

## **EXPLANATORY STATEMENT for ASIC CORPORATIONS (AMENDMENT) INSTRUMENT 2015/943**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (ASIC) makes *ASIC Corporations (Amendment) Instrument 2015/943* under subsections 283GA(1), 601QA(1), 741(1), 926A(2), 992B(1) and 1020F(1) and paragraph 911A(2)(l) of the *Corporations Act 2001*.

*ASIC Corporations (Amendment) Instrument 2015/943* amends ASIC Class Order [CO14/1000] *Employee incentive schemes: Listed bodies* and ASIC Class Order [CO14/1000] *Employee incentive schemes: Unlisted bodies*. Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the *Corporations Act 2001*), where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

### **1. Background**

In October 2014, ASIC released two new class orders ([CO14/1000] and [CO14/1001]) which significantly changed ASIC's previous policy in relation to employee share schemes. These class orders made it easier for both listed and unlisted companies to offer financial products to their employees under employee incentive schemes, while still ensuring adequate protection for employees investing in financial products through these schemes.

[CO14/1000] and [CO14/1001] provide relief to listed and unlisted bodies who operate an employee incentive scheme from the requirement to comply with a range of requirements and restrictions under the *Corporations Act* relating to disclosure, financial services licensing, managed investment schemes, advertising, hawking and on-sale of securities. They also impose conditions on the relief in order to maintain some protections for employees which ASIC considers important in light of its overarching policy objective of ensuring confident and informed investors.

As a result of industry feedback since the release of [CO14/1000] and [CO14/1001], ASIC has decided to make minor amendments to improve the drafting of provisions and provide industry with greater certainty around the operation and application of the relief. The amendments do not change ASIC's general policy settings in relation to employee incentive schemes and will not substantially alter the existing regulatory arrangements under [CO14/1000] and [CO14/1001].

The explanatory statement to [CO14/1000] and [CO14/1001] released in October 2014 provides further detail on the underlying policy and operation of those class orders. This explanatory statement sets out the purpose and operation of the amending instrument.

### **2. Purpose of the instrument**

The purpose of *ASIC Corporations (Amendment) Instrument 2015/943* is to make changes to [CO14/1000] and [CO14/1001] to clarify the intended operation and scope of the relief.

The amending instrument is necessary to ensure the relief contained in [CO14/1000] and [CO14/1001] aligns with the intended policy as outlined in the explanatory statement to [CO14/1000] and [CO14/1001] and ASIC Regulatory Guide 49 *Employee incentive schemes*. The purpose of the amending instrument is also to reduce unnecessary repetition and remove certain unintended practical burdens of complying with the conditions set out in [CO14/1000] and [CO14/1001].

### 3. Operation of the instrument

The definition of "employee incentive scheme" has also been simplified. Although the definition is broad, the relief provisions (and consequently the conditions of relief) only apply to offers of eligible products to eligible participants covered by the instrument. For the avoidance of doubt, new subparagraph 29(ca) has been inserted in the interpretation section of [CO 14/1000] (with a corresponding subparagraph 29(ba) in [CO14/1001]) to clarify that an employee incentive scheme is covered by the instrument to the extent that offers are made and conduct carried out in reliance on the relief. There may be other offers made under the same employee incentive scheme which are not made in reliance on the relief and are not covered by the instrument.

In the provisions requiring a company to give ASIC a notice of reliance, the reference to a person "relying on this instrument" has been removed because it is not required. Both [CO14/1000] and [CO14/1001] must be read as a whole, and the conditions only apply to the extent that the relief is relied upon.

The definition of "offer" has similarly been amended to clarify that it does not extend to an issue, grant or transfer of a product as a result of the exercise or vesting of a product which had previously been made. In other words, the conditions of relief (e.g. providing an offer document) do not re-enliven merely because the product acquired under the employee incentive scheme has vested or a right has been exercised.

A condition of relief is that a body must provide a participant with an offer document. Where a trustee will hold the products, the offer document must be accompanied by a copy of the trust deed or a summary of its terms. The definition of "offer document" has been amended so that this condition only applies if the trustee will hold the products on an allocated basis, where the participant has the right to exercise any rights and receive any income from the products.

Subparagraph 20(e) of both instruments has been amended to provide that, when calculating the percentage of voting shares held by a trustee, products which have been acquired as a result of offers made in reliance on individual relief instruments must also be counted in addition to those products offered in reliance on [CO14/1000] or [CO14/1001].

There are other common amendments to [CO14/1000] and [CO14/1001] of a machinery nature. [CO14/1000] has additional amendments to the provisions which are not contained in [CO14/1001].

#### **[CO14/1000] amendments**

##### (a) Offers of unquoted products

In [CO14/1000], paragraph 18A has been inserted to clarify that offers of products that are not able to be traded on an eligible financial market must be made for no more than nominal monetary consideration. The reason for the prohibition on paying money to acquire unquoted products is that it is difficult for many employees to determine the value of such a product. This is consistent with the guidance in RG49 and the rationale behind the condition in subparagraph 21(b) of [CO 14/1000] restricting the use of contribution plans to acquire options and incentive rights. For consistency, the condition in subparagraph 21(b) has also been amended to remove the unintended restriction on contribution plans which are used to acquire a product that is able to be traded on an

eligible financial market (eg quoted options). The restriction on the use of contribution plans remains in relation to unquoted products.

(b) Conditions relating to contribution plans

Subparagraph 21(d) requires a body to ensure that, where products have been acquired using contributions from a participant, the participant has the right to exercise voting rights and receive income, where applicable, from the products. This has been amended to clarify that this condition applies where a trustee holds the products on an allocated basis, as it would be impractical to comply with the condition if the products were acquired and held on an unallocated basis.

It would also be impractical for a body to comply with the condition requiring a body to ensure that a participant can discontinue their participation in the contribution plan in circumstances where the participant has received the products upfront, but still must make contributions to pay for those products. Accordingly subparagraph 21(e) has been amended so that a body does not have to allow a participant to discontinue participation in a contribution plan to the extent that those contributions are still required to pay for products already issued.

(c) Interpretation

The definition of "contribution" has been inserted to clarify that, for the purpose of a contribution plan, payments made in order to exercise options or cause incentive rights to vest, are not considered to be contributions towards the product initially granted under the employee incentive scheme. Nominal payments and one-off payments where the products are issued to the employee immediately (or as soon as practicable) are also not contributions. However, contributions can include payments made before or after the product has been acquired.

#### **4. Consultation**

Formal consultation was not conducted, because the amendments are minor and machinery in nature and do not impact the policy behind the relief. No Regulation Impact Statement is required. Targeted discussion on the amendments relating to contribution plans was undertaken with representatives from at least three different leading law firms in order to obtain their views given the technical nature of the relief and their particular expertise in the subject matter.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

*ASIC Corporations (Amendment) Instrument 2015/943*

*ASIC Corporations (Amendment) Instrument 2015/943 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.*

### **Overview**

*ASIC Corporations (Amendment) Instrument 2015/943 makes minor and machinery amendments to ASIC Class Orders [CO14/1000] and [CO14/1001]. These class orders apply to employee incentive schemes of listed and unlisted bodies, and give relief from requirements in the Corporations Act 2001 in relation to product disclosure, financial services licensing, hawking and advertising in connection with offers of financial products made under an employee incentive scheme.*

### **Human rights implications**

*ASIC Corporations (Amendment) Instrument 2015/943 does not engage any of the applicable rights or freedoms.*

### **Conclusion**

*ASIC Corporations (Amendment) Instrument 2015/943 is compatible with human rights as it does not raise any human rights issues.*

**Australian Securities and Investments Commission**