

Explanatory Statement

***ASIC Corporations (Employee Incentive Schemes****—****Ongoing Relief) Instrument 2025/169***

This is the Explanatory Statement for *ASIC Corporations (Employee Incentive Schemes—Ongoing Relief) Instrument 2025/169*.

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

**Summary**

1. We are making *ASIC Corporations (Employee Incentive Schemes—Ongoing Relief) Instrument 2025/169* (**Instrument**) to assist entities that have obligations in relation to employee incentive schemes (**legacy schemes**) that were established in reliance on Class Order [CO 14/1000] *Employee incentive schemes: Listed bodies* and Class Order [CO 14/1001] *Employee incentive schemes: Unlisted bodies* (**EIS class orders**)

**Purpose of the instrument**

2. Since 1 October 2022, the *Corporations Act 2001* (**Act**) has provided broad exemptions for offers of financial products to employees and other employee share scheme participants: Div 1A, Pt 7.12 (**ESS provisions**). The ESS provisions replaced similar relief in the EIS class orders and most entities now operate their employee share schemes in Australia under the Act.

3. The EIS class orders and related  Class Order [CO 14/978] *Employee incentive schemes: Personal offers* were repealed by ASIC Corporations (Repeal) Instrument 2025/170 before their expiry on 1 April 2025 under section 50 of the *Legislation Act 2003*. The Instrument combines the three class orders and provides relief to assist entities with their obligations under legacy schemes.

**Consultation**

4. ASIC did targeted consultation with lawyers who advise on employee incentive schemes and received technical feedback that was incorporated into the Instrument. We also publicly consulted through a simple consultation published on 20 January 2025: CS 14 *Proposed remake of relief for employee incentive schemes*. We received one submission in response to CS 14, which supported our proposal to provide ongoing relief for legacy schemes.

**Operation of the Instrument**

***Part 1 of the Instrument – commencement and definitions***

5. The Instrument commences on the day after it is registered on the Federal Register of Legislation: section 2.

6. Section of the Instrument contains definitions. The definitions are similar to definitions that were contained in the EIS class orders, with some changes to reflect the fact that the Instrument replaces the class orders. For example, employee incentive scheme is defined as an arrangement under which eligible products were offered to eligible participants under the EIS class orders or an individual instrument (***individual instrument***) that is not a legislative instrument but is on similar terms to the EIS class orders. The definition of employee incentive scheme means that the Instrument continues to support entities that have an individual instrument that relied on the EIS class orders for the activities of trustees and financial services licensees.

***Part 2 of the Instrument – exemptions for legacy schemes***

7. Part 2 of the Instrument provides exemptions for entities who have remaining obligations under legacy schemes. Entities were able to offer eligible products to their employees and other eligible participants under these schemes until 1 March 2023 (which offers could remain open until 1 April 2024). Entities should no longer need to issue further ‘overlying eligible products’ as a result of these offers but they may need to issue ‘underlying eligible products’ to participants for some years. For example, a company may need to issue shares to a participant when an ‘overlying eligible product’, such as an option, is exercised. For this reason, many of the exemptions in Part 2 of the Instrument only relate to underlying eligible products.

8. Entities that rely on the exemptions in Part 2 of the Instrument must comply with the conditions in section 7 of the Instrument. In addition, the repeal of the EIS class orders does not affect any right, privilege, obligation or liability acquired, accrued or incurred under them: section 7 of the *Acts Interpretation Act 1901*, applicable to the EIS class orders due to section 13 of the *Legislation Act 2003*). This means that entities may need to comply with conditions in the EIS class orders for so long as they have obligations under their legacy schemes.

*Secondary sales relief*

9. The EIS class orders originally provided relief so that entities could offer eligible products to eligible participants without providing disclosure under the Act. The sale of financial products issued without disclosure is potentially subject to section 707 or subsection 1012C(6) of the Act, if the sale occurs within 12 months after the product was first issued. The EIS class orders therefore also provided an exemption to ensure that participants were able to sell products without the need for a disclosure document or cleansing notice.

10. Similarly, subsection 5(1) of the Instrument provides a secondary sales exemption. A person can sell an underlying eligible product issued by reason of the exercise or vesting of an eligible product (**original eligible product**) without the need for a disclosure document or cleansing notice. The original eligible product must have been issued or otherwise granted to (a) an eligible participant under an employee incentive scheme or (b) a trustee in connection with an employee incentive scheme.

*Disclosure exemption for financial advice*

11. Subsection 5(2) of the Instrument provides relief from section 1012A of the Act so that a financial services licensee (or their authorised representative) who gives advice to an eligible participant that includes a recommendation to acquire an ‘underlying eligible product’ in connection with an employee incentive scheme does not have to provide a Product Disclosure Statement.

*Licensing relief and other incidental relief*

12.Subsections 6(1) to (3) of the Instrument provide incidental licensing relief to assist entities to operate legacy schemes. This includes relief for general advice, dealing and custodial or depository services.

13. Subsection 6(4) of the Instrument provides relief so that an entity that advertises or publishes a statement that is reasonably likely to induce eligible participants to acquire an underlying eligible product does not have to comply with section 1018A of the Act, which may otherwise require the advertisement or publication to refer to a Product Disclosure Statement.

14. Subsection 6(5) of the Instrument gives relief from the requirement in section 601ED of the Act to register a managed investment scheme if an entity or trustee is operating a contribution plan in connection with a legacy scheme. This exemption cannot be used by an unlisted body: subsection 7(3). Further conditions that apply to contribution plans are set out in subsection 7(1) to (2).

***Part 3 – declaration re small scale offer exclusion in section 708***

15. Subsection 708(1) of the Act provides a disclosure exemption for personal offers if certain limits apply – that is, none of the offers results in a breach of the 20 investors ceiling and none of the offers results in a breach of the $2 million ceiling. These limits are calculated over a 12 month period based on the securities actually issued or transferred and disregarding certain offers: subsection 708(3), 4 and (5).

16. Section 8 of the Instrument adds a further exclusion for offers that did not need a disclosure document because of the EIS class orders: notional paragraph 708(5)(aa). Although primary offers made under the EIS class orders could only remain open until 1 April 2024, entities may need to continue to issue securities pursuant to ‘overlying eligible products’ offered under their legacy schemes. The issue of these securities is covered by the disclosure exemption in the EIS class orders. The notional modification to paragraph 708(5)(aa) means that these securities do not reduce an entity’s ability to rely on the small scale offer exemption in subsection 708(1).

***Part 4 - Duration of the instrument***

17. The Instrument is repealed at the start of 1 April 2030: section 9. The Instrument does not have a shorter duration because entities may have obligations under their legacy schemes for more than 3 years.

**Legislative instrument and primary legislation**

18. The subject matter and policy implemented by this Instrument is more appropriate for a legislative instrument rather than primary legislation because the relief is only required temporarily to enable entities to deal with their remaining obligations under legacy schemes.

19. The relief provided by the Instrument will only be required on a temporary basis. Amendments to the Act are unnecessary.

**Legislative authority**

20. The Instrument is made under subsections 283GA(1), 601QA(1),741(1), 926A(2), 992B(1) and 1020F(1) of the Act. The Instrument 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.

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 (Employee Incentive Schemes–Ongoing Relief) Instrument 2025/169***

Overview

1. This instrument replaces Class Order [CO 14/1000] Employee incentive schemes: Listed bodies , Class Order [CO 14/1001] Employee incentive schemes: Unlisted bodies  and Class Order [CO 14/978] Employee incentive schemes: Personal offers , which were repealed by *ASIC Corporations (Repeal) Instrument 2025/170* and were due to expire on 1 April 2025 under section 50 of the *Legislation Act 2003*.This instrument provides relief from requirements under the *Corporations Act 2001* to assist entities to meet their remaining obligations under employee incentive schemes established in reliance on [CO 14/1000] and [CO 14/1001].

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*.