



ASIC
Australian Securities &
Investments Commission

CONSULTATION PAPER 328

Initial public offers: Relief for voluntary escrow arrangements and pre-prospectus communications

February 2020

About this paper

This consultation paper is about reducing red tape for initial public offers (IPOs). It sets out our proposals to grant legislative relief for:

- voluntary escrow arrangements requested by public companies, professional underwriters and lead managers in connection with an IPO; and
- companies' communications to employees and security holders about an IPO before the company lodges a disclosure document.

We are seeking feedback from law firms, industry, security holders and other stakeholders on our proposals.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 24 February 2020 and is based on the legislation as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on the regulation of voluntary escrow arrangements and pre-prospectus communications. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section D, 'Regulatory and financial impact'.

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information on how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 6 April 2020 to:

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What will happen next?

Stage 1	24 February 2020	ASIC consultation paper released
Stage 2	6 April 2020	Comments due on the consultation paper
Stage 3	Mid-2020	Commencement of any legislative instrument(s) providing relief and release of updates to RG 5 and RG 254

A Background to the proposals

Key points

A person who enters into an escrow arrangement with a security holder has a relevant interest in those securities. This is because, under the arrangement, that person has the power to control the disposal of the securities: see s608(1)(c) of the *Corporations Act 2001* (Corporations Act).

We are proposing to grant conditional relief from the takeovers provisions in Ch 6 of the Corporations Act. This will allow people who have obtained relevant interests as a result of voluntary escrow arrangements to disregard them for the purposes of those provisions. However, we are not proposing to grant relief from the substantial holding requirements in Pt 6C.1.

Companies are subject to a general prohibition on the advertising or publicity of an offer of securities that requires a disclosure document: see s734 of the Corporations Act. A company that is planning undertake an initial public offer (IPO) and wishes to communicate to its security holders or employees about the IPO may breach the fundraising provisions.

We are proposing to grant conditional relief to permit companies to communicate certain factual information to their security holders and employees about an IPO before the company lodges a disclosure document.

Why we are proposing this relief

- 1 Companies that are considering an IPO often apply to ASIC for individual relief so that they can enter into voluntary escrow arrangements with security holders. These arrangements may contravene s606 of the Corporations Act: see paragraphs 5–11. Companies also often apply for individual relief so that they can communicate with their security holders and employees about the IPO before the company lodges its disclosure documents. These communications are restricted by s734: see paragraphs 12–15.
- 2 During periods of significant IPO activity, we receive a large number of individual relief applications for voluntary escrow arrangements and pre-prospectus communications. For example, between 1 January 2013 and 30 June 2019, we received 221 relief applications for voluntary escrow arrangements and 144 relief applications for pre-prospectus communications. We granted relief in approximately 75% of the cases. We were minded to approve an additional 18% of applications, but these were ultimately withdrawn due to delays or changes in the IPO.
- 3 For these individual relief applications, the company must pay ASIC fees of approximately \$3,500 for each head of power and entity for which they seek

relief. The company is also likely to incur legal fees for the preparation of the relief applications. The applications are likely to delay to the IPO, or at least need to be factored into the IPO timetable.

- 4 In this paper, we are consulting on the terms of relief for voluntary escrow arrangements (see Section B) and pre-prospectus communications (see Section C). Our preliminary view is that relief will reduce costs for companies undertaking an IPO without compromising investor protection or market integrity.

Escrow arrangements create a relevant interest in securities

- 5 Escrow delays the time in which a security holder can realise the value of its securities. Under an escrow arrangement, the holder agrees not to dispose of its securities, or rights or interest connected with the securities, for the duration of the arrangement. The company, underwriter or lead manager may require certain security holders to enter into voluntary escrow arrangements to promote investor confidence in a public offering of securities.
- 6 The takeovers provisions are set out in Ch 6 of the Corporations Act. Among other things, they define when a person has a relevant interest in securities. A person who enters into an escrow arrangement with a security holder has a relevant interest in those securities. This is because, under the arrangement, that person has the power to control the disposal of the securities: see s608(1)(c).
- 7 When considering their obligations under the takeovers and substantial holding provisions, companies and other counterparties to an escrow arrangement must account for their relevant interests in the securities held in escrow arrangements.

Current ASIC relief from takeovers provisions

- 8 We have given individual relief from s609 so that a company, underwriter or lead manager does not have a relevant interest in securities placed in escrow merely because they require a holder to enter into a voluntary escrow arrangement.

Note: For further information, see [Regulatory Guide 5](#) *Relevant interests and substantial holding notices* (RG 5).

- 9 A listed company must restrict the disposal of securities as part of a listing rule escrow under the relevant listing rules of a prescribed financial market. We have modified s609 so that a listed company does not have a relevant interest in securities merely because they have complied with this listing rule: see [Class Order \[CO 13/520\]](#) *Relevant interests, voting power and exceptions to the general prohibition*.

- 10 While there are differences between listing rule and voluntary escrow arrangements, the rationale behind providing relief is the same or similar. Escrow relief facilitates a fair, orderly and transparent market by aligning the interests of the particular restricted parties with the interests of other holders.
- 11 As with the relief under [CO 13/520], our individual voluntary escrow relief applies to the takeover provisions. However, it does not apply to the substantial holding requirements in s671B.

Companies cannot advertise or publicise offers that require a disclosure document

- 12 There is a general prohibition on the advertising or publicity for offers of securities that require a disclosure document: see s734. If an offer or intended offer of securities needs a disclosure document, a person must not:
- (a) advertise the offer or intended offer; or
 - (b) publish a statement that:
 - (i) directly or indirectly refers to the offer or intended offer; or
 - (ii) is reasonably likely to induce people to apply for the securities (s734(2)).

Note: For more guidance, see Section J of [Regulatory Guide 254](#) *Offering securities under a disclosure document* (RG 254).

- 13 The Corporations Act recognises that an absolute prohibition on advertising may impose unreasonable and uncommercial constraints on issuers. The Act provides certain statutory exceptions to this general prohibition: see s734(5)–(7). However, these exceptions only permit very basic information about an offer of securities that requires a disclosure document to be advertised or published.

Current ASIC relief from the general prohibition

- 14 We have granted relief from the prohibitions in s734 for:
- (a) roadshow presentations; and
 - (b) market research.

Note: See [ASIC Corporations \(Market Research and Roadshows\) Instrument 2016/79](#).

- 15 Companies have sought an extension of this relief so they can communicate certain information about a planned IPO to employees and existing security holders before they lodge the disclosure document. We have provided individual relief to those companies. The relief is conditional on the company only providing certain factual information about the planned IPO to its employees and security holders.

Purpose of this paper

- 16 We are proposing to provide legislative relief for public companies, professional underwriters and lead managers requiring security holders to enter into voluntary escrow arrangements. We are not proposing to provide relief from the substantial holding requirements in s671B of the Corporations Act. We will use ASIC's modification power under s655A(1)(b) and 673(1)(b).
- 17 We are also proposing to provide relief to companies so they can make pre-prospectus disclosures in limited circumstances. We will use ASIC's modification power under s741(1)(a) of the Corporations Act.
- 18 We are seeking feedback on:
- (a) the proposals to grant legislative relief for voluntary escrow arrangements and pre-prospectus communications; and
 - (b) the particular requirements and conditions of relief we are proposing to impose for each legislative instrument.

B Relief for voluntary escrow arrangements

Key points

We are proposing to use ASIC's modification powers to grant conditional relief to public companies, professional underwriters and lead managers for voluntary escrow arrangements in connection with an IPO.

The relief would enable these entities to require certain security holders to enter into voluntary escrow arrangements without acquiring a relevant interest for the purposes of the takeover provisions. However, we are not proposing to grant relief from the substantial holding provisions.

Aligning our policy on listing rule and voluntary escrow arrangements

- 19 Our policy on granting relief for escrow arrangements is well established and outlined in [RG 5](#). We recognise that, by preventing an early sell-down of securities which may depress the price of securities, these arrangements may promote:
- (a) an orderly market for securities following an IPO; and
 - (b) investor confidence.
- 20 We have already provided relief to facilitate listing rule escrow arrangements: see [\[CO 13/520\]](#). Voluntary escrow relief is often sought in connection with an IPO. We consider the objectives and benefits of voluntary and listing rule escrow arrangements to be similar.
- 21 We are considering using ASIC's modification powers in Chs 6 and 6C to provide legislative relief to facilitate voluntary escrow arrangements: see proposal B1.

Proposal

- B1** We propose to use ASIC's modification powers in Chs 6 and 6C to grant conditional relief from the takeovers provisions: see s655A(1)(b) and 673(1)(b). Under this relief, certain entities (see proposal B2) would not have a relevant interest in securities merely because they required certain security holders to enter into voluntary escrow arrangements.

Your feedback

- B1Q1 Do you agree with our proposal to grant relief for voluntary escrow arrangements? If not, why not?

Rationale

- 22 We have a well-established policy on individual relief for voluntary escrow arrangements, which we regularly grant. Providing conditional relief through a legislative instrument is consistent with the objectives of:
- (a) promoting an orderly market for securities following an IPO; and
 - (b) increasing investor confidence when participating in an IPO.

Providing relief to public companies, professional underwriters and lead managers

Proposal

- B2 We propose to provide the voluntary escrow relief to:
- (a) public companies undertaking an IPO;
 - (b) professional underwriters; and
 - (c) lead managers.

Your feedback

B2Q1 Do you have any comments on our proposal to provide relief to public companies, professional underwriters and lead managers?

Rationale

- 23 We are proposing to provide the relief to the entities in proposal B2 because:
- (a) these are the entities that generally acquire relevant interests under voluntary escrow arrangements;
 - (b) relief for professional underwriters promotes capital raising and reorganisation. It allows underwriters to protect themselves from an early sell-down, which may depress the price of securities; and
 - (c) professional underwriters and lead managers acting in the ordinary course of their business are less likely to have a defensive purpose in requiring an escrow arrangement.

Circumstances and conditions of relief

- 24 We are proposing to maintain Ch 6 protections by limiting the voluntary escrow relief to certain circumstances. The purpose of this is to balance the benefits of a voluntary escrow arrangement with the possible defensive effect of an escrow against any potential takeover.

Limiting the maximum percentage of escrowed securities

- 25 A company offering its securities under a disclosure document is usually seeking admission on the official list of a prescribed financial market or exchange. Generally, companies must satisfy the minimum ‘free float’ requirements under the listing rules of the relevant financial market in order to be admitted on the exchange.
- 26 Each financial market has its own definition of ‘free float’ under their listing rules. Generally, free float is the percentage of the company’s securities at the time of listing that are not:
- (a) subject to listing rule and voluntary escrow arrangements; and
 - (b) held by related parties of the company (and their associates).
- 27 We are proposing to apply a cap on the total percentage of escrowed securities as a condition of our relief: see proposal B3.

Proposal

B3 We propose to impose a limit on the total percentage of escrowed securities that a listed company can have on issue at the time of admission to a prescribed financial market, as a condition of our relief. This limit would either be:

- (a) up to 50% of all securities in the listed company; or
- (b) up to 75% of all securities in the listed company.

The limit would include securities subject to listing rule escrow arrangements.

Your feedback

B3Q1 Which of the maximum limits should be the total permitted percentage of escrowed securities (including securities under listing rule escrow arrangements) under the relief for voluntary escrow arrangements? Please explain why.

Rationale

- 28 All companies seeking to list on a financial market must satisfy the exchange’s minimum free float requirement. Generally, ASX Limited has a minimum 20% free float requirement, and both NSX Limited and Sydney Stock Exchange Limited have a minimum 25% free float requirement. Based on these free float requirements, we have decided not to consult on a maximum limit for escrowed securities of 75% or above.
- 29 High percentages of escrowed securities in a listed company may deter potential acquirers from making a bid (even where holders are free to accept a successful takeover bid, as it is more difficult to build a pre-bid stake where there is a lower free float). It may also indicate that the purpose of the arrangements extend beyond the legitimate purposes of promoting orderly markets and facilitating price discovery.

Transfers where there is no change in beneficial ownership

- 30 Unlike listing rule escrow arrangements, voluntary escrow arrangements are contract based. The terms and period of escrow is a matter of negotiation between the relevant parties (the company, the security holder, the underwriter and/or lead manager). The terms of a voluntary escrow arrangement can be varied or terminated by mutual agreement.
- 31 Where the escrowed securities are held by a trust or nominee, voluntary escrow arrangements often contain terms that allow the securities to be transferred to another person in certain circumstances.
- 32 We are seeking feedback on the circumstance in which we should allow escrowed securities to be transferred under our relief: see proposal B4.

Proposal

B4 We propose to allow escrowed securities to be transferred when:

- (a) the transfer does not involve any change in the beneficial ownership of the escrowed securities;
- (b) the transfer does not extend the duration of the original voluntary escrow arrangements; and
- (c) the transferee agrees to inherit the same restrictions on voting and disposal under the original voluntary escrow arrangements.

Your feedback

B4Q1 Should the voluntary escrow relief allow for transfer of some or all of the escrowed securities in the circumstances described in proposal B4?

B4Q2 Should we consider permitting the voluntary escrow relief to continue in any other situation where the original restricted security holder no longer owns or holds the beneficial interest in the securities?

B5 We propose that, to meet the requirement in proposal B4, the transfer (of legal title) must be:

- (a) by the beneficial owner to a trustee or nominee who will hold the escrowed securities solely on behalf of the existing beneficial holder;
- (b) to a new trustee or nominee who will hold the securities solely on behalf of the existing beneficial owner; or
- (c) to the beneficial owner who will obtain legal title to the securities and maintain its existing beneficial interest.

Your feedback

B5Q1 Do you agree with our list of circumstances in which transfer will meet the conditions of our relief?

Rationale

- 33 We consider that the rationale for voluntary escrow relief is met where there is no change in beneficial ownership as a result of a transfer. However, we expect there to be no extension of the original escrow period, and that the terms of the escrow arrangement will allow the holder of securities to transfer escrowed securities despite the escrow.
- 34 This is consistent with ASX's rationale for recent updates to its listing rules on listing rule escrow. The updates permit transfers where there is no change in beneficial ownership: see ASX Listing Rule 9.6. However, the rationale is less clear where there is a change in the beneficial interest of the securities. In this case, the fact that transfer of the securities has occurred may indicate that there is no additional need for, or benefit in, permitting the voluntary escrow arrangement to continue (e.g. in the event of the death of the restricted party or other party who obtains the escrowed securities under a court order).

Type of escrowed securities

- 35 We will generally only grant voluntary escrow relief to listed companies for newly issued securities: see [RG 5](#). We have granted relief in this context to allow time for the value of assets and services to become apparent. We have limited the relief to new securities to ensure that the relief does not extend a prior escrow arrangement, such as a previous listing rule escrow. This rationale may be absent where the escrow is to apply to securities issued before the company is listed on a relevant financial market.
- 36 We are proposing to grant conditional relief to facilitate voluntary escrow over securities that were issued in connection with, or before, an IPO: see proposal B6.

Proposal

- B6** We propose to grant conditional relief to facilitate voluntary escrow over securities issued:
- (a) under or in connection with the IPO; or
 - (b) before the IPO to a promoter, seed capitalist, vendor or service provider.

Your feedback

- B6Q1 Should the relief only apply to the circumstances in proposal B6? If not, please outline any other circumstances the legislative relief ought to apply to and provide reasons for your submission.

Rationale

- 37 We consider that extending our voluntary escrow relief—to include securities that were issued before an IPO to a promoter, seed capitalist, vendor or service provider—does not detract from the rationale of allowing time for the value of assets and services to become apparent.
- 38 Further, where securities have been issued before an IPO, no listing rule escrow arrangement will have applied previously. Therefore, the voluntary escrow relief will not be extending a previous listing rule escrow arrangement.

Permitted terms of escrow arrangements

- 39 The existing requirements and conditions of voluntary escrow relief are set out in Table 11 of [RG 5](#). We consider that they are operating effectively, and strike the right balance between facilitating the benefits of escrow with the potential to use escrow for defensive purposes.

Proposal

- B7** We propose to retain the conditions and requirements for voluntary escrow relief, which are currently set out in Table 11 of [RG 5](#). In summary:
- (a) the escrow arrangement must restrict disposal and not voting;
 - (b) the escrow arrangement must allow the holder to accept into a successful takeover bid and allow the securities to be transferred or cancelled as part of a merger by scheme of arrangement;

Note: We will define a 'successful bid' as one where 50% of the bid-class securities that are not subject to escrow, and to which the offers under the bid relate, have been accepted. This applies to a full or a proportional bid.
 - (c) the escrow arrangement must terminate no later than:
 - (i) two years after the date of entry into the arrangement with a listed company; and
 - (ii) one year after the date of entry into the arrangement with a professional underwriter or professional lead manager;
 - (d) if the securities that are subject to escrow are issued under a prospectus, the company must disclose the details of the voluntary escrow; and
 - (e) an entity relying on this relief will still acquire a relevant interest (under s671B) as a result of entering into the escrow arrangement. They must notify the relevant company and the market, and include relevant documents in the notice given to the relevant market operator.

Your feedback

- B7Q1 Do you agree with the proposed conditions and requirements?

B7Q2 What concerns (if any) do you have with the proposed circumstances and conditions to be imposed?

B7Q3 Are there any other conditions that ought to apply to voluntary escrow relief?

Rationale

- 40 An escrow arrangement should not restrict a holder's ability to exercise the voting rights attached to the escrowed securities: see proposal B7(a). Such a restriction is not necessary to achieve the underlying objectives of escrow, and may indicate a purpose other than escrow, for which relevant interest relief is not appropriate.
- 41 The requirement that an escrow arrangement must allow the holder to accept into a successful takeover bid (see proposal B7(b)) is designed to reduce the defensive effect of the escrow. Our proposed definition of a 'successful bid' accords with the guidance in [RG 5](#).
- 42 The proposed voluntary escrow periods (see proposal B7(c)) are designed to provide a balance between:
- (a) allowing sufficient time for the market to value goods and services provided by the holder and to prevent a sell-down immediately after the securities are issued; and
 - (b) minimising the period during which the holder is restrained from further selling. A prolonged escrow may affect the market for control over the company.
- 43 The requirements to disclose details of substantial holdings in listed companies (see proposals B7(d)–B7(e)) ensure that investors have access to information about the interests and dealings of persons who may be in a position to influence or control the company.

C Relief for communications about an IPO before lodging a disclosure document

Key points

We are proposing to grant conditional relief to allow companies to communicate factual information to employees and security holders about an IPO, before the company lodges the disclosure document.

Allowing companies to communicate with security holders and employees about an IPO

- 44 Advertising or publicising offers of securities that require a disclosure document is restricted under the Corporations Act. This restriction aims to:
- (a) prevent drip-feeding of selective information to the market;
 - (b) discourage inadequate analysis of disclosure documents by individual investors and the market generally; and
 - (c) discourage investors making decisions on the basis of an advertising campaign and other publicity, rather than on the basis of the disclosure document.
- 45 However, we recognise that there are legitimate reasons why a company may wish to communicate information about a planned IPO to employees and security holders before the company lodges a disclosure document. Accordingly, we are proposing to grant conditional relief to allow the company to communicate factual information in these circumstances (exempted communication): see proposals C1–C2. The conditions are designed to alleviate some of the risks associated with statements outside a lodged disclosure document.

Proposal

- C1** We propose to use ASIC's modification powers (in s741(1)(a) of the Corporations Act) to grant relief to allow companies to communicate factual information about a planned IPO to security holders and employees before the company lodges a disclosure document.

Your feedback

- C1Q1 Do you agree with proposal C1? If not, please explain why.
- C1Q2 Should factual communications to any other persons be permitted under the proposed relief? If so, please explain why.

- c2** We propose to require a company that relies on our relief to:
- (a) make the exempted communications in writing; and
 - (b) update recipients of the exempted communications if the information previously provided is no longer accurate or up to date.

Your feedback

C2Q1 Do you agree with the proposed requirements of relief, set out in proposal C2?

C2Q2 Do you support any additional conditions to mitigate the risks of misinformation and drip-feeding of information about an IPO? If so, please include details of any measures you support to achieve this objective.

Rationale

- 46 We are proposing to modify the operation of the disclosure provisions, including the prohibition on advertising before lodging a disclosure document (see proposal C1), to ensure that companies are not unreasonably constrained.
- 47 We accept that companies may need to communicate with their existing employees and security holders about a planned IPO. It is particularly important that companies can give them general and non-promotional information on the progress of the IPO to prevent misinformation.
- 48 Our preliminary view is that this kind of communication does not offend the policy underlying the prohibition on advertising and publicity before lodging a disclosure document. These communications may form part of the ordinary and necessary preparatory work of a company before an IPO.
- 49 We have proposed that exempted communications must be made in writing: see proposal C2(a). This is to minimise the risk of misinformation, by ensuring companies and the recipients have a clear and contemporaneous record of the communication. Further, we consider it appropriate to require companies to update recipients of exempted communications if the information they have previously provided is no longer accurate or up to date: see proposal C2(b).

Permitted content of communications

- 50 We are proposing to restrict the information that may be disclosed in exempted communications: see proposal C3. The proposal requires companies relying on the relief to:
- (a) only provide certain types of factual information to employees and existing security holders; and
 - (b) refrain from communicating any advantages, benefits or merits of the IPO.

- 51 The type of permissible information that the company can disclose will vary, depending on whether the recipient is an employee or a security holder.
- 52 Companies often need to communicate in a timely manner to their employees about impending changes to the nature and scale of their employer, changes to management and ownership, and how employees may be remunerated. Similarly, companies may need to communicate in a timely manner to their security holders about necessary changes to the company's structure in preparation for the planned IPO.
- 53 This is especially important if the IPO is using a 'SaleCo' structure. This structure generally involves incorporating a new public company, SaleCo, and making arrangements with existing security holders to acquire their securities using the proceeds of the IPO. SaleCo then acquires securities from existing security holders immediately before completion of the IPO and transfers them to the successful subscribers of the IPO.

Proposal

- C3** We propose to require companies relying on the relief to only communicate the permitted content in Table 1 to employees and security holders. The relief is conditional on the company not providing any communication of the advantages, benefits or merits of the IPO.

Your feedback

- C3Q1 Do you agree with the proposed permitted content of exempted communications, as set out in proposal C3? If not, please outline your concerns with the proposed circumstances and restrictions.
- C3Q2 Are there any other conditions we should impose on companies that rely on this relief?

Table 1: Permitted content of exempted communications by recipient

Recipients	Permitted content
Employees and security holders	The company may communicate factual information about: <ul style="list-style-type: none"> • the fact that the company is undertaking an IPO; • the IPO timetable, including updates to the timetable; • impending announcements about the IPO; and • the structure of the IPO and offer period.

Recipients	Permitted content
Employees only	<p>The company may communicate factual information about:</p> <ul style="list-style-type: none"> • administrative and organisation changes, including: <ul style="list-style-type: none"> – personnel changes associated with the company becoming a listed entity; – changes to the business; and – future employment arrangements; and • proposed offer(s), including <ul style="list-style-type: none"> – employee incentive arrangements; – any proposed employee incentive plans or employee priority offers under the IPO; and – how recipients may participate in such offers.
Security holders only	<p>The company may communicate factual information about:</p> <ul style="list-style-type: none"> • security holder sell-down facilities under a SaleCo structure connected to an IPO, including: <ul style="list-style-type: none"> – the merits of the sale facility, but not the securities themselves; – share sale agreements; – the process; and – the implications of participating in the sell-down facilities; and • escrow arrangements and information about IPO-related matters that may require security holder approval.

Rationale

- 54 The proposed relief recognises that companies may need to communicate with existing security holders and employees before an IPO, to:
- (a) ensure existing security holders are well informed about the opportunity to participate in the sale of their existing securities as part of the IPO;
 - (b) ensure employees are well informed about the future of their employer during a time of significant change; and
 - (c) provide clear and adequate information to security holders and employees and avoid speculation and uncertainty about the IPO.
- 55 We have proposed to restrict the permitted content to factual information only, to alleviate the risk that investors will make decisions on the basis of incomplete information.
- 56 To prevent drip-feeding the market with selective information, we are proposing to make the relief conditional on the company not communicating any advantages, benefits or merits of the offer. We do not consider that this requirement unduly restricts the company, given that the purpose of the relief is to permit appropriate communications and notification to employees

and security holders who may be affected by the offer. Further, relief for ‘pathfinder’ prospectuses—involving communications to persons who do not require disclosure under Ch 6D—already exists.

Duration of the legislative relief

57 In individual relief instruments, we have generally included a cessation clause limiting the duration of the relief from s734. This date is the earlier of:

- (a) a number of months after the date of the relief instrument; or
- (b) the date the prospectus is lodged with ASIC.

Proposal

c4 We are seeking feedback on whether we should:

- (a) limit the relief so it ends on the earlier of:
 - (i) six months from the date of the first exempted communication; or
 - (ii) the date that the company lodges the disclosure document with ASIC; or
- (b) allow the relief to continue indefinitely to each exempted communication.

Your feedback

C4Q1 Should the relief allowing a company to make exempted communications apply for a specific amount of time?

C4Q2 If your answer to question C4Q1 is:

- (a) yes, do you consider relief for a period of up to six months from the first exempted communication appropriate? If not, what is the appropriate time period and why?
- (b) no, should the relief apply indefinitely?

C4Q3 Is it preferable that the relief apply to each exempted communication, and therefore no end date apply?

C4Q4 Please outline any unintended consequences you have identified may arise as a result of ASIC:

- (a) limiting the duration of the relief;
- (b) allowing the relief to apply indefinitely; or
- (c) drafting the relief to apply to each specific communication about an offer, such that a specific relief end date is unnecessary.

C4Q5 Please provide details of appropriate strategies to deal with any consequences identified in question C4Q4.

Rationale

- 58 Our view is that a specific relief period has the benefit of certainty. We consider that a period of up to six months should provide enough flexibility for companies to prepare for the IPO.
- 59 A longer or indefinite period may lead the company to communicate information about an IPO prematurely and where details of the offer are insufficiently certain. This information would be of questionable benefit for security holders and employees. A longer or indefinite period could also mean that employees and security holders may be drip-fed information over an extended period of time.
- 60 However, we acknowledge that a specific relief period is likely to be problematic if the expected offer is deferred for longer than the period. Especially in these circumstances, the company may need to communicate to its employees and security holders about the offer after the period has ended.

D Regulatory and financial impact

61 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us, we consider our proposals for voluntary escrow relief (see Section B) strike an appropriate balance between:

- (a) the benefits of voluntary escrow arrangements entered into for a company's IPO; and
- (b) mitigating the risk that escrow is used for defensive purposes and ensuring the acquisition of relevant interests takes place in an efficient, competitive and informed market.

62 On the information currently available to us, we also consider our proposals for relief for communications about an IPO before lodging a disclosure document (see Section C) strike an appropriate balance between:

- (a) enabling companies to appropriately communicate factual information about a fundraising offer to their security holders and employees before the company lodges disclosure documents with ASIC; and
- (b) ensuring that investors make decisions on the basis of information in the lodged offer documents, with the attendant liability regime for misleading or deceptive statements.

63 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options that could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
- (c) if our proposed option has more than a minor or machinery impact on business or on the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

64 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

65 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;

- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASX	ASX Limited or the exchange market operated by ASX Limited
Ch 6	A chapter of the Corporations Act (in this example numbered 6)
[CO 13/520] (for example)	An ASIC class order (in this example numbered 13/520) Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
disclosure document	For an offer of securities, this includes a prospectus, a transaction-specific prospectus, a short-form prospectus, a two-part simple corporate bonds prospectus, a profile statement and an offer information statement
exempted communication	A communication exempted from s734 of the Corporations Act under our relief. A company relying on this relief must only provide factual information about an IPO to its security holders and employees
financial market	Has the meaning given in s767A of the Corporations Act, and includes a facility through which offers to acquire or dispose of financial products are regularly made or accepted
IPO	An initial public offering
listing rule escrow	An escrow arrangement entered into in accordance with the requirements of the listing rules of a prescribed financial market
prescribed financial market	A financial market prescribed in reg 1.0.02A of the Corporations Regulations 2001
relevant financial market	A financial market operated by ASX, NSX Limited or Sydney Stock Exchange Limited
relevant interest	Has the meaning given in s608 and 609 of the Corporations Act
RG 5 (for example)	An ASIC regulatory guide (in this example numbered 5)
s606 (for example)	A section of the Corporations Act (in this example numbered 606), unless otherwise specified
securities	Has the meaning given to that term for the purposes of Chs 6–6C in s92(3) of the Corporations Act

Term	Meaning in this document
substantial holding	Has the meaning given in s9 of the Corporations Act
voluntary escrow	An escrow arrangement that is not required to be entered into under the listing rules of a prescribed financial market

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to use ASIC's modification powers in Chs 6 and 6C to grant conditional relief from the takeovers provisions: see s655A(1)(b) and 673(1)(b). Under this relief, certain entities (see proposal B2) would not have a relevant interest in securities merely because they required certain security holders to enter into voluntary escrow arrangements.</p>	<p>B1Q1 Do you agree with our proposal to grant relief for voluntary escrow arrangements? If not, why not?</p>
<p>B2 We propose to provide the voluntary escrow relief to:</p> <ul style="list-style-type: none"> (a) public companies undertaking an IPO; (b) professional underwriters; and (c) lead managers. 	<p>B2Q1 Do you have any comments on our proposal to provide relief to public companies, professional underwriters and lead managers?</p>
<p>B3 We propose to impose a limit on the total percentage of escrowed securities that a listed company can have on issue at the time of admission to a prescribed financial market, as a condition of our relief. This limit would either be:</p> <ul style="list-style-type: none"> (a) up to 50% of all securities in the listed company; or (b) up to 75% of all securities in the listed company. <p>The limit would include securities subject to listing rule escrow arrangements.</p>	<p>B3Q1 Which of the maximum limits should be the total permitted percentage of escrowed securities (including securities under listing rule escrow arrangements) under the relief for voluntary escrow arrangements? Please explain why.</p>
<p>B4 We propose to allow escrowed securities to be transferred when:</p> <ul style="list-style-type: none"> (a) the transfer does not involve any change in the beneficial ownership of the escrowed securities; (b) the transfer does not extend the duration of the original voluntary escrow arrangements; and (c) the transferee agrees to inherit the same restrictions on voting and disposal under the original voluntary escrow arrangements. 	<p>B4Q1 Should the voluntary escrow relief allow for transfer of some or all of the escrowed securities in the circumstances described in proposal B4?</p> <p>B4Q2 Should we consider permitting the voluntary escrow relief to continue in any other situation where the original restricted security holder no longer owns or holds the beneficial interest in the securities?</p>

Proposal	Your feedback
<p>B5 We propose that, to meet the requirement in proposal B4, the transfer (of legal title) must be:</p> <ul style="list-style-type: none"> (a) by the beneficial owner to a trustee or nominee who will hold the escrowed securities solely on behalf of the existing beneficial holder; (b) to a new trustee or nominee who will hold the securities solely on behalf of the existing beneficial owner; or (c) to the beneficial owner who will obtain legal title to the securities and maintain its existing beneficial interest. 	<p>B5Q1 Do you agree with our list of circumstances in which transfer will meet the conditions of our relief?</p>
<p>B6 We propose to grant conditional relief to facilitate voluntary escrow over securities issued:</p> <ul style="list-style-type: none"> (a) under or in connection with the IPO; or (b) before the IPO to a promoter, seed capitalist, vendor or service provider. 	<p>B6Q1 Should the relief only apply to the circumstances in proposal B6? If not, please outline any other circumstances the legislative relief ought to apply to and provide reasons for your submission.</p>

Proposal	Your feedback
<p>B7 We propose to retain the conditions and requirements for voluntary escrow relief, which are currently set out in Table 11 of RG 5. In summary:</p> <ul style="list-style-type: none"> (a) the escrow arrangement must restrict disposal and not voting; (b) the escrow arrangement must allow the holder to accept into a successful takeover bid and allow the securities to be transferred or cancelled as part of a merger by scheme of arrangement; <p>Note: We will define a 'successful bid' as one where 50% of the bid-class securities that are not subject to escrow, and to which the offers under the bid relate, have been accepted. This applies to a full or a proportional bid.</p> <ul style="list-style-type: none"> (c) the escrow arrangement must terminate no later than: <ul style="list-style-type: none"> (i) two years after the date of entry into the arrangement with a listed company; and (ii) one year after the date of entry into the arrangement with a professional underwriter or professional lead manager; (d) if the securities that are subject to escrow are issued under a prospectus, the company must disclose the details of the voluntary escrow; and (e) an entity relying on this relief will still acquire a relevant interest (under s671B) as a result of entering into the escrow arrangement. They must notify the relevant company and the market, and include relevant documents in the notice given to the relevant market operator. 	<p>B7Q1 Do you agree with the proposed conditions and requirements?</p> <p>B7Q2 What concerns (if any) do you have with the proposed circumstances and conditions to be imposed?</p> <p>B7Q3 Are there any other conditions that ought to apply to voluntary escrow relief?</p>
<p>C1 We propose to use ASIC's modification powers (in s741(1)(a) of the Corporations Act) to grant relief to allow companies to communicate factual information about a planned IPO to security holders and employees before the company lodges a disclosure document.</p>	<p>C1Q1 Do you agree with proposal C1? If not, please explain why.</p> <p>C1Q2 Should factual communications to any other persons be permitted under the proposed relief? If so, please explain why.</p>

Proposal	Your feedback
<p>C2 We propose to require a company that relies on our relief to:</p> <ul style="list-style-type: none"> (a) make the exempted communications in writing; and (b) update recipients of the exempted communications if the information previously provided is no longer accurate or up to date. 	<p>C2Q1 Do you agree with the proposed requirements of relief, set out in proposal C2?</p> <p>C2Q2 Do you support any additional conditions to mitigate the risks of misinformation and drip-feeding of information about an IPO? If so, please include details of any measures you support to achieve this objective.</p>
<p>C3 We propose to require companies relying on the relief to only communicate the permitted content in Table 1 to employees and security holders. The relief is conditional on the company not providing any communication of the advantages, benefits or merits of the IPO.</p>	<p>C3Q1 Do you agree with the proposed permitted content of exempted communications, as set out in proposal C3? If not, please outline your concerns with the proposed circumstances and restrictions.</p> <p>C3Q2 Are there any other conditions we should impose on companies that rely on this relief?</p>
<p>C4 We are seeking feedback on whether we should:</p> <ul style="list-style-type: none"> (a) limit the relief so it ends on the earlier of: <ul style="list-style-type: none"> (i) six months from the date of the first exempted communication; or (ii) the date that the company lodges the disclosure document with ASIC; or (b) allow the relief to continue indefinitely to each exempted communication. 	<p>C4Q1 Should the relief allowing a company to make exempted communications apply for a specific amount of time?</p> <p>C4Q2 If your answer to question C4Q1 is: <ul style="list-style-type: none"> (a) yes, do you consider relief for a period of up to six months from the first exempted communication appropriate? If not, what is the appropriate time period and why? (b) no, should the relief apply indefinitely? </p> <p>C4Q3 Is it preferable that the relief apply to each exempted communication, and therefore no end date apply?</p> <p>C4Q4 Please outline any unintended consequences you have identified may arise as a result of ASIC: <ul style="list-style-type: none"> (a) limiting the duration of the relief; (b) allowing the relief to apply indefinitely; or (c) drafting the relief to apply to each specific communication about an offer, such that a specific relief end date is unnecessary. </p> <p>C4Q5 Please provide details of appropriate strategies to deal with any consequences identified in question C4Q4.</p>