection with, the acquisition of financial products to which the offer relates, on the conditions set out in the Schedule and for so long as the conditions are met; and
 - (b) a person (other than a person covered by paragraph (a)) from Part 7.9 where the person makes a recommendation to acquire financial products under an eligible offer to which paragraph (a) relates, except where the person is aware, or ought reasonably to be aware, that any of the conditions set out in the Schedule have not been met.
3. For the avoidance of doubt, under paragraph 601QA(1)(a) ASIC exempts a person who operates a managed investment scheme only by reason of operating a contribution plan relating to an eligible offer to which paragraph (a) relates from section 601ED in relation to the operation of that managed investment scheme.

Third Exemption: disclosure relief for offers of options by an unlisted body

4. Under paragraphs 741(1)(a) and 1020F(1)(a) ASIC exempts:
 - (a) a person from Parts 6D.2, 6D.3 (except section 736) and 7.9 where the person:

- (i) makes an offer to issue or arrange for the issue of;
- (ii) issues,

options over fully-paid shares for no more than nominal consideration under an employee share scheme where:

- (iii) the scheme is extended only to eligible employees of the issuer; and
- (iv) the offer is not made through a trust; and
- (v) at the time of the offer or issue, the shares the subject of the options are not in the same class as shares that have been quoted on the financial market operated by Australian Stock Exchange Limited or an approved foreign market throughout the 12 month period immediately preceding the offer without suspension for more than a total of 2 trading days during that period,

on the conditions set out in the Schedule and on the further condition that where the issuer lodges a prospectus in relation to the shares the subject of the options, and a person who holds the options (“holder”) may exercise them before the expiry date of that prospectus, as soon as practicable after lodging the prospectus the issuer sends to each holder either:

- (vi) a copy of that prospectus; or
- (vii) a statement which:
 - (A) meets the requirements of subsection 734(6); and
 - (B) informs the holder of the manner in which a copy of that prospectus may be obtained free of charge,

and for so long as the conditions are met; and

- (b) a person (other than a person covered by paragraph (a)) from Part 7.9 where the person makes a recommendation to acquire options to which paragraph (a) relates, except where the person is aware, or ought reasonably to be aware, that any of the conditions set out in the Schedule or the further condition set out in paragraph (a) have not been met.

Fourth Exemption: licensing and hawking relief

5. Under paragraph 911A(2)(1) ASIC exempts a person who is exempt from Part 6D.2 or Part 7.9 because of the First, Second or Third Exemption (other than because the person made a recommendation to acquire financial products) from the requirement to hold an Australian financial services licence for the provision of a financial service consisting of general advice reasonably given in connection with an offer referred to in those exemptions (including any general advice given in the offer document) where the offer document for the offer includes a statement to the effect that any advice given by the person in connection with the offer is general advice only, and that employees should consider obtaining their own financial product advice from an independent person who is licensed by ASIC to give such advice.

6. Under paragraph 911A(2)(1) ASIC exempts:
 - (a) an issuer who is exempt from Part 6D.2 or Part 7.9 because of the First or Second Exemption; and
 - (b) any associate of the issuer,

from the requirement to hold an Australian financial services licence for the provision of the following financial services:

 - (c) the provision of a custodial or depositary service in connection with an eligible offer covered by the First or Second Exemption where the provider of the service performs their duties in good faith and has sufficient resources to perform those duties; and
 - (d) dealing in a financial product in the course of providing a custodial or depositary service covered by paragraph (c); and
 - (e) dealing in a financial product in connection with an eligible offer covered by the First or Second Exemption where any acquisition by purchase or disposal of the product (by the issuer or an associate) occurs either:
 - (i) through a person who holds an Australian financial services licence authorising the holder to deal in financial products or a dealers licence issued under the old Corporations Act authorising the holder to deal in securities; or
 - (ii) outside this jurisdiction and through a person who is licensed or otherwise authorised to deal in financial products in the relevant place; and

- (f) in the case where paragraph 3 of the Second Exemption applies — dealing in an interest in a managed investment scheme that is exempt from section 601ED because of that paragraph.

[Historical note: Paragraph 6 amended 30/9/2003 [CO 03/806] by :

1. replacing in paragraph 6(a) the words “First, Second or Third” with the words “First or Second”;

2. replacing paras 6(c) and (d) with new paras 6(c), (d), (e) and (f). Paragraphs 6(c) and (d) formerly read:

“(c) in the case where the First or Second Exemption applies — the provision of a custodial or depositary service in connection with an eligible offer where:

(i) the service is not a custodial arrangement within the meaning of section 1012IA; and

(ii) the provider of the service performs their duties in good faith and has sufficient resources to perform those duties; and

(d) dealing in a financial product in connection with an offer covered by the exemption where any acquisition by purchase or disposal of the product by the issuer or an associate occurs either:

(i) through a person who holds an Australian financial services licence authorising the holder to deal in those financial products or a dealers licence issued under the old Corporations Act authorising the holder to deal in securities; or

(ii) outside this jurisdiction and through a person who is licensed or otherwise authorised to deal in those financial products in the relevant place.”.]

7. Under paragraphs 741(1)(a) and 992B(1)(a) ASIC exempts a person who is exempt from Part 6D.2 or Part 7.9 because of the First, Second or Third Exemption from sections 736, 992A and 992AA in relation to offers made in the course of, or because of, unsolicited meetings or telephone calls reasonably held or made in connection with the offer.

Revocations

8. Under paragraph 741(1)(a) ASIC revokes Class Orders [CO00/220], [CO 00/221], and [CO 00/223] from 30 June 2003.
9. Under paragraphs 283GA(1)(a), 601QA(1)(a), 741(1)(a), 911A(2)(l) and 1020F(1)(a) ASIC revokes Class Order [CO 02/264] from 30 June 2003.

Schedule

The following conditions apply:

1. the person making the offer must:
- (a) include that offer in an offer document; and

- (b) take reasonable steps to ensure that any eligible employee to whom the offer is made is given a copy of the offer document; and
 - (c) provide to ASIC a copy of the offer document (which need not contain details of the offer particular to the employee such as the identity or entitlement of the employee) and of each accompanying document not later than 7 days after the first provision of that material to an employee; and
2. the issuer must comply (or, in the case of an issuer which does not have a registered office in this jurisdiction, cause an associated body corporate which does so have a registered office to comply) with any undertaking required to be made in the offer document by reason of this instrument; and
 3. in the case where the employee share scheme may involve the issue of shares (including as a result of the exercise of an option or as a component of stapled securities) — the issuer must take reasonable steps to ensure that the number of shares the subject of the offer or to be received on exercise of an option when aggregated with:
 - (a) the number of shares in the same class which would be issued were each outstanding offer with respect to shares, units of shares and options to acquire unissued shares, under an employee share scheme to be accepted or exercised; and
 - (b) the number of shares in the same class issued during the previous 5 years pursuant to the employee share scheme or any other employee share scheme extended only to eligible employees of the issuer;

but disregarding any offer made, or option acquired or share issued by way of or as a result of:

- (c) an offer to a person situated at the time of receipt of the offer outside this jurisdiction; or
- (d) an offer that was an excluded offer or invitation within the meaning of the Corporations Law as in force before the commencement of Schedule 1 to the *Corporate Law Economic Reform Program Act 1999*; or
- (e) an offer that did not need disclosure to investors because of section 708; or
- (f) an offer that did not require the giving of a Product Disclosure Statement because of section 1012D; or

- (g) an offer made under a disclosure document or Product Disclosure Statement,

must not exceed 5% of the total number of issued shares in that class of the issuer as at the time of the offer; and

4. in the case where an offer of shares is made through a trust:
 - (a) the trustee must hold the shares on trust for each person (a “beneficiary”) who acquires units of shares under an eligible offer; and
 - (b) the trustee must cause proper written financial records to be maintained in respect of the activities of the trust and cause those records to be audited annually and made available for inspection by the beneficiaries at an office of the trustee or a place of business of the issuer during normal business hours or such other time as is agreed with beneficiaries; and
 - (c) the trustee must ensure that each share to which a unit held by a beneficiary relates is identified in the written financial records as being held on account of that beneficiary; and
 - (d) the trustee must not levy any fees or charges for operating and administering the trust, either payable directly by the beneficiaries or out of the assets of the trust; and
 - (e) except as expressly provided by the trust deed, a beneficiary must have the capacity to authorise the trustee to sell at or above the current market price the shares to which he or she is entitled to under the deed; and
 - (f) the trustee must provide a copy of the trust deed to ASIC at the same time as a copy of the offer document is provided to ASIC in accordance with this instrument; and
 - (g) the issuer must ensure that the trust deed contains covenants binding the trustee and their agents, if any, to the effect that a beneficiary possesses substantially the same rights in respect of the shares to which the units of shares they hold relate as if they were the legal owner of the shares, including the right to:
 - (i) direct the trustee how the voting rights attaching to the shares shall be exercised, either generally or in any particular case; and
 - (ii) receive the income deriving from the shares, including dividends declared by the issuer in respect of those shares.

Note: where a document must be provided in writing it may be provided by electronic means. See s5C of the Act and s25 of the *Acts Interpretation Act 1901*.

Interpretation

In this instrument:

1. except where otherwise stated, references to provisions are to provisions of the Act;
2. an employee share scheme shall not be regarded as extended to a person other than an eligible employee only because such an employee may renounce an offer of financial products made to them under the scheme in favour of their nominee;
3. “approved foreign market” means each of the following financial markets:
 - (a) American Stock Exchange;
 - (b) Borsa Italiana;
 - (c) Bourse de Paris;
 - (d) Bursa Malaysia Main Board and Bursa Malaysia Second Board;
 - (e) Eurex Amsterdam;
 - (f) Frankfurt Stock Exchange;
 - (g) Hong Kong Stock Exchange;
 - (h) JSE Securities Exchange;
 - (i) London Stock Exchange;
 - (j) NASDAQ National Market;
 - (k) New York Stock Exchange;
 - (l) New Zealand Stock Exchange;
 - (m) Stock Exchange of Singapore;
 - (n) SWX Swiss Exchange;
 - (o) Tokyo Stock Exchange;
 - (p) Toronto Stock Exchange;

and for the avoidance of doubt, each of the above financial markets is not to be taken not to be an approved foreign market

at a particular time only because it was known by another name at that time;

[*Historical note:* [CO 03/184] amended 7/10/2005 by [CO 05/770] by, under the heading “Interpretation”, replacing paragraph 3. The paragraph formerly read:

“3. “approved foreign market” means:

(a) American Stock Exchange, Deutsche Borse, Euronext Amsterdam, Euronext Paris, Italian Exchange, Kuala Lumpur Stock Exchange (Main and Second Boards), London Stock Exchange, New York Stock Exchange, New Zealand Stock Exchange, Singapore Exchange, Stock Exchange of Hong Kong, Swiss Exchange, Tokyo Stock Exchange or Toronto Stock Exchange, provided that:

(i) unless otherwise expressly stated, if any such market involves more than one board, only the main board is an approved foreign market; and

(ii) such a market is not to be taken not to be an approved foreign market at a particular time only because it was known by another name at that time; or

(b) NASDAQ National Market;”].

4. “associated body corporate” of an issuer means:

(a) a body corporate that is a related body corporate of the issuer; or

(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%;

5. “Australian dollar equivalent” in relation to a price, means a price calculated by reference to the relevant exchange rate published by an Australian bank no earlier than the business day before the day to which price relates;

6. “contribution plan” means a plan under which a participating eligible employee may save money by regular deductions from wages or salary (including through salary sacrifice arrangements) towards paying for shares offered for issue or sale under an employee share scheme where the terms and conditions of the contribution plan include terms and conditions to the effect that:

(a) all deductions from wages or salary made in connection with participation in the contribution plan must be authorised by the employee on the same form of application which is used in respect of the offer, or on a form which is included in or accompanies the offer document;

(b) before transferring contributions to acquire shares, any contributions made by an employee as part of the contribution plan must be held by the issuer in trust for the employee in an account of an Australian ADI which is established and kept by the issuer only for the purpose of

depositing contribution moneys and other money paid by employees for the shares on offer under the employee share scheme; and

- (c) the employee may elect to discontinue their participation in the contribution plan at any time and as soon as practicable after that election is made all money deposited with the Australian ADI in relation to that employee, including any accumulated interest, must be repaid to that employee;

7. “current market price” means in relation to a share, the price published by the operator of the principal financial market on which the share is quoted as the final price for the previous day on which the share was traded on that financial market;

8. “eligible employee” means, in relation to an issuer, a person who is at the time of an offer under an employee share scheme, a full or part-time employee or director of the issuer or of an associated body corporate of the issuer;

9. “eligible offer” means an offer for issue or sale of:

- (a) fully-paid shares in an issuer in the same class as shares which have been quoted on the financial market operated by Australian Stock Exchange Limited or an approved foreign market throughout the 12 month period immediately before the offer without suspension for more than a total of 2 trading days during that period; or
- (b) options for the issue or transfer of shares referred to in paragraph (a) where each of the options is offered for no more than nominal consideration; or
- (c) fully-paid stapled securities in the same class as stapled securities which have been quoted on the financial market operated by Australian Stock Exchange Limited throughout the 12 month period immediately before the offer without suspension for more than a total of 2 trading days during that period; or
- (d) units of fully-paid shares referred to in paragraph (a),

made under an employee share scheme extended only to eligible employees of the issuer;

Note: the effect of paragraph (d) of the definition of “eligible offer” is that the First and Second Exemptions will only apply to offers made through a trust where the underlying financial products held by the trustee are fully-paid shares and not, for example, options or stapled securities.

10. “financial product advice” has the meaning given by section 766B;

11. “general advice” has the meaning given by section 766B;
12. “issuer” means a body that issues shares that are the subject of an employee share scheme (including where those shares are subject to an option, offered through a trust or are a component of stapled securities);
13. “nominal consideration” means consideration of not more than 1 cent per option;
14. “offer” has a meaning affected by sections 700, 702 and 1010C;
15. “offer document” means a document setting out an offer under an employee share scheme that:
 - (a) includes or is accompanied by a copy, or a summary, of the rules of the scheme under which the offer is made; and
 - (b) if a summary (rather than a copy) of the rules of the scheme is given — includes an undertaking that during the period (the “offer period”) during which an eligible employee may acquire the financial products offered or exercise options acquired under the scheme, the issuer (or, in the case of an issuer which does not have a registered office in this jurisdiction, an associated body corporate of the issuer which does so have a registered office) will, within a reasonable period of the employee so requesting, provide the employee without charge with a copy of the rules of the scheme; and
 - (c) specifies in respect of the shares, shares subject to the options, units of shares or stapled securities:
 - (i) the acquisition price in Australian dollars;
 - (ii) where the acquisition price is specified in a foreign currency, the Australian dollar equivalent of that price at the date of the offer; or
 - (iii) where the acquisition price is to be worked out in the future under a formula, the Australian dollar or Australian dollar equivalent of that price were that formula applied at the date of the offer; and
 - (d) includes an undertaking, and an explanation of the way in which, the issuer (or in the case of an issuer which does not have a registered office in this jurisdiction, an associated body corporate of the issuer which does so have a registered office) will, during the offer period,

within a reasonable period of the employee requesting, make available to the employee:

- (i) the current market price (or, where that price is denominated in a foreign currency, the Australian dollar equivalent of that price) of:
 - (A) where the document relates to an offer of shares, options or units — shares in the same class as those offered, subject to the options or to which the units relate; or
 - (B) where the document relates to an offer of stapled securities — stapled securities of the same class as those offered; and
 - (ii) where subparagraph (c)(ii) or (iii) applies, the information referred to in that paragraph as updated to that date; and
- (e) except in the case of an offer covered by the Second Exemption — discloses the conditions, obligations and risks associated with any loan or financial assistance offered by the issuer or any associated body corporate of it for the purpose of acquiring financial products under the scheme; and
- (f) in the case of an offer covered by the Second Exemption — specifies:
- (i) the Australian ADI where contributions for the purposes of the contribution plan are held;
 - (ii) the length of time they may be held; and
 - (iii) the rate of interest payable (if any) on the contributions held in the account; and
- (g) in the case of an offer covered by the Third Exemption — contains one of the following undertakings:
- (i) that throughout the period during which options acquired may be exercised, the issuer (or if the issuer does not have a registered office in this jurisdiction, an associated body corporate of the issuer which does so have a registered office) will have available a current prospectus in relation to the shares the subject of those options, which complies with the requirements of the Act; or
 - (ii) that, unless at the time of the exercise of the options the shares the subject of the options will be in the same class as securities which have been quoted on the financial market operated by Australian Stock

Exchange Limited or an approved foreign market throughout the 12 month period immediately preceding the exercise date of the option without suspension for more than a total of 2 trading days during that period, the issuer or an associated body corporate of the issuer will have a prospectus available in relation to the shares the subject of the options which complies with the requirements of the Act; and

- (h) in the case of an offer covered by the Third Exemption that contains the undertaking referred to in subparagraph (g)(ii) — contains a warning to the effect that employees cannot exercise the options being offered unless either a current prospectus is available to them or the shares the subject of the option are in the same class as securities which have been quoted on the financial market operated by Australian Stock Exchange Limited or an approved foreign market throughout the 12 month period immediately preceding the exercise date of the option without suspension for more than a total of 2 trading days during that period;

- 16. “old Corporations Act” has the meaning given by subsection 1410(1);
- 17. “stapled security” means two or more financial products (at least one of which is a share) which, under the terms on which each is traded, must be transferred together; and
- 18. “unit” in relation to a share means a legal or equitable right or interest in the share.

Dated this 30th day of April 2003

Signed by Brendan Byrne
as a delegate of the Australian Securities and Investments
Commission