

Global Rewards Update: Australia – Securities law – new Class Orders

November 2014

Background

Securities laws in Australia are administered by the Australian Securities and Investments Commission (ASIC). An offer of securities under an employee share plan would generally need to be accompanied by a disclosure document to ASIC, unless the offer is exempt under either a statutory or administrative exemption.

For example, if the shares offered by foreign (i.e. non-Australian headquartered) companies under employee share plans have been quoted on an approved foreign stock exchange for at least 12 months and are offered only to employees of the group, foreign companies have historically been exempt from disclosure, licensing, hawking and incidental requirements under an administrative exemption (ASIC Class Order [CO 03/184]) if certain conditions are met.

In an effort to reduce the compliance burden on companies in respect of employee incentive schemes, ASIC will adopt a new Class Order (Class Order [CO 14/1000]) for listed companies and a new Class Order (Class Order [CO 14/1001]) for unlisted companies to replace Class Order [CO 03/184]. Case by case relief can also be obtained for employee incentive schemes that do not meet the Class Order conditions, although they must meet policy objectives.

In addition, ASIC has updated its policy guidance (Regulatory Guide 49) on employee incentive schemes.

The ASIC changes are to be read together with the Australian federal government's recent announcement on taxation arrangements for employee share schemes.

The new Class Orders

The ASIC decided to widen the scope of its class order relief to accommodate developments in employee incentive schemes that do not offend the ASIC's fundamental policy objectives of granting relief i.e.:

- 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;
- that there are adequate protections for participants in the scheme, including appropriate disclosure and pricing information for the products offered; and
- that the objective of the offer is not fundraising.

New Class Order [CO 14/1000] will apply to a wider range of financial products typically used in employee incentive schemes, including shares, share options and certain other arrangements payable in shares or cash. Certain loan arrangements are also specifically granted relief.

In order to rely on Class Order [CO14/1000], listed companies must satisfy a number of general conditions, including:

- the shares (or other eligible product) must have been quoted on ASX (the Australian Securities Exchange) or another eligible foreign financial market for at least three months with suspension of no more than five trading days in the preceding 12 months. This is a more relaxed position than under Class Order [CO 03/184];
- offer documents must be presented in a clear, concise and effective manner with a warning that any advice given in respect of the eligible products offered does not take into account a participant's objectives or financial situation. The offer documents also need a general product risk warning. This is more specific and prescriptive than under [CO 03/184]; and
- instead of requiring a copy of the offer documents be filed with ASIC within seven days, for new employee incentive schemes, the offeror must send ASIC a notice of reliance on ASIC relief no later than one month after first relying on the Class Order. Notwithstanding the notice of reliance, ASIC has the power to request employee incentive scheme documents, and to exclude a company from relying on the Class Order where it has substantial concerns about the company's compliance or conduct.

Class Order [CO 14/1000] also provides transitional arrangements, under which relief will be 'grandfathered' for employee share schemes that were covered by ASIC Class Order [CO 03/184] or an individual instrument of relief granted by ASIC in terms similar to ASIC Class Order [CO 03/184].

Different conditions must be satisfied by non-listed companies seeking to rely on the new Class Order [CO 14/1001].

New employee incentive schemes that come into existence on or after commencement of the new Class Orders will only be able to have the benefit of the new Class Order relief.

The commencement date for the new Class Orders will be the later of the dates when registered or gazetted. This date has not yet been determined.

Action

If you have previously relied on the exemption under ASIC Class Order [CO 03/184] or individual instrument of relief, then you should continue to comply with any ongoing obligations, which have been grandfathered by the new Class Order 14/1000.

If you are considering offers of securities under a new employee incentive plan or if you would like to offer phantom awards, you should seek to comply with the new Class Orders, Class Order [CO14/1000] (for listed companies) or Class Order [CO 14/1001] (for unlisted companies).

People to contact

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