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TO: Corporations team
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001
By email: ess@asic.gov.au

31 October 2022

Dear Sir/Madam,

CONSULTATION PAPER 364: MODIFICATIONS TO THE ESS REGIME (OCTOBER 2022)

We refer to ASIC's ("**ASIC**") Consultation Paper 364: Modifications to the ESS regime following the commencement of Schedule 4 of *Treasury Laws Amendment (Cost of Living Support and Other Measures) Act 2022* and Division 1A of Part 7.12 of the *Corporations Act 2001* ("**Legislative Amendments**"). The Automic Group ("**Automic**") welcomes the opportunity to comment on these Legislative Amendments.

Automic offers a unique combination of Registry, Company Secretarial, Accounting, Investor Relations and Media/Communication services, specifically to ASX listed entities. At present, approximately 27% of the ASX listed entities utilise one or more of our services.

Our Company Secretarial team has formulated this response to the Legislative Amendments based on their representation of these ASX listed companies, as well as their extensive experience and expertise in helping over 100 companies successfully manage their company secretarial functions.

We have included in the Annexure a table setting out our submissions on a small number of the Legislative Amendments. Other than as identified in the Annexure, we did not have any comments on the other Legislative Amendments.

We welcome the opportunity to work with and engage with ASIC further in relation to these Legislative Amendments. Please let us know if you have any questions or would like to discuss our response.

Yours faithfully

[redacted]

Head of Company Secretarial at Automic Group

Annexure – Automic's Submissions

#	Issue	Submission
B1	We propose to notionally modify s1100ZD to expand the secondary sale exemption for financial products that are quoted on a financial market covered by s1100K and where the issuer had no on-sale purpose at the time of issue: notional s1100ZD(2). We will also notionally modify s1100ZD for unquoted products so that a person who acquired the product from the original recipient can on-sell it to ESS participants: notional s1100ZD(1)(c).	
B1Q1	Do you agree with the proposed modification to s1100ZD to expand the secondary sale exemption for quoted products?	We agree with the expanded secondary sale exemption (**Exemption**) for quoted products. However, we note that a condition of the Exemption is proposed new section 1100ZD(2)(d), which provides: *the body corporate or the responsible entity of the scheme did not issue the financial product with the purpose of the person to whom the financial product was issued:* *(i) selling or transferring the financial product; or* *(ii) granting, issuing or transferring interests in, or options or warrants over, the financial product* We question whether this provision will limit our clients' ability to rely upon the Exemption given it is commonplace for the person to whom the financial product was issued to ultimately sell or transfer the financial product to help pay their tax liabilities that have arisen from the issue of the same financial product. As noted within the Consultation Paper, ASIC has received the following feedback (which we endorse): 1. most of these ESS plans are predicated on participants being able to sell the financial products they receive on-market without restriction as to the potential purchasers; and 2. not all listed entities have the cash to acquire ESS interests in the secondary market, there can be tax implications with doing so and they are not always able to rely on the cleansing notice regime in s708A. We therefore question whether an entity that has an ESS plan which is "predicated on participants being able to sell the financial products they receive" would be able to rely upon the Exemption given proposed section 1100ZD(2)(d) and if it is not, would argue that the Exemption does not go

		far enough to rectify the unintended difficulties with the way the ESS provisions apply. Further guidance on this matter would be appreciated. We submit that a Company's ability to cleanse the market pursuant to section 708A of the *Corporations Act 2001* following the issue of securities is of concern to our clients.
B1Q2	What costs are you likely to incur if ASIC does not expand the on-sale exemption in s1100ZD in the way proposed? Are there additional costs associated with ASIC's proposal to grant relief? Please specify in both cases how such costs are likely to be incurred.	If ASIC does not expand the on-sale exemption in section 1100ZD of the *Corporations Act 2001*, we believe a significant number of our ASX listed clients will require a more complex and expensive employee share scheme. Our clients that are not able to rely upon the cleansing notice regime in s708A will, generally speaking, be required to either: 1. acquire quoted ESS securities on-market; or 2. establish an employee plan trust to hold quoted ESS securities for 12 months. The former will require the use of the Company's cash which is not only counter intuitive to having issued cash preserving ESS securities but susceptible to the volatility of the underlying share price. Whilst the latter will require the additional costs associated with establishing and maintaining the trust. The additional complexity of these employee share schemes will likely give rise to further administrative costs due to the need for companies to explain to its ESS participants the rules and operation of their respective ESS.
B1Q3	Are there any requirements in our proposed modification that will cause difficulties?	As per our response to B1Q1, guidance would be appreciated on how the new subsection 1100ZD(2)(d) of the *Corporations Act 2001*, would practically operate/be complied with. In addition to being able to sell quoted ESS securities to pay a tax liability arising from the issue of the same ESS securities, we submit that the very nature of an ESS security is to be an incentive to the ESS recipient and therefore there is an expectation that a number of those ESS recipients will look to crystalise a positive financial outcome by selling their quoted ESS securities upon vesting. An ESS recipient should be able to crystalise the positive financial outcome by selling the quoted ESS securities at their convenience.

		We submit that ASIC should give effect to the historic Class Order 14/1000 to extend the on-sale exemption to any securities issued to ESS participants pursuant to Division 1A of Part 7.12 of the *Corporations Act 2001* by amending or omitting paragraph (d) of the proposed section 1100ZD(2) to permit the on-sale of securities if a company has complied with its disclosure obligations.