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CORPORATE ADVISORS
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22 January 2014

Peng Lee
Senior Manager Corporations
Australian Securities and Investments Commission
Level 24, 120 Collins St
Melbourne Vic 3000

**Re: Comments on draft Regulatory Guide 49 on Employee Incentive Schemes**

Dear Peng,

Thank you for the opportunity to comment on the draft regulatory guide 49 on employee incentive schemes. D H Flinders has a particular interest in this area as a corporate advisory consultancy specialising in supporting start-up and emerging companies. D H Flinders also hosts an annual microcap investment conference in Melbourne which provides exposure for ASX listed emerging companies to an audience of over 350 institutional investors in developing their market presence and supporting their growth and expansion.

Our analysis of the changes and their impact are set out in Attachment A to this letter. The changes proposed to the relief available to better facilitate employee incentive schemes through ownership of securities are welcomed. There are however a number of areas which require further consideration which are summarised below.

Areas for further consideration

1. Access for smaller listed companies to professional trustees in managing share plan trusts
2. Provision for repayment of loans by dividends
3. Provision for mandatory deferral of bonuses into shares
4. Provision for salary sacrifice in general employee share plans meeting the upfront tax concession requirements
5. For unlisted bodies:
    - Lift the limit on annual offers of shares to $5,000
    - Allow cash settlement or a sale facility for annual offers
    - Limit offers to a single class of shares rather than limit the body to a single class of shares for both annual share offers and options/performance rights.
    - Remove the requirements for a valuation for a trade sale for options/performance rights.
6. Exempt general employee share plans accessing the upfront tax concession from the 25% in 12 months condition given the requirements of these plans.

**Melbourne**
Level 3, 454 Collins Street
Melbourne VIC 3000
Australia
Telephone: +613 8352 7100
Facsimile: +613 8352 7199

**Sydney**
Level 3, 16-18 Grosvenor Street
Sydney NSW 2000
Australia
Telephone: +612 8705 5411
Facsimile: +613 8352 7199

**Adelaide**
Level 5, 33 Pirie Street
Adelaide SA 5000
Australia
Telephone: +618 8211 8250
Facsimile: +618 8211 8256

**Wellington**
Level 12, 38 Waring Taylor Street
Wellington 6011
New Zealand
Telephone: +64 4 889 2434
Facsimile: +64 4 939 8701

**Kuala Lumpur**
Level 2, Tower Block
Menara Milenium, Jalan Damanlela
Pusat Bandar Damansara
50490 Malaysia
Telephone: +60 3211 75154
Facsimile: +60 3209 39542

I can be contacted on if you would like to explore any questions about these comments.

**<u>The author</u>**

Peter Armstrong is a Director of the Corporate Services Group at D H Flinders and consults on remuneration and HR governance issues. Peter has a wealth of experience in remuneration design and governance as well as an extensive track record in HR general management and business management. His experience includes development of remuneration policies, remuneration structures, incentive plans and broader initiatives associated with developing the employee value proposition. Peter is a Fellow of the Australian Institute of Management, a member of the Australian Institute of Company Directors.

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**Employee Incentive Scheme Relief: Comments on ASIC Proposals November 2013**

| Issue addressed | Current arrangements | Proposed arrangements | D H Flinders Comment |
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| General exemptions – Corporations Act | • Small scale offerings (20 offers in 12 months not exceeding $2m)<br>• Offers to senior managers (KMP)<br>• No consideration | No change proposed to application of current general exemptions.<br><br>ASIC clarified view that this exemption does not apply as employment is non-monetary consideration | Clarification is needed for employee incentive plans using securities that the hawking, on sale and advertising exemptions apply where the senior manager or small scale offering exemptions apply |
| Class order relief | Currently set out in ASIC Class Order 03/184. Key provisions are set out below. | New class order proposed. Key proposals are set out below | N/A |
| Who can make offers? | Restricted to offers made by:<br>Listed bodies and their associated bodies corporate<br>Unlisted bodies (in limited circumstances) | Expands relief to include offers to:<br>• Wholly owned subsidiaries of unlisted bodies<br>• Unlisted joint ventures with shares in listed associate. (related or not less than 20% voting power) | This is a positive extension. |
| Who can receive offers (generally)? | Restricted to offers made by listed and unlisted bodies to:<br>• Full time employees<br>• Part time employees<br>• Directors | Expands the existing relief to also include offers made by listed and unlisted bodies to:<br>• Prospective employees<br>• Contractors and casual employees that meet certain conditions | This is a positive extension<br>This is a positive extension. Its application is however likely to be limited to very specific circumstances where such an extension is consistent with the overall |

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| | | • NEDS under separate offer conditions (shares only/no performance conditions/, from own funds) | objectives of the employee incentive scheme<br><br>Given the proposed conditions, purchase of shares on market at arms length by Directors would be equally effective and would not require management of compliance with the special conditions required or general relief conditions. This proposal may be of some assistance in a non listed environment where there is no access to a tradeable instrument. |
| What "eligible" products" can be offered by listed bodies and their associated bodies corporate? | Restricted to offers of:<br>• Fully paid shares quoted on ASX and approved foreign markets<br>• Options for issues or transfer of those shares<br>• Units in those shares<br>• Fully paid stapled securities (at least one being a share). | Expands relief to specifically include offers of:<br>Performance rights which are not options (i.e. automatic exercise with right to unspecified share)<br>Depository interest including Aust/UK CDI's and US ADR's<br>Options over, or units in, depository interests and fully paid stapled securities. | These extensions are welcomed. |
| What structures can be used by listed bodies only? | Provides for the following offer structures:<br>• Direct issue of eligible products by the issuer<br>• Offers of shares which are held on trust for specific participants on an allocated basis provided the trust meets specified conditions | Expands relief to provide for:<br>• Offers of shares, foreign shares, depository interests and stapled securities via a trust structure where the trustee is an associated body of the issuer<br>• Trustees holding products for participants on an unallocated basis<br>• modified terms for contribution and loan | These changes are largely positive and are welcomed. Further consideration should be given to use of professional trustees, particularly for smaller and emerging listed entities as it reduces the cost and administrative complexity of these arrangements. It also addresses potential issues with self acquisition.<br><br>Repayment of loans via dividends is a standard feature of many loan based plans which should be allowed.<br><br>The mandatory deferral of bonus and incentive payments into shares is an increasingly common practice supported by regulatory standards in some |

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| | • Contribution plans.<br>• loans | plans. | industries (Finance). Specific provision should be made for these arrangements.<br><br>Provision is also needed to cover the common practice of salary sacrifice contributions for general employee share plans meeting the upfront tax concession requirements. |
| What products can be offered by unlisted bodies? | Limited relief by unlisted companies of options over fully paid shares | Expands relief to in include offers of<br>• up to $1,000 of fully paid ordinary shares annually per participant<br>• options or performance rights relating to fully paid ordinary shares via IPO or trade sale with offer/information statement. | These changes are largely positive and are welcomed. Further consideration should be given to the following matters:<br>• Only allowing one class of share for the body may be unnecessarily limiting as initial unlisted structures may involve a range of share classes to protect the interest of founder or venture capital investors in the development of the business towards listing or a sale. On this basis the proposal should be amended to prescribing one class of share for the offer.<br>• Increasing the $1000 limit to $5,000 for the annual plan to provide more scope for operation of this type of low risk plan in an unlisted environment.<br>• Allowing cash settlement/or share sale facilities for the annual plan given the lack of access to a tradeable share.<br>• Removal of the requirement of an independent valuation in the event of a sale for options/performance rights. The sale price will represent the market price based on the buyers due diligence. Requiring a separate report will add cost for very little additional value given the requirement for an offer/information statement to be provided. |

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| What general conditions apply to relief? | Requires:<br>• Quotation period (12 months; no suspension >2 days)<br>• Formula limiting amount of capital which can be issued to 5% to ensure they are not used for fundraising purposes<br>• Copy of offer documents must be given to ASIC | Require:<br>• Quotation period (3 months; no suspension > 5 days in last 12 months)<br>• Revised share capital formula reflecting the proposed expansion in the types of "eligible products" which might be used.<br>• Form to be submitted with details relating the relief. Copy of offer document does not need to be lodged.<br>• At least 25% of a scheme participant's entitlement must be subject to a 12 month restriction on disposal<br>• Offer d documents must be clear; concise and summarise risks<br>• ASIC can exclude a body from class order relief. | These changes are largely positive and are welcomed. The 25% in 12 month condition should not apply to general employee share plans designed to meet the ATO tax concession requirements as shares must be transferred to participants on termination or at the end of 3 years, whichever occurs first. This means shares may be required to be transferred to participants on termination of employment in the first 12 months of the issue. |