



ASIC
Australian Securities &
Investments Commission

ASIC Corporations (Employee Share Schemes) Instrument 2022/1021

I, Claire LaBouchardiere, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 16 December 2022

Claire LaBouchardiere

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Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Employee Share Schemes) Instrument 2022/1021*.

2 Commencement

This instrument commences on the day after it is registered on the Federal Register of Legislation.

Note: The register may be accessed at www.legislation.gov.au

3 Authority

This instrument is made under subsection 1100ZK(2) of the *Corporations Act 2001*.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

Part 2—Declaration

5 Salary sacrifice arrangements

Division 1A of Part 7.12 of the Act applies in relation to all persons as if section 1100T were omitted and substituted with:

“1100T Meaning of ESS contribution plan

- (1) An ESS contribution plan, for an offer for the issue or sale of ESS interests, means a plan with terms that:
- (a) allow an ESS participant to make regular contributions for the purpose of acquiring the ESS interests under the offer; and
 - (b) provide that, before the participant acquires ESS interests under the offer, the contributions are held on trust in an account with an Australian ADI that is kept solely for that purpose; and

Note: The contributions of more than one participant may be held in the same account.

- (c) allow the participant to elect to discontinue the contributions at any time; and

- (d) provide that, if the participant so elects:
 - (i) any contributions will cease, and any contributions made after the election will be repaid to the participant, within 45 days of the election; and
 - (ii) the amount of the contributions standing, at the time when the election is made, to the credit of the account for the participant, and any interest on that amount, will be repaid to the participant within 45 days of the election; and
 - (e) require the participant to agree in writing to the terms of the plan before participating in the plan; and
 - (f) meet any requirements prescribed in the regulations for the purposes of this paragraph.
- (2) For the purposes of this section, contribution means payments, deductions or other contributions from one or more of the following:
- (a) gross (before tax) wages or salary;
 - (b) net (after tax) wages or salary;
 - (c) other monies.
- (3) Paragraphs (1)(b) and (d) do not apply to:
- (a) future gross (before tax) wages or salary; or
 - (b) contributions from a loan covered by section 1100U.

6 Issue Cap

Division 1A of Part 7.12 of the Act applies in relation to all persons as if paragraph 1100V(1)(b) were modified or varied as follows:

- (a) omit “could have been issued”, insert “may be issued”;
- (b) after “under offers”, insert “that were both received in this jurisdiction and”;
- (c) omit “the employee share scheme”, substitute “an employee share scheme”.

7 Financial information prepared under a foreign standard

Division 1A of Part 7.12 of the Act applies in relation to all persons as if section 1100X were modified or varied as follows:

- (a) omit paragraph 1100X(2)(c), substitute:

“(c) otherwise:

- (i) in any case—a balance sheet and profit and loss statement prepared in compliance with either the accounting standards or the international accounting standards (within the meaning of the *Australian Securities and Investments Commission Act 2001*); or
- (ii) if the body corporate is a foreign company, but is not a registered foreign company—a balance sheet and profit and loss statement (together ***foreign financial statements***) together with any additional information required by subsection (2A) and referred to in subsection (2B) where the body corporate reasonably believes:
 - (A) the foreign financial statements are prepared in accordance with a standard (***foreign standard***) that is not covered by subparagraph (2)(c)(i); and
 - (B) the body corporate provides the foreign financial statements under the foreign standard in its place of origin or in its principal place of business.”;

(b) after subsection 1100X(2), insert:

“(2A) The additional information referred to in subparagraph 1100X(2)(c)(ii) is required unless the body corporate reasonably believes that the financial information has been prepared in accordance with the standards and generally accepted accounting principles applied in the United States of America.

(2B) For the purposes of subparagraph 1100X(2)(c)(ii), the additional information is either:

- (a) a confirmation that there is no material difference between the foreign financial statements and the information that would otherwise be required under subparagraph 1100X(2)(c)(i); or
- (b) a reconciliation of the material differences between the foreign financial statements and the information that would otherwise be required under paragraph 1100X(2)(c)(i).”;

(c) after paragraph 1100X(3)(a), insert:

“(aa) if the ESS interest is not an ordinary share in a company—a copy of a valuation of the ESS interest prepared by an expert.”.

8 Period of disclosure

Division 1A of Part 7.12 of the Act applies in relation to all persons as if paragraph 1100Z(1)(b) were modified or varied by omitting “after becoming

aware” and substituting “if, during the application period for the offer mentioned in paragraph 1100W(2)(e), the offeror becomes aware”.

9 Regulatory relief for certain subsequent sale offers of ESS interests

Division 1A of Part 7.12 of the Act applies in relation to all persons as if section 1100ZD of the Act were omitted and substituted with:

“1100ZD Regulatory relief for certain subsequent sale offers of ESS interests

- (1) The provisions of Part 6D.2, 6D.3 and 7.9 do not apply in relation to an offer of an ESS interest in a body corporate or a registered scheme for sale if:
 - (a) the body corporate or scheme operates an employee share scheme; and
 - (b) the ESS interest is not in a class of financial products that is able to be traded on a financial market covered by section 1100K; and
 - (c) the person making the offer reasonably believes that:
 - (i) the person acquired the ESS interest:
 - (A) in connection with the employee share scheme; or
 - (B) from an ESS participant in the employee share scheme; and
 - (ii) the person is making the offer only to persons who are ESS participants in the employee share scheme.
- (2) The provisions of Part 6D.2, 6D.3 and 7.9 do not apply in relation to an offer of an ESS interest in a body corporate or a registered scheme for sale if:
 - (a) the body corporate or scheme operates an employee share scheme; and
 - (b) the ESS interest is in a class of financial products that is able to be traded on a financial market covered by section 1100K; and
 - (c) the ESS interest was issued in connection with the employee share scheme; and
 - (d) if the ESS interest was issued to the trustee of a trust that meets the requirements in section 1100S—the body corporate or responsible entity that issued the ESS interest did not do so with the purpose of a person to whom the trustee transfers the ESS interest:
 - (i) selling or transferring the ESS interest; or

- (ii) granting, issuing or transferring interests in, or options or warrants over, the ESS interest; and
- (e) if the ESS interest was not issued to the trustee of a trust that meets the requirements in section 1100S—the body corporate or responsible entity that issued the ESS interest did not do so with the purpose of the person to whom the ESS interest was issued:
 - (i) selling or transferring the ESS interest; or
 - (ii) granting, issuing or transferring interests in, or options or warrants over, the ESS interest.”.

Part 3—Repeal

10 Repeal

This instrument is repealed at the start of the day that is 5 years after the day it commences.