



**ASIC**  
Australian Securities &  
Investments Commission

# Explanatory Statement

## *ASIC Corporations (Amendment) Instrument 2022/1022*

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2022/1022*.

The Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

### Summary

1. The instrument terminates the ability of entities to make new offers under ASIC Class Order [CO 14/1000] *Employee incentive schemes: Listed bodies* or ASIC Class Order [CO 14/1001] *Employee incentive schemes: Unlisted bodies* from 1 March 2023.

### Purpose of the instrument

2. Class order 14/1000 and 14/1001 (**EIS class orders**) provide exemptions from the *Corporations Act 2001 (Corporations Act)* so that entities can offer financial products to employees and other ‘eligible participants’ under an employee incentive scheme. The main exemption provided by the class orders is from the disclosure requirements in Ch 6D and Ch 7. The EIS class orders also provide incidental relief from Australian Financial Services (**AFS**) licensing requirements in Ch 7, the requirements in Ch 5C that may apply to contribution plans and the on-sale restrictions in Chapters 6D and 7 (**incidental relief**).
3. However, entities are now able to operate employee share schemes under Div 1A of Pt 7.12 (**ESS provisions**) of the *Corporations Act*. The ESS regime contains broad, conditional regulatory exemptions for employee share schemes and is intended to replace the EIS class orders. *ASIC Corporations (Amendment) Instrument 2022/1022* therefore terminates the ability to make new offers under the EIS class orders from 1 March 2023. The instrument does not terminate other relief provided by the EIS class orders because financial products issued under the class orders continue to require relief for secondary sales and licensing.

### Consultation

4. ASIC consulted with the Law Council of Australia and advisors who work on employee share schemes about the termination arrangements for the EIS class orders. As a result of that feedback, the instrument only terminates the ability of

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entities to make new offers under the EIS class orders but does not terminate the following incidental relief:

- (a) the relief from AFS licensing requirements in Ch 7;
  - (b) the relief from the requirements in Ch 5C that may apply to contribution plans; or
  - (c) the relief from the on-sale restrictions in Chs 6D and 7,
5. ASIC also foreshadowed our approach to the EIS class orders in Consultation Paper 364 *Modifications to the ESS regime* at paragraphs 7 to 9.

### **Operation of the instrument**

6. *ASIC Corporations (Amendment) Instrument 2022/1022* amends [CO 14/1000] and [CO 14/1001] so that the disclosure relief for primary offers provided by those class orders only applies if the offer is made before 1 March 2023 and is only capable of acceptance until 1 April 2024.
7. *ASIC Corporations (Amendment) Instrument 2022/1022* does not terminate any of the incidental relief provided by the EIS class orders because financial products issued pursuant to the class orders continue to require those exemptions.
8. *ASIC Corporations (Amendment) Instrument 2022/1022* commences on the day after it is registered on the Federal Register of Legislation Instruments.

### **Amendments made by the instrument**

9. Paragraph 5 and 6 of [CO 14/1000] and [CO 14/1001] provide that an offer under an employee incentive scheme does not have to comply with Part 6D.2 or Part 7.9 of the Act. *ASIC Corporations (Amendment) Instrument 2022/1022* amends paragraphs 5 and 6 of [CO 14/1000] so that this disclosure exemption will only apply if the offer is made before 1 March 2023 and is only capable of acceptance until 1 April 2024: see paragraphs 1, 2, 4 and 5 of Schedule 1 of *ASIC Corporations (Amendment) Instrument 2022/1022*.
10. The instrument also inserts paragraph 6A in [CO 14/1000] and [CO 14/1001] so that the date an offer is made is the date that the offer is first made: see paragraphs 3 and 6 of Schedule 1 to *ASIC Corporations (Amendment) Instrument 2022/1022*. This ensures that an offer may remain open for acceptance after 1 March 2023 and still be entitled to the disclosure relief provided it is first made before that date.

### **Legislative instrument and primary legislation**

11. The EIS class orders provide relief for employee incentive schemes because at the time they were made, the Corporations Act did not contain a disclosure exemption for employee incentive schemes and only limited exemptions from

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licensing and hawking provisions (i.e. where the offer was made with a disclosure document to a narrow class of participants).

12. The disclosure relief for primary offers provided in paragraphs 5 and 6 of the EIS class orders is no longer required because the ESS regime in Div 1A of Pt 7.12 provides legislative disclosure exemptions for offers of ESS interests. The ESS provisions commenced on 1 October 2022 and *ASIC Corporations (Employee share schemes) 2022/1021* provides minor technical relief to facilitate reliance on the provisions. It is Parliament's intention that entities rely on the ESS provisions for future employee share schemes.
13. For this reason, ASIC is terminating the ability of entities to make new offers under the EIS class orders. *ASIC Corporations (Amendment) Instrument 2022/1022* amends the EIS class orders so that offers must be made before 1 March 2023. This deadline is intended to give entities adequate time to adjust their employee share schemes to the regime available under Div 1A of Pt 7.12.
14. The other incidental relief in the EIS class orders for secondary sales, licensing and contribution plans remains required for employee incentive schemes established before the ESS provisions commenced. For example, some financial products such as options or incentive rights issued under the EIS class orders may result in the issue of further financial products for several years. The employer may need the licensing relief in the EIS class orders to issue these products and the employee may need the on-sale relief in order to be able to sell the products. Stakeholders also provided feedback that it was not necessarily straightforward to terminate contribution plans. Div 1A of Pt 7.12 of the Corporations Act will not cover these arrangements because there will not be compliance with the relevant conditions. Therefore, the incidental relief in the EIS class orders will sunset in the ordinary course on 1 April 2025.
15. It is possible that some ongoing exemptions may be required for longer term incentive rights or options issued pursuant to the class orders after the EIS class orders sunset. For example, some options and incentive rights issued to employees under the class orders may result in the issue of new financial products in several years' time. These financial products may continue to require relief from the on-sale restrictions in section 707 and 1012C of the Corporations Act.
16. This relief is required by only a relatively small number of persons (i.e. persons who were issued certain financial products as a result of the EIS class orders) and at this time are more appropriate in a legislative instrument rather than the Corporations Act. If the matters in the instrument were to be inserted into the primary legislation, they would insert, into an already complex statutory framework, a set of specific provisions that would apply only to a relatively small group of entities. This would result in unnecessary complexity for other users of the primary legislation

### **Duration of the instrument**

17. The duration of the amendments made by *ASIC Corporations (Amendment) Instrument 2022/1022* aligns with the duration of [CO 14/1000] and [CO

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14/1001]. These class orders will automatically sunset on 1 April 2025 in accordance with section 50 of the *Legislation Act 2003*.

### **Legislative authority**

18. *ASIC Corporations (Amendment) Instrument 2022/1022* is made under subsections 741(1) and 1020F(1) of the Corporations Act.
19. The instrument amends ASIC class orders [CO 14/1000] and [CO 14/1001]. Where an Act confers a power to make an instrument, the power is to be construed as including a power to amend the instrument: see subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005, per section 5C of the Corporations Act).
20. *ASIC Corporations (Amendment) Instrument 2022/1022* is a disallowable instrument.

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

21. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the [Attachment](#).

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

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### ***ASIC Corporations (Amendment) Instrument 2022/1022***

#### Overview

1. *ASIC Corporations (Amendment) Instrument 2022/1022* makes amendments to ASIC Class Order [CO 14/1000] *Employee incentive schemes: Listed bodies* or ASIC Class Order [CO 14/1001] *Employee incentive schemes: Unlisted bodies*.

#### Assessment of human rights implications

2. This instrument does not engage any of the applicable rights or freedoms

#### Conclusion

3. This instrument 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*.