



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 49

Employee incentive schemes

November 2015

About this guide

This guide sets out our guidance on when we will give relief from the disclosure, licensing, advertising, hawking, managed investment scheme, 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;
- the specific structures that can be used under our relief; and
- the general conditions of our relief.

Sections B to F of this guide set out our policy and relief for listed bodies, while Section G does the same for unlisted bodies.

Note: This guide does not reflect amendments to Div 1A of Pt 7.12 of the Corporations Act introduced by the *Treasury Laws Amendment (Cost of Living Support and Other Measures) Act 2022*, which received the Royal Assent on 31 March 2022. This guide remains relevant to the continuing obligations for employee incentive schemes (legacy schemes) established under Superseded Class Order [SCO 14/1000] *Employee incentive schemes: Listed bodies* or Superseded Class Order [SCO 14/1001] *Employee incentive schemes: Unlisted bodies*. This guide will be reviewed and updated in due course. For more information, please read [Corporate Finance Update Issue 22](#).

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 guide was issued in November 2015 and is based on legislation and regulations as at the date of issue. In August 2026, the note on the front page was inserted.

Previous versions:

- Superseded Regulatory Guide 49, reissued on 1 May 2003, amended on 4 February 2004 and reissued October 2014

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.

Contents

A	Overview	4
	Our approach to facilitating employee incentive schemes	4
	How the Corporations Act applies to employee incentive schemes ..	5
	Our relief for employee incentive schemes	7
B	Listed bodies: Who can make offers?	11
	Listed bodies and their associated bodies corporate	11
C	Listed bodies: Who can participate in offers?.....	14
	Who can participate in an employee incentive scheme?	14
D	Listed bodies: What financial products can be offered?	18
	Main criteria for eligible products of listed bodies	18
	Other financial products	23
	Commissions and cash bonuses	23
E	Listed bodies: What structures can be used?	24
	Our approach to the structure of offers.....	24
	Trusts	24
	Contribution plans	26
	Loan arrangements	28
F	Listed bodies: What general conditions apply?	29
	Quotation condition	29
	Issue limit of 5%	30
	Nominal monetary consideration	32
	Disclosure provided to employees and ASIC	32
	Excluding bodies from relief.....	34
G	Unlisted bodies: What relief is available?	35
	Our approach to offers by unlisted bodies	35
	Who can make offers?	36
	Who can participate in offers (eligible participants)?	36
	What financial products can be offered (eligible products)?	37
	What structures can be used?	38
	What general conditions apply?	40
H	Listed and unlisted bodies: Incidental relief and transitional arrangements	45
	Our approach to licensing and other relief.....	45
	Licensing relief	45
	Operating a managed investment scheme	47
	Advertising relief	48
	Hawking relief	48
	On-sale relief	48
	Transitional arrangements	49
	Personal offers exemption	49
	Key terms	50
	Related information.....	58

A Overview

Key points

Employee incentive schemes involve the offer of financial products by an employer to its employees. Such offers will trigger a range of obligations under the *Corporations Act 2001* (Corporations Act) in relation to disclosure, financial services licensing, advertising, hawking, incidental operation of a managed investment scheme and the on-sale of financial products.

We are prepared to give conditional relief from these obligations for employee incentive schemes where:

- the offer is designed to support interdependence between the employer and its employees for their long-term mutual benefit by aligning their respective interests;
- there is adequate protection for participants in the scheme; and
- the objective of the offer is not fundraising.

We may also grant individual 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 generally supports the principle that ongoing ownership interests can lead to greater employee engagement and improved business outcomes.

Note: See House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared endeavours: Inquiry into employee share ownership in Australian enterprises*, report, Commonwealth of Australia, September 2000; and G Nuttall, *Sharing success: The Nuttall review of employee ownership*, independent review for UK Department of Business, Innovation and Skill, July 2012.

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 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. Various governments have indicated support for employee incentive schemes.

Note: For example, see para 5.21 of the Explanatory Memorandum to the Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007.

- RG 49.4 The main policy objectives that must be satisfied to qualify for our relief are:
- (a) that the employee incentive scheme is designed to support interdependence between the employer and its employees for their long-term mutual benefit by seeking to align their respective interests—for example, by giving employees an ownership interest in their employer or a cash benefit derived from an increase in the value of the employer’s shares;
 - (b) that there are adequate protections for participants in the scheme, including appropriate disclosure and pricing information for the products offered; and
 - (c) that the objective of the offer is not fundraising.
- RG 49.5 We have given conditional relief—in Class Order [CO 14/1000] *Employee incentive schemes: Listed bodies* and Class Order [CO 14/1001] *Employee incentive schemes: Unlisted bodies*—for employee incentive schemes where the policy objectives in RG 49.4 are satisfied.
- RG 49.6 The object of our relief is to facilitate offers of financial products under employee incentive schemes in circumstances where the terms of the scheme are designed to support interdependence between the employer and its employees for their long-term mutual benefit. We accept that employers may choose different terms and conditions to give effect to this objective. Examples include imposing different qualifying periods, or restricting the disposal of eligible products until specified conditions have been met. While some employee incentive schemes utilise short-term incentives involving the offer of financial products, we consider these are capable of fostering long-term mutual benefit—for example, where these are offered for no more than nominal monetary consideration.
- RG 49.7 [CO 14/1000] and [CO 14/1001] cover a range of financial products that can be offered to eligible participants. We will also consider individual relief for other employee incentive schemes that do not meet the conditions of our class orders, provided that they meet our policy objectives set out in RG 49.4. The relief application will need to explain why the conditions set out in the class order are not appropriate, and why any different conditions should apply in the particular circumstances.

How the Corporations Act applies to employee incentive schemes

Disclosure

- RG 49.8 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 49.9 There are limited disclosure exemptions that may apply for offers to employees of securities and certain other financial products. The disclosure exemptions available for offers to employees include the senior manager exemption (s708(12) and 1012D(9B)) and the small-scale offers exemption (s708(1) and 1012E).

Note: In this guide, references to chapters (Chs), parts (Pts) and sections (s) are to the Corporations Act, unless otherwise specified.

- RG 49.10 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. We also consider that the exclusion of a contract for the future provision of services from the definition of a ‘derivative’ in s761D (see s761D(3)(b)) is not intended to apply to employee incentive schemes. Our view is that these exemptions are not generally available to employee incentive schemes.

- RG 49.11 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, managed investment scheme and/or on-sale provisions.

Licensing

- RG 49.12 The Corporations Act imposes licensing requirements on the provision of financial services. The licensing requirements may apply to an employee incentive scheme, including where the scheme involves a trust.

Other provisions that may apply to employee incentive schemes

- RG 49.13 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; and
 - (d) the restrictions in s707 and 1012C on the on-sale of financial products issued without disclosure within 12 months of their issue.

Exemptions for eligible employee share schemes

- RG 49.14 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, to certain types of participants (i.e. employees and directors that meet the requirements in the s9 definition of ‘employee share scheme’).

Our relief for employee incentive schemes

- RG 49.15 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 49.16 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 that may benefit employees. We also consider that an employment relationship may reduce some of the risks that the disclosure and licensing provisions are intended to address.
- RG 49.17 [CO 14/1000] and [CO 14/1001] reduce the compliance burden for listed and unlisted bodies (respectively) offering eligible products to eligible participants under employee incentive schemes by providing conditional relief from the following provisions of the Corporations Act (as relevant):
- (a) the requirement to give a disclosure document;
 - (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 advertising and hawking provisions;
 - (d) the requirement to register a managed investment scheme for a contribution plan (listed bodies only); and
 - (e) the on-sale provisions in s707 and 1012C.

Note: See **Table 1** below.

- RG 49.18 However, our policy is that we will not extend to providing relief from the licensing, advertising, hawking, managed investment scheme or on-sale provisions where employers are relying on the statutory exemptions from having to provide a disclosure document.

Transitional arrangements

RG 49.19 [CO 14/1000] and [CO 14/1001] also provide transitional arrangements, under which relief will be ‘grandfathered’ for employee incentive schemes that are in operation in reliance on Superseded Class Order [SCO 03/184] *Employee share schemes* or similar individual relief. New schemes that come into existence after the commencement of [CO 14/1000] or [CO 14/1001] can only have the benefit of relief in reliance on either of these class orders.

Note: See Section H.

Table 1: Overview of our relief in [CO 14/1000] and [CO 14/1001] for employee incentive schemes

Topic	Description	Section reference
Who can make offers?	[CO 14/1000] enables offers to be made by bodies listed on ASX or an approved foreign market and their associated bodies corporate. [CO 14/1001] enables offers to be made by unlisted bodies and their wholly owned subsidiaries.	Section B (listed bodies) and Section G (unlisted bodies)
Who can participate in offers? (eligible participants)	[CO 14/1000] and [CO 14/1001] enable listed and unlisted bodies to make offers to: • full-time and part-time employees; • directors (including non-executive directors); • certain contractors and casual employees; and • prospective participants.	Section C (listed bodies) and Section G (unlisted bodies)
What financial products can be offered? (eligible products)	[CO 14/1000] permits listed bodies to offer: • fully paid shares or stocks; • certain depository interests; • fully paid units in registered managed investment schemes; • fully paid stapled securities; and • options over, units in and incentive rights in relation to any of the above products offered for no more than nominal monetary consideration, unless the options, units or incentive rights are able to be traded on an eligible financial market. [CO 14/1001] permits unlisted bodies to offer for no more than nominal monetary consideration: • fully paid voting ordinary shares; • units in and options over these ordinary shares; and • incentive rights to receive ordinary shares or a cash amount, or some combination of both.	Section D (listed bodies) and Section G (unlisted bodies)
What structures can be used?	[CO 14/1000] provides relief for listed bodies to make offers using the following structures: • trusts; • contribution plans; and • certain types of loan arrangements. [CO 14/1001] provides relief for unlisted bodies to make offers using trusts (but not contribution plans or loans).	Section E (listed bodies) and Section G (unlisted bodies)

What general conditions apply?	For listed bodies relying on [CO 14/1000]: - the product must have been quoted for at least three months with suspension of no more than five trading days in 12 months (or the shorter period during which the product has been quoted); - the listed body or its associated bodies corporate making the offer must, at the time of making the offer, have reasonable grounds to believe that the number of underlying eligible products that have been or may be issued under the offer, when aggregated with offers made under ASIC relief in the previous three years, will not exceed 5% of the issued capital of the listed body; - offer documents must be presented in a clear, concise and effective manner with an advice warning and general product risk warning; - offers must include the documents comprising any trust or contribution plan or summary information about their terms, and the terms of any loan arrangements; - a notice of reliance on [CO 14/1000] is given to ASIC no later than one month after first relying on the class order; and - ASIC has the power to request employee incentive scheme documents and to exclude a body from relying on [CO 14/1000]. For unlisted bodies relying on [CO 14/1001]: - offers can only relate to fully paid voting ordinary shares or units in, options over and incentive rights relating to fully paid voting ordinary shares (where no other classes of ordinary shares are offered under [CO 14/1001]); - all offers of the above financial products can only be made for no more than nominal monetary consideration; - offers must, in aggregate, not exceed \$5,000 in value per participant per year, based on a directors' valuation resolution that is dated no earlier than 12 months before the offer, with the methodology for the valuation being disclosed in the offer document; - the unlisted body or its wholly owned subsidiaries making the offer must, at the time of making the offer, have reasonable grounds to believe that the number of fully paid voting ordinary shares that have been or may be issued under the offer, when aggregated with offers made under ASIC relief in the previous three years, will not exceed 20% of the issued capital of the unlisted body; - if, at the time of the offer, the body has a statutory obligation to prepare, or has prepared, an audited financial statement, the offer document must include that audited financial statement; for all other unlisted bodies, the offer document must include a special purpose financial statement for a 12-month period; - at the time of the offer, the offer document must include a directors' solvency resolution that is made no later than one month before the offer; - if requested by an eligible participant, for any financial year end after the offer, the offer document must include current 12-month financial statements within four months after that financial year end;	Section F (listed bodies) and Section G (unlisted bodies)
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Topic	Description	Section reference
What general conditions apply? (cont.)	- offer documents must be presented in a clear, concise and effective manner, with a general product risk warning; and must contain a prominent specific warning on the front page; - payment of more than nominal monetary consideration on exercise, or vesting, of the underlying ordinary shares is only permitted where the following circumstances are included as terms of the offer: - the underlying ordinary shares have been quoted for three months and have not been suspended for more than five trading days (in the shorter of 12 months or since quotation); or - a valuation document is provided to the participant no later than 14 days before exercise or vesting. A valuation document is a current disclosure document (i.e. offer information statement or prospectus), a copy of an executed agreement for the purchase of underlying ordinary shares on arm's length terms where the acquirer is not an associate of the issuer, or an independent expert's report; - a notice of reliance on [CO 14/1001] is given to ASIC no later than one month after first relying on the class order; and - ASIC has the power to request employee incentive scheme documents, and to exclude a body from relying on [CO 14/1001].	Section F (listed bodies) and Section G (unlisted bodies)
What other relief is available?	[CO 14/1000] and [CO 14/1001] provide relief to listed and unlisted bodies in relation to: - licensing (general advice, dealing, custodial and depository services); - advertising and hawking; - the registration of managed investment schemes (i.e. as a result of the pooling or use of contributions in a common enterprise under a contribution plan used in an employee incentive scheme in relation to listed bodies only); and - the on-sale provisions. Transitional arrangements are also provided for bodies who were relying on [SCO 03/184] or Class Order [CO 04/671] <i>Disclosure for on-sale of securities and other financial products</i>, or similar individual relief, before the commencement of [CO 14/1000] and [CO 14/1001]. In addition, we have provided separate relief in Class Order [CO 14/978] <i>Employee incentive schemes: Personal offers</i> to enable employers to continue to make personal offers regardless of their reliance on [CO 14/1000] or [CO 14/1001].	Section H (listed and unlisted bodies)

B Listed bodies: Who can make offers?

Key points

Generally, the listed body is the primary person involved in making offers under an employee incentive scheme. Our conditional relief in [CO 14/1000] provides relief to the listed body to offer financial products under an employee incentive scheme where the listed body operates in a jurisdiction that we consider is well regulated.

Because listed bodies operate using a range of corporate structures, our relief also applies to additional related bodies where there is a sufficient relationship between that body and the listed body.

The relief in [CO 14/1000] applies to offers under employee incentive schemes made by:

- bodies listed on ASX or an approved foreign market (eligible financial market); and
- associated bodies corporate of these listed bodies.

Listed bodies and their associated bodies corporate

Bodies listed on ASX or an approved foreign market

RG 49.20 Our broadest general disclosure relief for employee incentive schemes is focused on bodies that are listed on an eligible financial market (i.e. ASX or an approved foreign market). This ensures that eligible participants have the most accurate and current information because 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 49.21 [CO 14/1000] 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: Disclosure relief* (RG 72). See the 'Key terms' list for our definition of 'approved foreign market'.

- RG 49.22 Our relief applies only to the main board of the markets listed in the class order definition of 'eligible financial market', unless otherwise stated. We will continue to consider applications for relief on a case-by-case basis in relation to other markets, including other prescribed financial markets.

Foreign bodies

- RG 49.23 Our relief applies to offers of eligible products by 'bodies', which includes foreign bodies. The relief and conditions apply only to the extent that there is a 'jurisdictional nexus' between an offer or conduct and the Corporations Act, whether or not a broader global arrangement exists between the body and other people. That is, the disclosure relief applies to offers that are received in this jurisdiction, the licensing relief applies to conduct that amounts to carrying on a financial services business in this jurisdiction and other relief relates to conduct that occurs in this jurisdiction.

- RG 49.24 We are aware that complying with the disclosure requirements of the Corporations Act or the conditions of our class relief may be disproportionately onerous for some foreign issuers in the context of offers made to a small number of Australian employees under a multinational employee incentive scheme. On this basis, we will consider individual relief in exceptional circumstances for employee incentive schemes that do not meet certain conditions of our relief, provided that they meet our policy objectives set out in RG 49.4.

Associated bodies corporate of listed bodies

- RG 49.25 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 49.26 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 interdependence between the employer and its employees.

Note: In this regulatory guide, unless we need to make a distinction between employees and other personnel, 'employees' and 'participants' are interchangeable and mean any person eligible to participate in the employee incentive scheme under our relief.

RG 49.27 [CO 14/1000] applies to offers made by a body that is listed on an eligible financial market and its associated bodies corporate. Our class order defines an 'associated body corporate' to mean a body corporate:

- (a) that is a related body corporate of the body;
- (b) that has voting power in the body of not less than 20%; or
- (c) in which the body has voting power of not less than 20%.

Note: In this regulatory guide, unless we need to make a distinction between the listed body and its associated body corporate, we refer to them simply as the 'body', the 'employer' or the 'issuer'.

RG 49.28 To rely on our general disclosure 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.

C Listed bodies: Who can participate in offers?

Key points

Employee incentive schemes usually involve the listed body making offers to its employees. However, employers may seek to make offers to personnel engaged in different capacities. Our relief will extend to such personnel where we are satisfied that an equivalent level of interdependence can be achieved.

[CO 14/1000] provides general disclosure relief for offers by listed bodies or their associated bodies corporate under employee incentive schemes made to 'eligible participants'. This term is defined to include:

- full-time or part-time employees (including executive directors);
- non-executive directors; and
- contractors or casual employees who meet the conditions relating to their hours worked (i.e. 40% of a full-time equivalent position).

Offers may also be made to prospective participants—on the condition that they accept a position.

Who can participate in an employee incentive scheme?

- RG 49.29 We are prepared to grant general disclosure relief for employee incentive schemes where the employee incentive arrangement is designed to support interdependence between the employer and its employees for their long-term mutual benefit by aligning their respective interests to enhance shareholder value. The nature of the economic interest and working relationship (past, current and future) is a key factor in determining whether these policy objectives are satisfied.
- RG 49.30 Under [CO 14/1000], offers may be made to a broad range of eligible participants, including current employees and other personnel who meet criteria that relate to their personal service, even where their personal services are engaged via a body corporate of which the person is a director or the spouse of a director.
- RG 49.31 For the purposes of [CO 14/1000], eligible participants are:
- (a) full-time or part-time employees (including executive directors);
 - (b) non-executive directors; and
 - (c) contractors and casual employees who work a pro-rata equivalent of 40% or more of a comparable full-time position.
- RG 49.32 There may be rare instances where we grant individual relief for offers to people who do not meet our definition of 'eligible participant', if the offer

satisfies our policy objectives. The body would need to demonstrate, to our satisfaction, 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.

Full-time and part-time employees

- RG 49.33 [CO 14/1000] 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.

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. We have set the threshold level of interdependence for relief at being contracted to work the pro-rata equivalent of 40% or more of a comparable full-time position.
- RG 49.35 Our class order recognises that work relationships for contractors can take various forms. Our relief is designed to cover contractors who enter into service arrangements with the employer:
- (a) directly in their individual capacity; or
 - (b) through a company (e.g. a small family-owned company or a corporate trustee of a family trust) where the individual who performs the work is a director or the spouse of a director of that company.

Casual employees

- RG 49.36 [CO 14/1000] permits an offer of eligible products to casual employees where they are, or might reasonably be expected to be, engaged to work the pro-rata equivalent of 40% or more of a comparable full-time position.
- RG 49.37 We consider that these criteria indicate a relationship of sufficient interdependence to be covered by our relief. For individual relief applications, we may be prepared to consider different indicators. For example, a casual employee may work fewer hours per week but has a history of working for the employer on this basis over a long timeframe.

Directors

- RG 49.38 The Corporations Act provides exemptions from the requirement to provide a disclosure document to senior managers who are offered securities (s708(12)) or a Product Disclosure Statement (PDS) in a recommendation situation in relation to a managed investment product (s1012D(9B)). These exemptions have been extended by Class Order [CO 04/899] *Definition of*

‘senior manager’—modification to include directors—including those with executive positions and those who are non-executive directors.

RG 49.39 These statutory exemptions therefore permit bodies to implement employee incentive schemes that offer such financial products to both executive directors and non-executive directors without the need for a disclosure document.

RG 49.40 However, the statutory exemptions do not provide certain types of relief for some consequential or incidental activities. [CO 14/1000] provides relief for employee incentive schemes to be offered to directors, including non-executive directors, but does not extend to offers made under the statutory exemptions.

RG 49.41 We note that corporate governance principles recommend that bodies should not offer to non-executive directors employee incentive schemes designed for executives (i.e. schemes that contain performance-based features).

Note: See ASX, *Corporate governance principles and recommendations*, 3rd edition, 2014, Recommendation 8.2; Investment and Financial Services Association Limited (IFSA), *Corporate governance: A guide for fund managers and corporations* (IFSA Blue Book), June 2009, Guideline 11.12; Australian Council of Superannuation Investors (ACSI), *Governance guidelines: A guide for superannuation funds to monitor listed Australian companies*, July 2013, paragraphs 16.1 and 16.2; and Australian Institute of Company Directors, policy paper, *Non-executive director remuneration*, 9 January 2003.

RG 49.42 [CO 14/1000] also does not provide relief from the remuneration-related reporting obligations under the Corporations Act (e.g. s300 and 300A). Directors and bodies will need to continue to comply with these obligations.

Prospective participants

RG 49.43 [CO 14/1000] permits bodies to make offers to prospective participants where the offer is conditional on acceptance of an offer of engagement as an employee, a contractor or a casual employee: RG 49.33–RG 49.37.

Note: See also advertising and hawking relief in Section H.

Renouncement by eligible participants

RG 49.44 [CO 14/1000] also provides that, where an eligible participant renounces an offer in favour of a person listed below, the offer will still be treated as an offer of eligible products to an eligible participant:

- (a) an immediate family member of the eligible participant;
- (b) a company whose members comprise no persons other than the eligible participant or immediate family members of the participant; or

- (c) a corporate trustee of a self-managed superannuation fund (within the meaning of the *Superannuation Industry (Supervision) Act 1993*), where the eligible participant is a director of the trustee.

RG 49.45 We are prepared to extend our relief to cover a renouncement made by an eligible participant in favour of one of the above persons because we consider them to be sufficiently related to the eligible participant to meet the objective of interdependence and long-term mutual benefit.

D Listed bodies: What financial products can be offered?

Key points

We will facilitate offers of financial products under employee incentive schemes where the financial product offered is capable of reinforcing the interdependent relationship between an employer and its employees for long-term mutual benefit, and where there is appropriate disclosure and pricing information about the financial products that are being offered.

[CO 14/1000] provides general disclosure relief for offers by listed bodies or their associated bodies corporate of the following 'eligible products':

- fully paid ordinary shares in a class able to be traded on ASX and fully paid ordinary shares or stocks in a class able to be traded on an approved foreign market;
- depository interests in fully paid shares or stocks where the interest is in a class able to be traded on an eligible financial market or is convertible into fully paid shares or stocks that are in a class able to be traded on an eligible financial market;
- fully paid units in registered managed investment schemes (registered schemes) in a class able to be traded on ASX;
- fully paid stapled securities in a class able to be traded on ASX;
- units in any of the financial products mentioned above;
- options to acquire any of the above financial products; and
- incentive rights relating to any of the above financial products (excluding options).

Main criteria for eligible products of listed bodies

- RG 49.46 When determining whether to provide relief for an offer of financial products to eligible participants, we focus on the following criteria:
- (a) whether the financial product is likely to support interdependence between the employer and its employees for their long-term mutual benefit—either because of the nature of the product or the terms on which it is offered (see RG 49.48–RG 49.50);
 - (b) whether there is adequate information about the financial product to justify removing the requirement for a disclosure document (see RG 49.51–RG 49.52); 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 49.53–RG 49.54).

- RG 49.47 These criteria are reflected in [CO 14/1000], as explained in this section. If an employee incentive scheme does not satisfy one or more of these criteria, we will consider granting more limited relief if the objectives of our policy are satisfied. An example of where we are prepared to provide more limited relief is in the case of offers by unlisted bodies in [CO 14/1001]: see Section G.

Financial products that support interdependence

- RG 49.48 [CO 14/1000] covers a range of financial products that have the potential to support 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 (or the economic equivalent) in their employer. This includes shares or stocks, units in a registered scheme and equity-related 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 support interdependence between the employer and its employees.
- RG 49.49 Our relief can also apply to offers of products by foreign bodies that may be known by a different term in another jurisdiction (e.g. 'stocks'). We look at the characteristics of the product rather than the label when determining whether it will meet the definition of 'eligible product'.
- RG 49.50 We also give relief for offers of options and incentive rights that may ultimately result in the employee receiving an ownership interest or a financial benefit, the value of which is determined, in whole or in part, from the underlying eligible products. This relief is given where the employee incentive scheme is designed to support interdependence between the employer and the employees for their long-term mutual benefit and to enhance shareholder value.

Quoted eligible products

- RG 49.51 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 an eligible financial 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 incentive rights where the underlying eligible products meet this quotation condition.
- RG 49.52 The quotation requirement means that employees can assess the offer by reference to a reliable market price: see RG 49.101–RG 49.103.

Financial products that may expose the employee to liability

- RG 49.53 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 value of the financial products that are the subject of the arrangement). Particular risks associated with these offers mean that reduced disclosure will not generally be appropriate.
- RG 49.54 For this reason, [CO 14/1000] does not provide relief for employee incentive schemes that involve loans to employees, unless the loans are on terms that are limited recourse or no recourse and the loan is fee free and interest free: see RG 49.97–RG 49.98.

Units in registered schemes and stapled securities

- RG 49.55 [CO 14/1000] permits employers to offer units in registered schemes and fully paid stapled securities that are able to be traded on ASX.
- RG 49.56 We also give relief for options over and incentive rights relating to these units and stapled securities.
- RG 49.57 We are prepared to give relief for the above units in registered schemes where the employee incentive scheme allows 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.
- RG 49.58 We will consider, on a case-by-case basis, relief applications for offers made under an employee incentive scheme of units in a foreign collective investment scheme.

Depository interests

- RG 49.59 Foreign bodies may want to offer equity-based 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.
- RG 49.60 [CO 14/1000] facilitates offers of beneficial interests (commonly referred to as ‘depository interests’) that are quoted on an eligible financial market—for example, CHESS Depository Interests (Australian CDIs), UK depository interests and American depository receipts (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 have very limited filing requirements. Levels I, II and III are defined under the Rules of the US Securities and Exchange Commission.

- RG 49.61 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; and
 - (b) without our relief, employees in Australia may be excluded from multinational offers because of the disproportionate cost of complying with the disclosure (and other) requirements of the Corporations Act, often for a relatively small number of Australian employees.

RG 49.62 Our relief applies to quoted depository interests and shares or stocks that can be converted into such depository interests (i.e. whether or not the shares or stocks 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 49.63 Our relief does not cover depository interests over debt instruments (e.g. bonds) because these are not the economic equivalent to underlying shares or stocks.

Options

RG 49.64 [CO 14/1000] gives general relief for offers of options over ‘underlying eligible products’ (i.e. financial products that are quoted on an eligible financial market).

RG 49.65 The class order does not provide relief for the offer of options over options or options over incentive rights. This is because we consider that determining the value of such financial products would be difficult for many participants.

RG 49.66 The options do not need to be quoted on an eligible financial market but the underlying eligible product must be in a class that is quoted on an eligible financial market.

RG 49.67 Unless the options are in a class that is quoted on an eligible financial market, the options must be offered to participants for no more than nominal monetary consideration (and cannot be acquired, for example, via a contribution plan). This is again because determining the value of unquoted options would be difficult for many participants.

Incentive rights

RG 49.68 We consider that incentive rights, which generally constitute a financial product that is a derivative under Ch 7 the Corporations Act, can be structured in a way that is economically equivalent to options. Accordingly, [CO 14/1000] gives relief for offers of incentive rights where the value of

the incentive right is determined by reference to the same underlying eligible products as those that apply to options.

- RG 49.69 Correspondingly, the class order does not provide relief for the offer of incentive rights over options or incentive rights over incentive rights.
- RG 49.70 As with options, the incentive rights must also be offered to participants for no more than nominal monetary consideration (and cannot be acquired, for example, via a contribution plan) for the same reason (i.e. that they are not quoted on an eligible financial market and are therefore more difficult to value).
- RG 49.71 Under [CO 14/1000], a body can offer incentive rights, where they provide a conditional right:
- (a) to acquire (by issue or transfer) underlying eligible products—the number of underlying eligible products to be issued or transferred can be a specified number or can be determined with a formula that uses, or represents, the financial value of the underlying eligible product (e.g. a volume-weighted average price, the value of any share price appreciation, or return on equity);
 - (b) to be paid a cash amount where the value of that cash amount is ultimately determined (either wholly or in part) with a formula that uses, or represents, the financial value of the underlying eligible product (e.g. a volume-weighted average price, the value of any share price appreciation, or return on equity); or
 - (c) to receive a combination of RG 49.71(a)–RG 49.71(b).

Units

- RG 49.72 [CO 14/1000] also gives relief for offers of units in underlying eligible products. Generally, where the units in the underlying eligible products are not able to be traded on an eligible financial market, they must be offered to participants for no more than nominal monetary consideration (and cannot be acquired, for example, via a contribution plan).

Trust arrangements

- RG 49.73 Where a trustee holds eligible products on behalf of eligible participants, the eligible participant may arguably hold a unit in the eligible product by virtue of the trust arrangements, and that unit is not able to be traded. In these cases, where the underlying eligible product is able to be traded, it may be offered for more than nominal monetary consideration. This is because we consider the eligible participant to be making a monetary contribution to acquire the underlying eligible product and not to be making a monetary contribution towards the unit.

Other financial products

RG 49.74 [CO 14/1000] does not extend to financial products other than those defined above either because we have not received any, or many, applications in relation to other financial products, or we have not assessed whether they are equivalent to those which have been included. We will continue to consider on a case-by-case basis whether our policy objectives are satisfied for offers of other financial products.

Commissions and cash bonuses

RG 49.75 We consider that cash payments made under employment or employment-like arrangements—where the value of the cash payment is determined by measures unrelated to underlying financial products, such as a volume-based sales commission or bonus—are not intended to be regulated by Ch 7. Accordingly, we have not included offers involving such arrangements in our class order. We consider that, if these arrangements are not caught by Ch 7, no relief is required.

E Listed bodies: What structures can be used?

Key points

Employee incentive schemes adopt a number of structures for various reasons, including administrative efficiencies, tax concessions, and contractual and equitable protection for the listed body and participants. Our policy facilitates the use of some of these structures where the rights of participants are adequately protected.

[CO 14/1000] provides relief for arrangements that listed bodies often use to manage their offers and to facilitate employee incentive schemes. This includes relief for:

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

Our approach to the structure of offers

- RG 49.76 We consider that employers should have the flexibility to structure their arrangements in ways that are more efficient or beneficial, provided that those structures do not undermine ASIC's policy objectives for employee incentive schemes.
- RG 49.77 [CO 14/1000] gives relief from a number of the requirements in the Corporations Act so that employers can:
- (a) use a trust arrangement 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 49.78 We may be prepared to give individual relief for other types of structures if an employer can demonstrate why a particular structure or feature is warranted, and we are satisfied that this is consistent with our policy objectives.

Trusts

- RG 49.79 Bodies often use trust arrangements to help manage their obligation to have sufficient underlying eligible products available for delivery to participants on the fulfilment of conditions, the exercise of options or the vesting of incentive rights. Using a trust also avoids the requirement to cancel shares if the issuer were to buy back shares under Div 2 of Pt 2J. The trust

arrangement is eligible to rely on [CO 14/1000], even if the trust is also being used for an employee incentive scheme, or similar scheme, that is not relying on [CO 14/1000].

RG 49.80 Accumulating underlying eligible products in a trust allows the employer 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 49.81 A trustee may hold underlying financial products on an allocated basis. This means that these products are being held for specific employees. Depending on the design of the trust, the underlying financial products may be recorded as held for a particular beneficiary, where the beneficiary has no particular entitlements—alternatively, the beneficiary may have the right to direct the trustee how to vote and have a right to receive dividends. A trustee may also hold the underlying financial products on an unallocated basis, which means that the products are being held in a pool for participating employees generally.

RG 49.82 If an employee incentive scheme involves a trust, relief from the requirement to hold an AFS licence may be required when providing a custodial or depository service, and for dealing in a financial product in the course of providing such a service. [CO 14/1000] provides conditional relief from this requirement for listed bodies and their associated bodies corporate on condition that the financial service is merely incidental to the operation of an employee incentive scheme.

Note 1: For more information on custodial and depository services, see RG 49.178–RG 49.179.

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

RG 49.83 Many bodies use professional trustees to assist them to operate or manage their offers. Our licensing relief does not apply to bodies that provide professional trustee services because they are required to have the appropriate AFS licence authorisations. We will consider individual relief for foreign professional trustees who are authorised to provide trustee services in their home jurisdiction and other foreign jurisdictions: see RG 49.173.

Conditions applying to trusts

RG 49.84 Our licensing relief in [CO 14/1000] for trust arrangements is subject to conditions that provide certain investor protections, including that:

- (a) the activities of the trust are limited to holding underlying eligible products for participants who may become entitled to those products under an employee incentive scheme or similar scheme;

- (b) the trustee must maintain written records on the administration of the trust and keep details of the underlying eligible products if these are being held for a specified eligible participant on an allocated basis;
- (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 disbursements including brokerage and taxes in connection with the trust);
- (d) if the trustee is the listed body, or an associate of the body, the trustee is not entitled, at its own discretion, to exercise any voting rights attaching to the underlying financial products held on trust (see RG 49.85); and
- (e) the trustee must not hold more than 5% of the issued capital of the listed body on trust in reliance on ASIC's employee incentive scheme relief (see RG 49.86).

RG 49.85 Where the trustee is the listed body, or an associate—as defined in Div 2 of Pt 1.2 (except s12 and 16)—of the listed body, the trustee must not exercise its own discretion in relation to voting rights attaching to the underlying eligible products. This prohibition applies even where the beneficiary has a right to direct the trustee how to vote but does not exercise this right.

RG 49.86 The imposition of a 5% holding limit is to limit the distortion of voting power caused by the trustee holding a parcel of financial products that may effectively be quarantined from voting. The 5% limit is calculated based on holdings of voting shares or voting interests that relate to employee incentive schemes that rely on our class relief or on individual relief. Where the trustee is not the listed body, or an associate of the listed body, the trustee may, subject to the terms of the trust, exercise its own discretion in relation to voting rights attaching to the underlying eligible products in accordance with its fiduciary duties as a trustee of the employee incentive scheme trust.

Contribution plans

RG 49.87 Employee incentive schemes may also include a contribution plan, where the participant makes a monetary contribution that is then used to acquire eligible products offered under the scheme. Contributions may be made from either the employee's:

- (a) remuneration, whether from before-tax funds (salary sacrifice arrangements) or after-tax funds; or
- (b) private funds.

RG 49.88 We facilitate the use of contribution plans and other monetary contributions for offers of eligible products (whether overlying or underlying) that can be traded on an eligible financial market because employees are able to assess the value of those products by comparing them to a reliable market price.

- RG 49.89 The definition of ‘contribution plan’ is broad and covers various structures—including, for example:
- (a) where contributions are made regularly, such as monthly or weekly;
 - (b) where eligible products are received by participants upfront; and
 - (c) where eligible products are received by participants only after their contributions meet the value of the products or at some other time.
- RG 49.90 We do not consider a contribution plan to include one-off payments by the eligible participant on the exercise of an option, vesting of an incentive right or where the product is issued to the eligible participant without undue delay. This is because most of the conditions in [CO 14/1000] relating to contribution plans would not be of benefit to the eligible participant once the product has been acquired.
- Note: We do not consider that undue delay would occur if, for example, the product was not issued until the company was satisfied that insider trading prohibitions would not be contravened or until the company’s next trading window opened.
- RG 49.91 It is important to note that our relief is structured to not permit monetary contributions to acquire eligible products that are not able to be traded on an eligible financial market, whether or not the monetary contributions form part of a contribution plan.
- RG 49.92 [CO 14/1000] facilitates contribution plan 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.

Conditions applying to contribution plans

- RG 49.93 Our relief is granted subject to conditions designed to ensure that contributions by participants are safeguarded, including that:
- (a) prior written agreement is obtained from the eligible participant;
 - (b) the use of contributions to acquire eligible products that are not able to be traded on an eligible financial market is prohibited;
 - (c) the holding of any after-tax contributions must be in a dedicated trust account with an Australian authorised deposit-taking institution (ADI);
 - (d) the beneficiary has the right to direct the trustee how to vote with (if there are voting rights), and a right to receive dividends from, underlying eligible products acquired with the contributions;
 - (e) the notice period for discontinuing participation in the contribution plan must not exceed 45 days; and
 - (f) as soon as reasonably practicable, any after-tax contributions not used to acquire underlying eligible products are returned.

- RG 49.94 We consider that discontinuing participation in the contribution plan means that eligible participants can elect to stop making payments towards the acquisition of eligible products; however, they may still remain subject to certain terms of the employee incentive scheme, such as any trading restrictions.
- RG 49.95 The condition allowing the participant to discontinue participation in the contribution plan does not apply where contributions are still required to be paid towards eligible products that have been acquired upfront by the participant.
- RG 49.96 [CO 14/1000] does not extend to contribution plans involving the offer of untraded options, units or incentive rights. This is because our relief for untraded options, units and incentive rights is given on the condition that they are offered for no more than nominal monetary consideration: see RG 49.64–RG 49.71.

Loan arrangements

- RG 49.97 [CO 14/1000] 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 acquired under the loan arrangement; and
 - (b) fee free and interest free.
- RG 49.98 These conditions are consistent with our policy objective that participants should not be subject to any additional liability (other than forfeiture of the financial products acquired under the loan). Being fee free and interest free is consistent with the policy objective of creating interdependence between the employer and employee, rather than an agreement that confers a commercial benefit in favour of the employer.
- RG 49.99 [CO 14/1000] may also provide relief where the employee incentive scheme is 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—provide sufficient protections to enable these arrangements to be offered together under [CO 14/1000].
- RG 49.100 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. A body will need to consider whether providing financial assistance to a person to acquire shares (or units in shares) in the body or a holding company of the body would materially prejudice the interests of the body or its shareholders, or the body's ability to pay its creditors, and whether shareholder approval will be required under s260B, or is exempted under s260C. In particular, the exemption under s260C(4) for approved employee share schemes may apply for some but not all employee incentive schemes relying on [CO 14/1000].

F Listed bodies: What general conditions apply?

Key points

The conditions that we impose on our general disclosure relief in [CO 14/1000] for offers under employee incentive schemes reflect the key elements of our policy objectives, which aim to ensure that:

- the scheme supports interdependence between the employer and its employees;
- participants have adequate protections, including appropriate disclosure and pricing information about the financial products offered; and
- the objective of the offer is not fundraising.

The conditions relating to meeting the information needs of participants include:

- quotation of the product for at least three months without suspension for more than five trading days;
- a 5% issue limit;
- the offer document being presented in a clear, concise and effective manner, and including an advice warning and a general product risk warning; and
- disclosure of the terms of any trust, contribution plan or loan arrangement.

There is also a requirement to give ASIC a notice of reliance on relief and to provide basic key information. Subject to affording procedural fairness, we may also exclude a body from relying on [CO 14/1000] where we have substantial concerns about the body's compliance or conduct.

Quotation condition

- RG 49.101 Our relief applies to financial products that are in a class that is able to be traded on an eligible financial 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 49.102 These conditions are 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 49.103 Offers of unquoted eligible products must be issued for no more than nominal monetary consideration and, where the offer is an unquoted

overlying eligible product, the corresponding underlying eligible products must be quoted on an eligible financial market.

Potential relief from the quotation requirement

- RG 49.104 We may grant individual relief for employee incentive schemes involving financial products that have been quoted for less than three months or suspended for more than five trading days, provided that they meet our policy objectives set out in RG 49.4.
- RG 49.105 Factors that we will take into account when considering relief from the three-month quotation requirement include whether there is an alternative disclosure document or regime at the time of offer that we consider to be an adequate substitute. Examples may include where the offer under the employee incentive scheme is for products in the same class as those being offered under a prospectus, Pt 5.1 scheme of arrangement explanatory statement or a foreign scheme of arrangement. For further guidance, see Regulatory Guide 188 *Disclosure in reconstructions* (RG 188) and ASIC Corporations (Compromises or Arrangements) Instrument 2015/358.
- RG 49.106 We may also consider granting individual 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 that we will take into account, see Regulatory Guide 189 *Disclosure relief for rights issues* (RG 189) at RG 189.64–RG 189.68.

Issue limit of 5%

- RG 49.107 One of the objectives we consider when providing relief for employee incentive schemes is that the scheme is designed to support interdependence between the employer and its employees, and is not designed specifically for the purposes of fundraising. There are also other factors we consider, including the potential effect on control and voting distortions that may arise. To address these implications, one of the conditions we apply to listed bodies is the imposition of a 5% issue limit on underlying eligible products in reliance on ASIC relief.

Products included in calculating the 5% issue limit

- RG 49.108 The 5% limit is to be calculated based on the maximum number of underlying eligible products that form part of the issued capital of the body (i.e. shares, stocks, units in registered schemes and stapled securities) that the listed body or its associated bodies corporate have reasonable grounds to believe:
- (a) will be issued under the current offer; and

- (b) have been or may be issued as a result of offers under employee incentive schemes made over the previous three years in reliance on ASIC class relief or similar individual relief.

RG 49.109 We accept that the number of underlying eligible products that will ultimately be issued in reliance on ASIC relief over the relevant period, as discussed above, will not always be known. Accordingly, [CO 14/1000] will require the calculation to be made based on the listed body or its associated bodies corporate only making offers in circumstances where they have reasonable grounds to believe that these offers will not result in the issue of more than 5% of the issued capital of the listed body.

Exclusions from 5% issue limit

RG 49.110 Only financial products offered in reliance on ASIC class relief or similar individual relief are included in the calculation of the 5% issue limit. This means that financial products issued to participants without our relief are not included in the calculation—for example, as a result of offers:

- (a) received outside Australia (e.g. employees in another jurisdiction);
- (b) made in reliance on s708 or 1012D and therefore not requiring a disclosure document; or
- (c) made in a disclosure document.

Example

Company X has:

- (a) 10,000 shares to be issued under the current offer in reliance on [CO 14/1000];
- (b) 30,000 shares issued under offers in the past three years in reliance on [SCO 03/184];
- (c) 8,000 shares that could be issued under offers made in reliance on class relief 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 incentive rights on issue where those options and incentive rights were offered on the basis of ASIC individual relief for an employee incentive scheme;
- (e) a potential of up to 3,000 shares which may be issued, or may be cash settled (and the company reasonably estimates at the time of the offer that 2,000 shares will be issued and the remaining 1,000 will be cash settled);
- (f) one million shares issued under a prospectus in the past year;
- (g) 200,000 shares issued two years ago to a sophisticated investor under s708; and
- (h) in addition to the shares issued under paragraphs (b), (f) and (g), a further three million shares on issue.

Company X's calculations are set out below.

The total number of shares that Company X has, and has reasonable grounds to believe have been or may be issued, under the current offer and in offers made in reliance on ASIC relief over the past three years:	=	(a) + (b) + (c) + (d) + (e)
	=	10,000 + 30,000 + 8,000 + 50,000 + 2,000
	=	100,000 shares
The total number of shares under the current offer, aggregated with those that Company X currently has on issue:	=	(a) + (b) + (f) + (g) + (h)
	=	10,000 + 30,000 + 1,000,000 + 200,000 + 3,000,000
	=	4,240,000 shares
Issue calculation (not to exceed 5%):	=	100,000 multiplied by 100, divided by 4,240,000
	=	2.36%

Nominal monetary consideration

- RG 49.111 We consider that offers under an employee incentive scheme are not 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 remaining with the same employer.
- RG 49.112 To ensure that our relief does not facilitate participants paying money for financial products for which there is no market, we require that offers of options or incentive rights are made only if they involve 'no more than nominal monetary consideration'. We have defined 'nominal monetary consideration' to involve a 'token or trivial' amount rather than by reference to an absolute or relative value.

Disclosure provided to employees and ASIC

- RG 49.113 Our relief significantly reduces the regulatory and 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 14/1000] therefore requires employees to be given the information set out at RG 49.114–RG 49.118. Our relief requires this information to be presented in a clear, concise and effective manner, and requires the disclosure of general information about the eligible products being offered, and a general warning about seeking independent advice.

Note: For guidance on 'clear, concise and effective' disclosure, see Section B of Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* (RG 228).

Offer document and associated documents

- RG 49.114 Participants must be given an offer document that includes, or is accompanied by, the terms or a summary of the terms of the employee incentive scheme. If a summary is provided, the employer must make a copy of the terms available to the eligible participant on request, and provide this copy free of charge within a reasonable time before the offers are made.
- RG 49.115 The offer document must also provide information, or a copy of associated documents, relating to any special features (e.g. the terms of any loan or contribution plan offered and information on trust arrangements).
- RG 49.116 An offer document and any associated documentation referred to in [CO 14/1000] can be delivered by electronic means. For further guidance on electronic delivery and processing, see Regulatory Guide 107 *Fundraising: Facilitating electronic offers of securities* (RG 107).

Pricing information

- RG 49.117 Employers must provide participants with the Australian dollar acquisition price, or explain how it is to be determined if subject to a formula. The offer document must provide this information and must explain how it will be made available at other times (which may be included on the employer's website).
- RG 49.118 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 incentive rights).

ASIC right to request scheme documents

- RG 49.119 On written request by ASIC, a body must also provide ASIC with a copy of the offer document and any other documentation given, or made available, to employees in connection with the employee incentive scheme. We may request this as part of a targeted or general surveillance, or if we have concerns about compliance by a body with our relief.

Notice of reliance on class order

- RG 49.120 A listed body must notify ASIC no later than one month after first relying on [CO 14/1000], and must do so by completing the ASIC-approved notice of reliance, Form CF08 *Notice of reliance on Class Order [14/1000] Employee incentive schemes: Listed bodies; and Class Order [14/1001] Employee incentive schemes: Unlisted bodies*. The notice must contain certain basic information, including the identity of the issuer, the types of eligible

products being offered, the relevant market on which the underlying eligible products are quoted, and whether a trust, contribution plan or loan is being used to facilitate the offer. This notice will not be publicly available on ASIC's register.

Note: You can [download Form CF08](#) from our website.

- RG 49.121 Further notices of reliance on our relief are only required if the body establishes a new employee incentive scheme in reliance on our relief.

Excluding bodies from relief

- RG 49.122 We may, by giving written notice, exclude a body from relying on [CO 14/1000] when making offers under an employee incentive scheme. This may occur in circumstances, including without limitation, where there is substantial, systemic or repeated non-compliance with the conditions of ASIC relief, corporate governance failure, or non-compliance with the Corporations Act.
- RG 49.123 Breaches of the Corporations Act may include the body having 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 ASIC's 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 14/1000]. We may withdraw the exclusion notice if we consider our concerns have been addressed.

G Unlisted bodies: What relief is available?

Key points

The relief provided in [CO 14/1001] for offers under employee incentive schemes relating to unlisted bodies is more limited than the relief provided for listed bodies. This is because disclosure and pricing information about the financial products relating to unlisted bodies is generally more limited than the information available for listed bodies.

[CO 14/1001] provides relief where:

- offers are for fully paid voting ordinary shares, units in fully paid voting ordinary shares, or options over and incentive rights that relate to fully paid voting ordinary shares;
- the above offers are made for no more than nominal monetary consideration and, in aggregate, do not exceed \$5,000 in value per participant per year;
- the body, when making offers in reliance on ASIC relief, must have reasonable grounds to believe that the number of shares that have been or may be issued under the current offer, when aggregated with offers made under ASIC relief during the previous three years, do not exceed 20% of the issued capital of the unlisted body;
- the valuation of the offer is calculated by reference to a directors' valuation resolution, which also discloses the methodology for the valuation;
- a directors' solvency resolution is included in the offer document; audited financial statements are provided—if these have been prepared, or are required to be prepared under the Corporations Act—or otherwise a special purpose financial report is required to be provided; and the offer document contains an explicit front page warning about illiquidity and realisation of value; and
- the most recent financial year's audited financial statements or special purpose financial report are provided within four months, to current participants on request.

Our approach to offers by unlisted bodies

RG 49.124 In general terms, we apply similar policy considerations to unlisted bodies that we apply to listed bodies. This means that [CO 14/1001] provides relief to unlisted bodies where the employee incentive scheme:

- (a) is designed to support interdependence between the employer and its employees for their long-term mutual benefit by seeking to align their respective interests to enhance shareholder value;
- (b) there are adequate protections for participants, including appropriate disclosure and pricing information about the financial products offered; and
- (c) the objective of the offer is not fundraising.

- RG 49.125 Because unlisted bodies are subject to a lower level of supervision and disclosure than listed bodies, in the absence of a disclosure document, it is more difficult for participants to assess the value of an unlisted body's offer. Therefore, the risks for participants may be higher and the relief we are prepared to grant to unlisted bodies is more restrictive than the relief that we are prepared to grant to listed bodies.

Who can make offers?

- RG 49.126 As many unlisted bodies operate their businesses through corporate groups, [CO 14/1001] is available to an unlisted body and its wholly owned subsidiaries. Relief is extended to include wholly owned subsidiaries because of the direct control the unlisted body has over the wholly owned subsidiary.
- RG 49.127 [CO 14/1001] has not been extended to apply to associated bodies corporate or related bodies corporate that are not wholly owned subsidiaries. This is because the extent of control and interdependence is less in these instances, and would apply in situations that are less transparent than those that apply to listed bodies.

Who can participate in offers (eligible participants)?

- RG 49.128 We consider there is no policy reason to distinguish between participants that should be eligible to receive offers on the basis of whether the offer relates to financial products of a listed body or an unlisted body.
- RG 49.129 The eligible participants are therefore the same for both listed bodies and unlisted bodies and comprise:
- (a) full-time or part-time employees (including executive directors) (see RG 49.33);
 - (b) non-executive directors (see RG 49.38–RG 49.42); and
 - (c) contractors and casual employees who work a 40% pro-rata equivalent of a comparable full-time position (see RG 49.34–RG 49.37).
- RG 49.130 Offers may be able to be made to prospective participants, on condition that they accept a position in one of the categories outlined in RG 49.129 (see also RG 49.43 and our guidance on advertising and hawking relief at RG 49.182–RG 49.184, which may also be relevant to prospective participants).
- RG 49.131 There may be rare instances where we grant individual relief for offers to people who do not meet our definition of 'eligible participant': see RG 49.32.

What financial products can be offered (eligible products)?

Ordinary shares, units in shares, options and incentive rights

- RG 49.132 [CO 14/1001] only provides relief for a body to offer:
- (a) a fully paid voting ordinary share;
 - (b) a unit in a fully paid voting ordinary share;
 - (c) an option to acquire, by way of issue or transfer, a fully paid voting ordinary share; or
 - (d) an incentive right involving a conditional right:
 - (i) to acquire fully paid voting ordinary shares;
 - (ii) to be paid a cash amount that is ultimately determined by reference (either wholly or in part) to:
 - (A) the price or value at a given time of the fully paid voting ordinary shares to which the right relates;
 - (B) a change in the price or value over a given period of the fully paid voting ordinary shares to which the right relates;
 - (C) the amount or value of dividends or distributions paid or payable in relation to the fully paid voting ordinary shares to which the right relates; or
 - (D) a change in the amount or value over a given period of time of dividends or distributions paid or payable in relation to the fully paid voting ordinary shares to which the right relates; or
 - (iii) a combination of RG 49.132(d)(i)–RG 49.132(d)(ii).
- RG 49.133 We have limited the relief in [CO 14/1001] to relate only to fully paid voting ordinary shares because these shares are easier to value, given that they are the most common and easily understood class of shares.
- RG 49.134 Offers of fully paid voting ordinary shares are permitted under [CO 14/1001] on condition that no other classes of shares are offered to eligible participants under an employee incentive scheme in reliance on ASIC relief. Unlisted bodies are not prevented from making offers and issuing different classes of shares, with different rights, under employee incentive schemes, or similar schemes, that are not relying on ASIC relief.
- RG 49.135 While unlisted bodies may wish to offer classes of financial products other than those covered by our relief in [CO 14/1001], we are unlikely to consider individual relief for other classes of financial products (e.g. non-voting shares), given the additional difficulties in determining their value.

What structures can be used?

- RG 49.136 We consider that unlisted bodies should also have the flexibility to structure their arrangements in ways that are efficient or beneficial, provided that those structures do not undermine our policy objectives applicable to employee incentive schemes and the protection of participants.

Trusts

- RG 49.137 We understand that trusts arrangements are used by unlisted bodies to reduce the administration costs associated with offering employee incentive schemes. They can also benefit participants in protecting their beneficial interests by separating these from the other assets of the body.
- RG 49.138 As with listed bodies (see RG 49.79–RG 49.83), we also consider that the use of trusts by unlisted bodies does not undermine our policy objectives for providing relief for employee incentive schemes. [CO 14/1001] gives relief to enable a trust to be used in relation to an unlisted body's employee incentive scheme and imposes conditions similar to those that we have imposed on trusts used by listed bodies: see RG 49.84–RG 49.86.

Licensing relief for trustee services

- RG 49.139 [CO 14/1001] provides relief to a trustee who is the unlisted body, or its wholly owned subsidiary, from the requirement to hold an AFS licence when providing a custodial or depository service, and for dealing in a financial product in the course of providing such a service. We only provide relief from this requirement for bodies on condition that the financial service is merely incidental to the operation of an employee incentive scheme. Alternatively, the unlisted body may engage a trustee who is appropriately licensed or authorised under the Corporations Act. For foreign professional trustees who are not licensed under the Corporations Act, see RG 49.173.

Conditions applying to trusts

- RG 49.140 Our licensing relief in [CO 14/1001] for trusts is subject to similar conditions to those that apply to trusts used by listed bodies, including that:
- (a) the activities of the trust are limited to holding fully paid voting ordinary shares for participants who may become entitled to those products under an employee incentive scheme or similar scheme;
 - (b) the trustee must maintain written records on the administration of the trust and keep details of the fully paid voting ordinary shares where these are being held for a specified eligible participant on an allocated basis;

- (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 disbursements including brokerage and taxes);
- (d) if the trustee is the unlisted body or an associate of the body, the trustee must not, at its own discretion, exercise any voting rights attaching to the ordinary shares; and
- (e) the trustee must not hold more than 20% of the issued capital of the unlisted body.

RG 49.141 The imposition of a 20% holding limit is to limit the distortion of voting power caused by the trustee holding a parcel of financial products that may effectively be quarantined from voting. While this limit applies to all unlisted bodies, it is likely only to operate as a limit for unlisted bodies that have more than 50 members—which is the intention, given that they will be subject to the obligations of Ch 6.

RG 49.142 Where the trustee is the unlisted body or an associate—as defined in Div 2 of Pt 1.2 (except s12 and 16)—of the unlisted body, the trustee must not exercise its own discretion in relation to voting rights attaching to the underlying fully paid voting ordinary shares. This prohibition applies even where the beneficiary has a right to direct the trustee how to vote but does not exercise this right.

RG 49.143 Where the trustee is not the unlisted body or an associate of the unlisted body, the trustee may, subject to the terms of the trust, exercise its own discretion in relation to voting rights attaching to the fully paid voting ordinary shares in accordance with its fiduciary duties as a trustee of the employee incentive scheme trust.

Contribution plans and loans excluded

RG 49.144 We consider that contribution plans and loan arrangements create additional risks and complexity for participants of employee incentive schemes in relation to an unlisted body.

RG 49.145 Given the difficulty in establishing a reliable market price, and the lower level of transparency associated with unlisted bodies, we have imposed a condition that all offers by unlisted bodies and their wholly owned subsidiaries must be made for no more than nominal monetary consideration.

RG 49.146 By definition, contribution plans and loan arrangements require a participant to make a monetary contribution to acquire the ordinary shares. In the case of a loan, the monetary contribution is deferred to a future time when repayment of the loan is required to acquire legal title to the ordinary shares. In some instances, at that future point in time, there may be a reliable market price for the ordinary shares, but this will not always be the case.

What general conditions apply?

Monetary consideration

- RG 49.147 An employment relationship, by its nature, creates interdependence given the exchange of labour for wages or fees.
- RG 49.148 An employee incentive scheme is designed to support that interdependence and to extend it for the longer-term mutual benefit of the employer and the employee. Because employee incentive schemes are offered to participants in exchange for valuable consideration above and beyond their wages or fees, [CO 14/1001] only provides relief for offers made for no more than nominal monetary consideration at the time of the offer.
- RG 49.149 Where more than nominal monetary consideration is required to exercise an option, or for an incentive right to vest, the offer will have the benefit of [CO 14/1001] only if:
- (a) the underlying eligible products (i.e. the fully paid voting ordinary shares) have been quoted on an eligible financial market for at least three months and have not been suspended for more than five trading days during the shorter of the period since quotation and 12 months before the exercise or vesting date; or
 - (b) a valuation document, dated no earlier than one month before it is given to the eligible participant, is given no later than 14 days before exercise or vesting. A valuation document comprises one of the following:
 - (i) a current disclosure document (i.e. an offer information statement or a prospectus) relating to the fully paid voting ordinary shares;
 - (ii) an independent expert's report with an opinion on the value of the fully paid voting ordinary shares; or
 - (iii) a copy of an executed agreement that specifies the value of fully paid voting ordinary shares where these shares are to be acquired on arm's length terms by a third party that is not an associate of the body.

Note: For the meaning of 'arm's length', see Section C of Regulatory Guide 76 *Related party transactions* (RG 76).

- RG 49.150 The policy is designed to protect participants because the disclosure, level of regulatory oversight, and availability of a reliable market price for the unlisted body's shares, options or incentive rights is less transparent, and therefore more difficult to ascertain, than is the case for listed bodies.

Offer limit of \$5,000 per participant per year

- RG 49.151 Given the additional difficulties in establishing a reliable market price, the relief in [CO 14/1001] is only available if the aggregate value of all shares,

options, and incentive rights offered in reliance on [CO 14/1001] in any 12-month period is no more than \$5,000 per participant per year.

- RG 49.152 The value of the offers is calculated based on the most recent directors' valuation resolution, which relates to a valuation of the body or the eligible products. We expect that the valuation will have a reasonable basis.
- RG 49.153 [CO 14/1001] requires that the offer document include (or be accompanied by) the directors' valuation resolution, an explanation of the methodology used by the directors to determine the value, and an explanation of the basis for the valuation.
- RG 49.154 The \$5,000 offer limit is imposed to balance the risks of not providing a disclosure document prescribed by the Corporations Act with the benefits of giving employees incentives and encouraging ownership interests. There are also risks in offering products to employees where there is no reliable market price. Even where there is no monetary consideration required to acquire the shares, our view is that there is always consideration and risk, given that the employee incentive scheme will be one element of a wider remuneration arrangement. We consider that these risks are offset where the offer is of sufficiently low monetary value.

Financial (annual) reports

- RG 49.155 [CO 14/1001] also requires that all offers by unlisted bodies and their wholly owned subsidiaries include an offer document that is accompanied by a copy of an annual report that is either a report under s319 or 601CK, or a special purpose financial report for the most recent financial year of the unlisted body.
- RG 49.156 The financial report does not have to comply with the accounting standards and may be an unaudited special purpose financial report—unless the unlisted body is required under the Corporations Act to prepare and lodge an audited financial report or, where it is not required to do so, it has in any event prepared an audited financial report. If a special purpose financial report is provided, the offer document must contain a prominent warning that the financial statement has not been audited (if relevant) and that it should not be solely relied on for the purposes of deciding whether or not to accept the offer.
- RG 49.157 There is also an obligation to advise participants that they may request a copy of the most recent financial year's annual report while they are participating in the employee incentive scheme. This is to be provided within four months of the request. For example, an unlisted body with a financial year that ends on 30 June, who receives a request before 30 June in a particular year, will have an obligation to provide the previous financial year's report. If the request is received after 30 June in a particular year, the obligation will require the unlisted body to provide that financial year's

30 June report within four months of that request. This is consistent with the longest period it would have to comply under the Corporations Act (i.e. s319(3)(b) if it is not a disclosing entity), or otherwise provides the unlisted body with up to four months to prepare a special purpose financial statement for that financial year.

Note: Eligible participants are participating in the employee incentive scheme only when they are subject to the scheme rules (including any trading restrictions).

Directors' solvency resolution

- RG 49.158 The offer document must also include a copy of a directors' solvency resolution made no earlier than one month before the making of the offer.

Issue limit of 20%

- RG 49.159 Unlike the 5% issue limit applicable to listed bodies, a 20% issue limit applies to offers made under an employee incentive scheme by an unlisted body in reliance on [CO 14/1001]. This is higher for unlisted bodies because the spread of shareholders will be narrower, and unlisted bodies may be less capitalised than listed bodies, which means that a lower limit may not be sufficient to enable broader-based employee share schemes to be offered in the case of unlisted bodies. In addition, while this limit is higher than is available to listed bodies, the risks to participants are mitigated by the condition that offers can only be made for no more than nominal monetary consideration.
- RG 49.160 The 20% issue limit is calculated in the same manner as that applicable to listed bodies (see RG 49.108–RG 49.109)—that is, by aggregating the maximum number of ordinary shares that may be issued under the current offer with the number of ordinary shares that have been issued over the previous three years, in relation only to offers made in reliance on ASIC class relief and similar individual relief. When making the current offer, the body must have reasonable grounds to believe that it will not exceed the 20% issue limit, as calculated under [CO 14/1001].
- RG 49.161 [CO 14/1001] is intended to provide relief in relation to an unlisted body's broader-based employee incentive schemes. Where an unlisted body wishes to make offers that would exceed the 20% issue limit, we would expect the body to rely on the s708 exemptions, as these would be likely to involve larger percentages of shares being offered to persons such as senior managers under s708(12) or other strategic parties: s708(1) or 708(8).

Cover page warning statement

- RG 49.162 Unlike for listed bodies, [CO 14/1001] will also require that the cover page of the unlisted body's offer document contains, in a box and in a minimum font size of 14 points, prominent warning statements to the effect that the

eligible products offered under that document may or may not have any value that is capable of being realised by the eligible participant, and whether the eligible products have any value that is capable of being realised by the eligible participant will depend on future events which may or may not occur.

- RG 49.163 This warning statement is intended to clearly explain the greater uncertainty, and potential financial impact, of offers of financial products in an unlisted body.

Standard conditions

- RG 49.164 Consistent with the requirements imposed on listed bodies, unlisted bodies seeking to rely on [CO 14/1001], when making an offer under an employee incentive scheme, must:
- (a) provide an offer document that is presented in a clear, concise and effective manner;
 - (b) provide copies of, or summaries of, relevant employee incentive scheme documents—including, as relevant, the offer terms and trust arrangements;
 - (c) include in the offer document general information about the risks of acquiring and holding shares, options or incentive rights;
 - (d) prominently state that any advice does not take into account the participant's objectives, financial situation or needs, and that the participant should consider obtaining their own financial product advice;
 - (e) on written request by ASIC, provide ASIC with a copy of the offer document and all other documentation given, or made available, to employees in connection with the employee incentive scheme; and
 - (f) give ASIC a notice of reliance no later than one month after first relying on [CO 14/1001].
- RG 49.165 In addition, ASIC will retain a discretion to determine that an unlisted body or its wholly owned subsidiaries are excluded from being entitled to rely on [CO 14/1001]: see RG 49.122–RG 49.123.

Individual relief for unlisted bodies

- RG 49.166 We may also give individual relief for offers by unlisted bodies that do not meet the specific conditions in [CO 14/1001], if our policy objectives are satisfied.
- RG 49.167 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 may be able to show there is adequate information because the offer complies with another jurisdiction's disclosure requirements for

employee incentive schemes in circumstances that ASIC should regard as appropriate.

Other statutory obligations including Ch 6

- RG 49.168 Employee incentive schemes are designed to, and can, increase the number of members of an unlisted body. We note that proprietary companies must not have more than 50 non-employee shareholders and that the definition of employee under s113(2) covers a narrower range of persons than the definition of participants of an employee incentive scheme under [CO 14/1001].
- RG 49.169 In addition, we also note that an unlisted company with more than 50 members (regardless of whether or not they are employees) will be subject to the takeover provisions in Ch 6.

H Listed and unlisted bodies: Incidental relief and transitional arrangements

Key points

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

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

Under transitional arrangements, we have also provided 'grandfathered' relief for offers made under employee incentive schemes in reliance on [SCO 03/184], [CO 04/671] or individual relief.

Our approach to licensing and other relief

RG 49.170 If an offer made under an employee incentive scheme qualifies for disclosure relief—under either [CO 14/1000] or [CO 14/1001], or under individual relief based on [CO 14/1000] or [CO 14/1001]—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 49.172–RG 49.179); and
- (b) relief from the requirements in Ch 5C for managed investment schemes (i.e. for contribution plans offered in relation to listed bodies only) (see RG 49.180–RG 49.181).

RG 49.171 We will also grant relief from the advertising, hawking and on-sale provisions where the body has made an offer to eligible participants in reliance on our class orders.

Licensing relief

RG 49.172 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, or an unlisted body and its wholly owned subsidiaries.

- RG 49.173 Where issuers use a professional trustee to manage their employee incentive schemes, the trustee must have an appropriate licence authorisation under an AFS licence. We will consider individual relief for foreign professional trustees that provide trustee services to foreign bodies who offer global employee incentive schemes where the body, or its associated bodies corporate (or wholly owned subsidiaries if it is an unlisted body), has Australian participants that represent no more than 5% of the body's employee incentive scheme participants on a global basis. In considering whether to grant relief, we will take into account:
- (a) the licence and authorisations that the foreign professional trustee holds in its home jurisdictions, as well as other foreign markets in which it provides its services;
 - (b) the types of Australian-based financial services it is seeking relief for; and
 - (c) the extent of its current or proposed future trustee services for which ASIC relief may be required—for example:
 - (i) the scope of its custodial and depository services;
 - (ii) any other financial services it provides;
 - (iii) the number of bodies to whom the trustee provides, or intends to provide, employee incentive schemes; and
 - (iv) the number of Australian participants participating in, or expected to participate in, such schemes.

Financial product advice

- RG 49.174 The Corporations Act may require a body to hold an AFS licence when providing 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 in this regard.
- RG 49.175 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. In addition, our class order provides relief to AFS licensees, or their authorised representatives, who make a recommendation when providing financial product advice, from the requirement to give the participant a PDS, provided that the adviser has no reason to believe the employee incentive scheme is not covered by our relief.

Dealing

- RG 49.176 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 or, if unlisted, its unlisted parent entity).

RG 49.177 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 appears to be adequate protection for participants. For example, under [CO 14/1000], the dealing must be carried out by a person authorised to do so—which, for products able to be traded on ASX, will be a licensed securities dealer or AFS licensee; and for financial products able to be traded on an approved foreign market, will be a person licensed or otherwise authorised to deal in financial products of that kind in that jurisdiction.

Custodial or depository services

RG 49.178 If an employee incentive scheme involves the use of 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 that service.

RG 49.179 [CO 14/1000] and [CO 14/1001] provide 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 appears to be adequate protection for participants. We have therefore imposed as conditions of relief that:

- (a) the custodial service is provided by:
 - (i) the issuer or its associated bodies corporate for listed bodies; or
 - (ii) the issuer or its wholly owned subsidiaries for unlisted bodies; 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 49.180 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 49.181 We have granted relief in [CO 14/1000] from the registration and licensing requirements for persons who operate a contribution plan in the context of an employee incentive scheme.

Advertising relief

- RG 49.182 No relief for advertising is required for offers of a security (under Ch 6D) because the advertising prohibition only applies where a disclosure document is required, and [CO 14/1000] and [CO 14/1001] have the effect of removing the requirement for a disclosure document. However, there is no equivalent exclusion from the advertising prohibitions for financial products covered by Pt 7.9. Our class orders therefore provide relief from the advertising restrictions in s1018A for eligible products that are covered by Pt 7.9.
- RG 49.183 A condition of our class relief is that bodies notify ASIC of reliance on our relief no later than one month after first relying on the relief. This means that bodies and their advisers should be mindful that activities associated with advertising (and also in relation to hawking, as discussed below) are likely to be the first occasions on which a body and its trustees (if any) may be relying on relief under [CO 14/1000] and [CO 14/1001].

Hawking relief

- RG 49.184 We have given relief in [CO 14/1000] and [CO 14/1001] from the prohibitions on hawking in s736, 992A and 992AA, where an employee incentive scheme is offered in reliance on our relief. The hawking provisions may otherwise apply to prohibit unsolicited meetings or telephone calls reasonably held or made in connection with the offer. To be exempt from these provisions, offers under the employee incentive scheme must be for eligible products and made only to eligible participants.

On-sale relief

- RG 49.185 The on-sale provisions in s707 and 1012C may apply if eligible products are acquired by participants, or by trustees in anticipation of being transferred to participants, under an employee incentive scheme because they have been provided without a disclosure document. These anti-avoidance provisions are not warranted for an employee incentive scheme that is made in reliance on our relief because the eligible products are being issued to enhance the relationship between the employer and its employees, rather than to avoid the disclosure requirements in the Corporations Act.
- RG 49.186 We have therefore granted relief in [CO 14/1000] and [CO 14/1001] from the on-sale provisions for employee incentive schemes that rely on our relief. We have not extended on-sale relief to cover arrangements similar to employee incentive schemes that are not relying on our relief, given that our relief is conditional on providing a level of disclosure, and that additional conditions are imposed on the relief, that would not apply where a body is seeking to rely on a statutory exemption from disclosure under the Corporations Act.

Transitional arrangements

- RG 49.187 Before the commencement of [CO 14/1000] and [CO 14/1001], listed bodies and unlisted bodies may have relied on, or may have approved the implementation of employee incentive schemes in reliance on relief provided under [SCO 03/184] (and [CO 04/671]) or similar individual relief. Offers may continue to be made under these employee incentive schemes, and they may also give rise to continuing obligations requiring ongoing relief for a period of time (which may last for a number of years) after the initial offer is made. Accordingly, in these circumstances, relief under [SCO 03/184] and [CO 04/671] will be ‘grandfathered’ under [CO 14/1000] and [CO 14/1001].
- RG 49.188 We will consider individual relief for any variation of the transitional arrangements in rare and exceptional circumstances.

Personal offers exemption

- RG 49.189 The exemption from disclosure for personal offers (not exceeding 20 offers in 12 months and not exceeding \$2 million in total) under s708(1) would not be available to a body that relies on [CO 14/1000] or [CO 14/1001] because offers under these class orders would not be excluded from the personal offers limitation under s708(5).
- RG 49.190 ASIC has made [CO 14/978] to provide relief to enable a body to continue to make offers under s708(1), despite the body relying on ASIC’s relief for employee incentive schemes. We consider that relief under [CO 14/978] is consistent with the policy underpinning the exclusion of the types of offers made under s708(5)—that is, in imposing conditions on our employee incentive scheme relief, there are sufficient safeguards for participants such that a body should not be prevented from continuing to be entitled to make personal offers without any disclosure under s708(1).

Key terms

Term	Meaning in this document
able to be traded	Has the meaning given in s761A of the Corporations Act
advertising relief	Relief from the prohibition in s734 and 1018A 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.
annual report	Means: • for a body that is subject to Pt 2M.3 of the Corporations Act—the most recent reports required by s319 of the Act to be lodged with ASIC; • for a body that is a registered foreign company—the most recent reports required by s601CK of the Corporations Act to be lodged with ASIC; or • otherwise—a special purpose financial report covering the most recent financial year of the body
approved foreign market	Any of the financial markets listed in [CO 14/1000]
ASIC	Australian Securities and Investments Commission
associate	Has the meaning given in Div 2 of Pt 1.2 of the Corporations Act (except s12 and 16)
associated body corporate	For a listed body, a body corporate: • that is a related body corporate of the body; • that has voting power in the body of not less than 20%; or • in which the body has voting power of not less than 20%
ASX	The exchange market operated by ASX Limited
Australian ADI	Australian authorised deposit-taking institution—has the meaning given in s9 of the Corporations Act
Australian CDI	A CHESS Depository Interest traded on ASX, with a share or stock as the underlying security
casual employee	In relation to a body, an individual who is, or might reasonably be expected to be, engaged to work the number of hours that are the pro-rata equivalent of 40% or more of a comparable full-time position with the body
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7)

Term	Meaning in this document
[CO 14/1000] (for example)	An ASIC class order (in this example numbered 14/1000) Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
contractor	In relation to a body: • an individual with whom the body has entered into a contract for the provision of services under which the individual performs work for the body; or • a company with whom the body has entered into a contract for the provision of services under which an individual, who is a director of the company or their spouse, performs work for the body. The individual who performs the work under or in relation to the contract must, or reasonably be expected to, be engaged to work the number of hours that are the pro-rata equivalent of 40% or more of a comparable full-time position with the body
contribution plan	A plan under which an eligible participant may make monetary contributions to acquire eligible products, whether made before or after the acquisition, from one or more of the following: • gross (before-tax) wages or salary; • net (after-tax) wages or salary; and/or • other monies
Corporations Act	<i>Corporations Act 2001</i> , including any regulations made for the purposes of that Act
depository interest	Means: • Australian CDIs, able to be traded on ASX, where the underlying security is a share or stock; or • depository interests that are able to be traded on an approved foreign market where the underlying security is a share or stock
disclosure document	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
directors' solvency resolution	A resolution that, in the opinion of the directors of an unlisted body, there are reasonable grounds to believe that the body will be able to pay its debts as and when they become due and payable
directors' valuation resolution	A resolution of the directors of an unlisted body, which relates to a valuation of the body or its eligible products, and is used to determine the value of an offer of eligible products to an eligible participant

Term	Meaning in this document
eligible financial market	ASX or an approved foreign market
eligible participant	Means: • full-time or part-time employees (including executive directors); • non-executive directors; • contractors; • casual employees; and • prospective participants. Where the issuer is listed on ASX or an approved foreign market, eligible participants can be engaged by either the issuer or its associated bodies corporate. Where the issuer is an unlisted body, eligible participants can be engaged by either the issuer or its wholly owned subsidiaries
eligible products	For listed bodies: (a) fully paid ordinary shares in a class able to be traded on ASX; (b) fully paid ordinary shares or stocks in a class able to be traded on an approved foreign market; (c) depository (beneficial) interests in a class able to be traded on an eligible financial market; (d) fully paid units in registered schemes in a class able to be traded on ASX (e) fully paid stapled securities in a class able to be traded on ASX; (f) options over, or units in, any of the products in paragraphs (a)–(e); and (g) incentive rights relating to any of the products in paragraphs (a)–(e). For unlisted bodies: (a) fully paid voting ordinary shares; (b) options over, or units in, fully paid voting ordinary shares of the body; and (c) incentive rights granted in relation to fully paid voting ordinary shares
employee incentive scheme	A scheme that is designed to support interdependence between a body and its eligible participants for their long-term mutual benefit
employee share scheme	Has the meaning given in s9 of the Corporations Act
expert	Has the meaning given in s9 of the Corporations Act

Term	Meaning in this document
financial product advice	Has the meaning given in s766B of the Corporations Act
general advice	Has the meaning given in s766B of the Corporations Act
grandfathered relief	Employee share scheme relief provided to bodies that have made offers in reliance on [SCO 03/184], or have established employee incentive schemes by approval from directors or members, before the commencement of [CO 14/1000] and [CO 14/1001]
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 eligible participants for the purposes of an employee incentive scheme
incentive right	A conditional right: (a) to acquire underlying eligible products; (b) to be paid a cash amount that is ultimately determined by reference (either wholly or in part) to: (i) the price or value at a given time of the underlying eligible product to which the right relates; (ii) a change in the price or value over a given period of the underlying eligible product to which the right relates; (iii) the amount or value of dividends or distributions paid or payable in relation to the underlying eligible product to which the right relates; or (iv) a change in the amount or value over a given period of time of dividends or distributions paid or payable in relation to the underlying eligible product to which the right relates; or (c) to acquire or be paid a combination of underlying eligible products and a cash amount as determined in accordance with paragraph (b)
issuer	The body issuing an 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
listed body	A body that is listed on an eligible financial market
nominal monetary consideration	Monetary consideration of a token or trivial amount
notice of reliance	In relation to a particular employee incentive scheme, a written notice in a form approved in writing by ASIC and which includes the information, statements, explanations or other matters required: see Form CF08

Term	Meaning in this document
offer	In relation to an eligible product, has a meaning affected by s700, 702 and 1010C of the Corporations Act and includes: • an offer to issue the eligible product; • an issue or grant of the eligible product; • an offer to transfer the eligible product; • a transfer of the eligible product; and • an offer to arrange for the issue or transfer of the eligible product
offer document (listed bodies)	In relation to an employee incentive scheme of a listed body, a document which includes, or is accompanied by, the following information, statements and explanations worded and presented in a clear, concise and effective manner: • prominent statements to the effect that: – any advice given by the body in relation to eligible products offered under the employee incentive scheme does not take into account an eligible participant's objectives, financial situation and needs; and – eligible participants should consider obtaining their own financial product advice from a person who is licensed by ASIC to give such advice; • either: – a copy of the terms of the employee incentive scheme; or – a summary of the terms of the scheme together with a statement that, on request and at no charge and within a reasonable time, the body will provide an eligible participant with a copy of the terms of the scheme; • general information about the risks of acquiring and holding an eligible product being offered under the scheme; • if a trustee will hold underlying eligible products in connection with the employee incentive scheme—either: – a copy of the trust deed; or – a summary of the terms of the trust deed together with a statement that, on request and at no charge and within a reasonable time, the body will provide an eligible participant with a copy of the trust deed; • if the employee incentive scheme involves a contribution plan—either: – a copy of the contribution plan; or – a summary of the terms of the contribution plan together with a statement that, on request and at no charge and within a reasonable time, the body will provide an eligible participant with a copy of the terms of the contribution plan;

Term	Meaning in this document
offer document (unlisted bodies) (cont.)	• if the employee incentive scheme involves a loan from the body or an associated body corporate to an eligible participant to acquire the product—a copy of the terms of the loan; • the acquisition price of the eligible products in Australian dollars or, where the acquisition price is to be worked out in the future under a formula, an explanation of how an eligible participant could calculate the acquisition price of the eligible products in Australian dollars were that formula applied at the date of the offer; and • an explanation of how an eligible participant could, from time to time, calculate the market price of the underlying eligible products in Australian dollars
offer document (unlisted bodies)	In relation to an employee incentive scheme of an unlisted body, a document which includes, or is accompanied by, the following information, statements and explanations worded and presented in a clear, concise and effective manner: • on the cover page of the offer document, in a box and in a minimum font size of 14 points—prominent statements to the effect that: – the eligible products offered under this document may or may not have any value that is capable of being realised by an eligible participant; and – whether the eligible products have any value that is capable of being realised by an eligible participant will depend on future events which may or may not occur; • prominent statements to the effect that: – any advice given by the body in relation to eligible products offered under the employee incentive scheme does not take into account an eligible participant's objectives, financial situation and needs; – eligible participants should consider obtaining their own financial product advice from a person who is licensed by ASIC to give such advice; and – eligible participants may, at any time during the operation of the employee incentive scheme, make a request to be given, without charge, a copy of the most recent annual report; • if the annual report required to accompany the offer document is a special purpose financial report—prominent statements to the effect that: – the financial report that accompanies this offer document is a special purpose financial report that has been prepared to inform members of the body of the body's financial position and performance; – if applicable—the special purpose financial report has not been audited; and – eligible participants participating in the employee incentive scheme should not solely rely on the special purpose financial report;

Term	Meaning in this document
offer document (unlisted bodies) (cont.)	• either: – a copy of the terms of the employee incentive scheme; or – a summary of the terms of the scheme together with a statement that, on request and at no charge and within a reasonable time, the body will provide an eligible participant with a copy of the terms of the scheme; • general information about the risks of acquiring and holding an eligible product being offered under the scheme; • if a trustee will hold underlying eligible products in connection with the employee incentive scheme—either: – a copy of the trust deed; or – a summary of the terms of the trust deed together with a statement that, on request and at no charge and within a reasonable time, the body will provide an eligible participant with a copy of the trust deed; and • an explanation of the methodology used or adopted by the directors of the body for the purposes of the directors' valuation resolution Note: The offer document must be accompanied by the most recent directors' valuation resolution.
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	In relation to employee incentive schemes of unlisted bodies, fully paid voting ordinary shares
PDS (Product Disclosure Statement)	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
	Note: See s761A for the exact definition.
prospective participant	A person to whom an offer of an eligible product under an employee incentive scheme is made, but who can only accept the offer if an arrangement is entered into that will result in the person becoming an eligible participant of a kind other than a prospective participant
Pt 5C (for example)	A part of the Corporations Act (in this example, numbered 5C), unless otherwise specified
registered scheme	Registered managed investment scheme
related body corporate	Has the meaning given in s50 of the Corporations Act

Term	Meaning in this document
RG 49 (for example)	An ASIC regulatory guide (in this example numbered 49)
s707 (for example)	A section of the Corporations Act (in this example numbered 707)
special purpose financial report	A balance sheet and profit and loss statement prepared in accordance with a financial reporting framework designed to meet the financial information needs of specific users
stapled securities	Two or more financial products which, under the terms on which each is traded, must be transferred together
trustee	A body that holds, or will hold, underlying eligible products on trust for participants who may become entitled to the products under an employee incentive scheme
underlying eligible products	For listed bodies, eligible products other than options, units or incentive rights For unlisted bodies, fully paid voting ordinary shares
unit	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
unlisted body	A body that is not listed on an eligible financial market
valuation document	For an unlisted body offering options or incentive rights for more than nominal monetary consideration: • a current disclosure document for an offer of shares in the same class as the shares to which the options or rights relate; • an independent expert's report that contains an opinion on the value of a share in the same class as the shares to which the options or rights relate; or • a copy of an executed agreement under which shares in the same class as shares to which the options or rights relate are to be acquired on arm's length terms by a third party that is not an associate of the body and which specifies a value of a share in that class

Related information

Headnotes

associated bodies corporate, contribution plan, depository interests, derivatives, disclosure, employee incentive scheme, employee share scheme, financial product, incentive rights, listed bodies, loan, managed investment scheme, non-executive director, offer information statement, options, participants, Product Disclosure Statement, prospectus, registered schemes, securities, stapled securities, trusts, unlisted bodies

Class orders and legislative instruments

ASIC Corporations (Compromises or Arrangements) Instrument 2015/358

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

[CO 04/899] *Definition of ‘senior manager’—modification*

[CO 14/978] *Employee incentive schemes: Personal offers*

[CO 14/1000] *Employee incentive schemes: Listed bodies*

[CO 14/1001] *Employee incentive schemes: Unlisted bodies*

[SCO 03/184] *Employee share schemes*

Regulatory guides

RG 72 *Foreign securities: Disclosure relief*

RG 76 *Related party transactions*

RG 107 *Fundraising: Facilitating electronic offers of securities*

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 2M, 5C, 6, 6D, 7, Pts 1.2, 2J, 2J.2, 2J.3, 5C, 5.1, 7.9, s9, 12, 16, 113(2), 260B, 260C, 300, 300A, 319, 601CK, 601ED, 674(2), 675(2), 707, 708, 708A(2), 708AA(3), 713(6), 734, 736, 761D, 761D(3)(b), 766B, 766C(4), 992A, 992AA, 1012C, 1012D, 1012E, 1018A, 1018B

Explanatory Memorandum to the Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007, para 5.21

Superannuation Industry (Supervision) Act 1993

Media and other releases

MR 13-310 *ASIC to update its employee share scheme policy and class order*, 14 November 2013

ASIC forms

Form CF08 *Notice of reliance on Class Order [CO 14/1000] Employee incentive schemes: Listed bodies; and Class Order [CO 14/1001] Employee incentive schemes: Unlisted bodies*

Other documents

ASX Corporate Governance Council's Corporate Governance Principles and Recommendations, 3rd edition, 2014

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

Australian Institute of Company Directors, *Non-executive director remuneration*, policy paper, January 2003

Investment and Financial Services Association Limited (IFSA), *Corporate governance: A guide for fund managers and corporations* (IFSA Blue Book), June 2009

House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared endeavours: Inquiry into employee share ownership in Australian enterprises*, report, September 2000

G Nuttall, *Sharing success: The Nuttall review of employee ownership*, independent review for UK Department of Business, Innovation and Skill, July 2012