



ASIC
Australian Securities &
Investments Commission

CONSULTATION PAPER 364

Modifications to the ESS regime

September 2022

About this paper

This consultation paper is about relief that ASIC proposes to provide to facilitate the employee share scheme provisions in Pt 7.12 of the *Corporations Act 2001*.

It sets out our proposals on relief for secondary sales of financial products issued by listed entities, clarification of salary sacrificing arrangements and financial information that unlisted companies may provide.

The paper also explains where we do not consider relief is required or appropriate.

Note: The draft ASIC instrument is available on our website at www.asic.gov.au/cp under CP 364.

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 29 September 2022 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 use of ASIC's relief power in s1100ZK of the *Corporations Act 2001*. 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](#) 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 31 October 2022 to:

Corporations team
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001
email: ess@asic.gov.au

What will happen next?

Stage 1	29 September 2022	ASIC consultation paper released
Stage 2	31 October 2022	Comments due on the consultation paper
Stage 3	Q4 2022	Legislative instrument executed

A Background to the proposals

Key points

The employee share scheme (ESS) provisions in Div 1A of Pt 7.12 commence on 1 October 2022: see paragraphs 1–2.

We have been asked to provide guidance on how certain provisions operate and there are indications that some relief may be required to facilitate ESS offers: see paragraphs 4–5.

Section B sets out ASIC’s current relief proposals.

Section C explains where we do not consider relief is required or appropriate.

Our plans for ASIC’s existing relief in [Class Order \[CO 14/1000\] Employee incentive schemes: Listed bodies](#) and [Class Order \[CO 14/1001\] Employee incentive schemes: Unlisted bodies](#) are outlined in paragraphs 7–10 below.

Employee share scheme provisions

- 1 On 31 March 2022, following extensive public consultation, Parliament passed legislation that removes regulatory barriers for entities offering employee share schemes: see Sch 4 of *Treasury Laws Amendment (Cost of Living Support and Other Measures) Act 2022* (No. 14, 2022) and Div 1A of Pt 7.12 of the *Corporations Act 2001* (Corporations Act).
- 2 The provisions in Div 1A of Pt 7.12 (ESS provisions) contain broad exemptions from the Corporations Act’s disclosure and licensing requirements. In particular, the provisions make it easier to offer ESS interests where there is no monetary consideration and they significantly expand the ability of unlisted companies to make offers.

Regulatory guidance and relief

- 3 Stakeholders have asked ASIC for guidance on how specific ESS provisions operate. We may provide guidance in our regular [Corporate Finance Update](#) and we may consult on giving more extensive guidance where this is consistent with ASIC’s regulatory priorities.

Note: You can subscribe to the *Corporate Finance Update* at [ASIC Corporate Finance Update | ASIC - Australian Securities and Investments Commission](#).

- 4 Stakeholders have also foreshadowed that they plan to seek relief in relation to some of the ESS provisions. We will assess applications for relief in accordance with [Regulatory Guide 51 Applications for relief](#) (RG 51). At this time, our focus will be on rectifying unintended difficulties with the way the

ESS provisions apply, rather than expanding on how the regime operates. This is consistent with RG 51, which says that relief will not be given to reverse the usual and intended effect of the Corporations Act: see [RG 51](#) at RG 51.71.

- 5 Our preference is to provide relief by legislative instrument to reduce the regulatory burden associated with individual applications. Therefore, to facilitate the ESS provisions and reduce regulatory costs, we are proposing to give relief by legislative instrument in relation to:
- (a) secondary sales of quoted ESS interests issued by listed entities;
 - (b) the financial information and valuations that unlisted companies can provide to ESS participants; and
 - (c) salary sacrifice arrangements: see Section B for our relief proposals and proposed *ASIC Corporations (Employee Share Schemes) Instrument 2022/XX* (draft instrument).
- 6 We do not propose to give legislative relief to:
- (a) limit a participant's right in s1100T(c) to discontinue deductions for a contribution plan;
 - (b) expand the issue cap in s1100V; or
 - (c) change how the monetary cap in s1100ZA operates: see Section C.

Our existing relief for employee incentive schemes

- 7 The ESS provisions are intended to replace ASIC's existing relief for employee incentive schemes in [Class Order \[CO 14/1000\]](#) *Employee incentive schemes: Listed bodies* and [Class Order \[CO 14/1001\]](#) *Employee incentive scheme: Unlisted bodies*.
- 8 After our consultation on the proposals in this paper, we intend to terminate the ability to make new offers of financial products under the class orders (although offers made before the termination date may remain open for acceptance for 13 months). We do not intend to make any further changes to the class orders because financial products that have been issued or offered under the class orders continue to require some of the relief, including relief for secondary sales, licensing and contribution plans.
- 9 To provide certainty to entities who rely on the class orders, we will terminate the ability to make new offers from 1 January 2023. This will give us time to consider feedback on the proposals in this paper and make any appropriate legislative instrument for the new ESS provisions.
- 10 Some entities have individual relief for employee incentive schemes because they were unable to rely on [CO 14/1000] or [CO 14/1001]. We do not currently intend to revoke those instruments.

B Relief proposals

Key points

We propose to give legislative relief to:

- expand the secondary sale exemption in s1100ZD for financial products that are quoted on a financial market covered by s1100K: see proposal B1;
- modify s1100X(2) so that unlisted foreign companies may provide financial information prepared in accordance with foreign accounting standards: see proposal B2;
- modify s1100X(3) so that companies can provide a valuation prepared by an independent expert where they are offering ESS interests that are not covered by a method approved under s960-412 of the *Income Tax Assessment Act 1997* (ITAA 1997): see proposal B3; and
- modify s1100T so that salary sacrifice arrangements can comply with contribution plan requirements: see proposal B4.

Secondary sale exemption

Proposal

- B1** We propose to notionally modify s1100ZD to expand the secondary sale exemption for financial products that are quoted on a financial market covered by s1100K and where the issuer had no on-sale purpose at the time of issue: notional s1100ZD(2). We will also notionally modify s1100ZD for unquoted products so that a person who acquired the product from the original recipient can on-sell it to ESS participants: notional s1100ZD(1)(c).

See paragraph 18 for our proposed requirements and paragraph 7 of the draft instrument.

Your feedback

- B1Q1 Do you agree with the proposed modification to s1100ZD to expand the secondary sale exemption for quoted products?
- B1Q2 What costs are you likely to incur if ASIC does not expand the on-sale exemption in s1100ZD in the way proposed? Are there additional costs associated with ASIC's proposal to grant relief? Please specify in both cases how such costs are likely to be incurred.
- B1Q3 Are there any requirements in our proposed modification that will cause difficulties?

Rationale

- 11 Sections 707(3)–(4) and 1012C(6)–(7) of the Corporations Act (on-sale provisions) are intended to prevent issuers of financial products avoiding retail disclosure requirements by first issuing the financial products to a wholesale investor for on-sale to retail investors. The on-sale provisions seek to ensure that retail investors receive adequate disclosure and that the issuer is liable to retail investors for the efficacy of that disclosure.
- 12 We recognise that the on-sale provisions can present difficulties, including where retail investors are issued financial products under a specific exemption from the disclosure provisions (e.g. for dividend reinvestment plans). These retail investors may not be able to sell the products within 12 months of their issue due to the on-sale provisions: see [Regulatory Guide 173](#) *Disclosure for on-sale of securities and other financial products* (RG 173) at RG 173.8 and RG 173.70–RG 173.71. We have therefore provided on-sale relief for various categories where retail investors have been issued financial products under an exemption from disclosure: see [ASIC Corporations \(Sale Offers That Do Not Need Disclosure\) Instrument 2016/80](#).
- 13 Section 1100ZD provides that the on-sale provisions do not apply to an offer of ESS interests for sale if the issuer operates an employee share scheme and the person making the sale offer reasonably believes they acquired the interests under the employee share scheme and the person is making the offer only to persons who are ESS participants.
- 14 We have had feedback that the limited class of potential offerees specified in s1100ZD will undermine the ability of listed entities to rely on the ESS regime. Stakeholders have explained that most of these ESS plans are predicated on participants being able to sell the financial products they receive on-market without restriction as to the potential purchasers. Not all listed entities have the cash to acquire ESS interests in the secondary market, there can be tax implications with doing so and they are not always able to rely on the cleansing notice regime in s708A.
- 15 As noted in [RG 173](#) at RG 173.9, it would generally be inappropriate for ASIC to exercise discretionary powers to make fundamental changes to the settings determined by Parliament. However, we may exercise discretionary powers to enable the legislation to operate in circumstances that may not have been envisaged or to mitigate apparently unintended outcomes.
- 16 Consistent with our policy in RG 173, we propose to provide relief where we consider it will facilitate the sale of ESS interests without compromising the investor protection that the on-sale provisions provide to retail investors: see RG 173.13.

- 17 ASIC's class orders for employee share schemes provide a broad exemption from the on-sale provisions: see paragraphs 7 and 8 of [\[CO 14/1000\]](#) and [\[CO 14/1001\]](#). However, in the case of employee share schemes offered under Div 1A of Pt 7.12, we consider that a broad exemption of this type from the on-sale provisions would be inappropriate because:
- (a) the ESS regime in Div 1A of Pt 7.12 is much broader, particularly for unlisted companies; and
 - (b) the limitations imposed by Parliament in s1100ZD indicate some concern that the ESS regime could be abused.

Financial products that are quoted on a financial market

- 18 We therefore propose to only provide a broader on-sale exemption for financial products that are in a class that is able to be traded on a financial market: see notional s1100ZD(2). This broader exemption applies where:
- (a) the entity operates an employee share scheme;
 - (b) the person making the offer reasonably believes that the financial product was acquired under the employee share scheme or on a financial market covered by s1100K;
 - (c) the financial product is in a class of financial products that is able to be traded on a financial market covered by s1100K; and
 - (d) the body corporate or the responsible entity of the scheme did not issue the financial product with the purpose of the recipient selling the product.

Note: For the purposes of s1100K(2), we intend to determine the foreign financial markets consistent with [ASIC Corporations \(Definition of Approved Foreign Market\) Instrument 2017/669](#).

- 19 The restriction to quoted financial products will help ensure there is sufficient information available to potential purchasers. The requirement that the body does not have an 'on-sale' purpose will help to minimise abuse of employee share schemes to circumvent the Corporations Act's disclosure requirements.

Financial products that are not quoted on a financial market

- 20 We do not propose to significantly expand s1100ZD for financial products that are not in a class that is able to be traded on a financial market (unquoted financial products) because we consider this would fundamentally change the settings determined by Parliament.
- 21 We do propose to make a minor change to s1100ZD for unquoted financial products so that the provision adequately covers subsequent re-sales. At present, s1100ZD(b)(i) only permits an ESS interest to be sold if the seller reasonably believes that they acquired the interest under an employee share scheme. This may mean the buyer cannot on-sell the ESS interest to another ESS participant and we therefore propose to notionally modify this requirement: see s1100ZD(1)(c).

Financial information

Proposal

- B2** We propose to notionally modify s1100X(2) so that foreign companies not registered under the Corporations Act can provide a balance sheet and profit and loss statement prepared in accordance with accounting standards the company is required or permitted to use in the company's place of origin. This will be acceptable if the foreign company discloses either:
- (a) confirmation that there is no material difference between the financial statements prepared under the foreign standard and the financial statements that would otherwise be required under paragraph 2(c); or
 - (b) a reconciliation of the material differences.

See paragraphs 6(a) and 6(b) of the draft instrument.

Your feedback

B2Q1 Do you agree with the proposed relief?

B2Q2 What are the financial or cost implications if ASIC does not modify s1100X(2) by legislative instrument to permit information prepared under foreign accounting standards? For example, please specify the costs associated with a foreign company providing financial information that complies with s1100X(2)(c) and the costs associated with a foreign company providing the information we have proposed (including the confirmation as to no material difference or a reconciliation of the material differences).

B2Q3 Should our relief require a reconciliation of net assets and profit after tax rather than the condition proposed (i.e. that the company either confirms there is no material difference between information prepared under the applicable foreign standard and Australian accounting standards or a reconciliation of the material differences)?

Rationale

- 22 Section 1100Q(2)(a) requires an offer by an unlisted company to be accompanied by supporting information specified in s1100X. This includes financial information: s1100X(2). If the company does not lodge financial reports with ASIC under s319 or s601CK of the Corporations Act, the company is required to provide a balance sheet and profit and loss statement prepared in compliance with accounting standards or the international accounting standards: s1100X(2)(c).

Note: In this context:

- (a) 'accounting standards' means standards made by the Australian Accounting Standards Board (see s9 and s334 of the Corporations Act); and

(b) 'international accounting standards' means accounting standards made by the International Accounting Standards Board (see s5 of the *Australian Securities and Investments Commission Act 2001*).

23 We have received feedback that some foreign employers with employees in Australia are not required to report under s601CK because they operate using an Australian subsidiary.

24 For ESS offers, we are not opposed to foreign companies providing financial information prepared under a foreign accounting standard where the company is required or permitted to report financial information under that standard in its place of origin. We are consulting on whether the company should be required to provide:

- (a) a statement either confirming there is no material difference between their financial statements prepared under the foreign accounting standard and the information that would be required under international accounting standards or a reconciliation of the material differences; or
- (b) a reconciliation of net assets and profit after tax (as is expected in Australian financial reports).

25 Our preliminary view is that it is not onerous to require a statement confirming there is no material difference between the company's financial statements prepared under the foreign standard and the information that would be required under international accounting standards because an Australian subsidiary should be following the full recognition and measurement requirements of the accounting standards.

Note: For our policy on disclosing financial information that is presented other than in accordance with accounting standards, see [Regulatory Guide 230 Disclosing non-IFRS financial information](#) (RG 230).

Valuation of financial products that are not ordinary shares

Proposal

B3 Section 1100X(3)(a) provides that ESS interests may be valued in accordance with an applicable method approved by the Commissioner of Taxation under s960-412 of the ITAA 1997. Currently the method specified under that provision only covers ordinary shares: *Income Tax Assessment (Methods for Valuing Unlisted Shares) Approval 2015* (ESS 2015/1). For other types of ESS interests, we are proposing legislative relief that allows a company to provide a valuation of the ESS interests in an independent expert report.

See paragraph 6(c) of the draft instrument, which notionally inserts s1100X(3)(aa).

Your feedback

- B3Q1 Do you agree with our proposal to permit valuations prepared by an independent expert?
- B3Q2 If another valuation method was specified, what valuation method would you recommend and why do you consider it a reliable alternative?

Rationale

- 26 Under s1100Q(a), offers by unlisted companies need to be accompanied by supporting information specified under s1100X. The main valuation method specified under s1100X(3) is a method approved for tax purposes under s960-412 of the ITAA 1997. This is consistent with the aim of the ESS reform to harmonise requirements under the Corporations Act with those under the ITAA 1997. The method currently specified for these purposes only relates to ordinary shares.
- 27 The other methods specified by s1100X(3) are contemporaneous disclosure documents and certain agreements: s1100X(3)(b)–(e). We recognise that such agreements will often not be an option and it appears contrary to the intent of the ESS regime for companies to offer ESS interests under a disclosure document solely to comply with valuation requirements. We are therefore proposing to grant legislative relief so that companies offering ESS interests other than ordinary shares may provide a valuation prepared by an independent expert for the purposes of s1100X(3).
- 28 We recognise that an expert report will not be feasible for all companies. However, ESS participants may pay significant monetary consideration for ESS interests in an unlisted company and it is important that they have reliable supporting valuation information.
- 29 The Government can specify another valuation method by regulation if considered appropriate: s1100X(3)(f).

Contribution plans and salary sacrifice arrangements**Proposal**

- B4** We propose to make minor modifications to s1100T, primarily so that salary sacrifice arrangements can comply with requirements for contribution plans. Consistent with [\[CO 14/1000\]](#), the proposed changes would exempt salary sacrifice payments from:
- (a) the requirement to be held in an account with an Australian authorised deposit-taking institution (ADI); and
 - (b) the repayment requirement applying to unused contributions if the ESS participant discontinues participation.

See paragraph 5 of the draft instrument.

Your feedback

- B4Q1 Do you agree with the changes proposed above in relation to salary sacrifice arrangements—so that they can comply with the s1100T requirements for contribution plans? If not, please explain why, including any difficulties and costs associated with salary sacrifice arrangements complying with s1100T as modified.
- B4Q2 Section 1100T refers to ‘payments’ and ‘deductions’. Do you agree that salary sacrifice arrangements are a ‘payment’?
- B4Q3 Do you agree that salary sacrifice payments should be exempt from the repayment requirement in s1100T(d)?
- B4Q4 Section 1100T(d)(i) refers to deductions ceasing and being repaid after an election to discontinue. Do you agree that s1100T(d)(i) should also refer to payments ceasing and being repaid after an election to discontinue? If not, please explain why.

Rationale

- 30 Salary sacrifice arrangements are where an employee elects to receive part of their future monetary entitlements in financial products, before earning that entitlement. These arrangements, which involve the employee forgoing monetary consideration, need to comply with s1100Q at a minimum. There is also benefit in salary sacrifice contributions complying with requirements in s1100T, which are intended to safeguard participants’ contributions.
- 31 This is the case under [\[CO 14/1000\]](#), although paragraphs 21(c) and 21(f) of the class order exempt future entitlements from a couple of requirements they cannot comply with: see [Consultation Paper 218 *Employee incentive schemes*](#) (CP 218) at paragraphs 138 and 139.
- 32 We have proposed modifying s1100T so that salary sacrifice contributions do not need to be held in an Australian ADI and are not subject to the repayment requirements. We are seeking feedback as to whether salary sacrifice contributions will be able to comply with s1100T as modified and, if so, information on any additional costs.

Other technical relief**Proposal**

- B5 We are open to considering other technical relief if our stakeholders have identified unintended difficulties with the way the ESS provisions apply to standard employee share schemes (i.e. that are not covered in Section B or Section C of this paper).

Your feedback

B5Q1 Are you encountering any technical difficulties that are not covered in this paper as you apply Div 1A of Pt 7.12 to your employee share scheme? If so, please provide feedback.

Rationale

- 33 Although there was extensive consultation on the new provisions, it appears that entities are only identifying technical difficulties with how Div 1A of Pt 7.12 applies as they seek to put the provisions into practice for their employee share scheme.
- 34 We are seeking feedback on potential difficulties because if the ESS provisions require modification, our preference is to do so by way of legislative instrument. This is more efficient and cost effective. It is also more equitable because it ensures a level playing field for all entities.
- 35 We are willing to modify the provisions to remove unintended technical difficulties. However, as per [RG 51](#), we will not give relief simply because compliance with the ESS provisions is inconvenient and we will not undermine the intended effect of these provisions: see RG 51.66 and RG 51.71. Section C provides some examples of where we do not consider it would be appropriate to give relief for these reasons.

C Other feedback on the ESS regime where we do not propose to give relief

Key points

We do not currently propose to give legislative or individual relief to:

- limit a participant's right to discontinue deductions for a contribution plan and are seeking feedback on ways entities can manage their obligations: see paragraphs 37–40;
- expand the issue cap in s1100V because it is already sufficiently broad and flexible: see paragraphs 41–43; and
- alter how the monetary cap in s1100ZA operates for related primary participants because we consider it already provides each primary participant with a significant cap: see paragraphs 44–51.

Approach to use of s1100ZK

- 36 This section seeks to explain how we plan to use our power in s1100ZK and the limits on the use of that power in the context of several potential issues that have been raised by stakeholders.

Opting out of contribution plans

- 37 Section 1100T defines an ESS contribution plan as a plan with terms set out in paragraphs (a)–(f). Paragraph (c) says the terms must allow the participant to discontinue deductions or payments at any time and paragraph (d) says that if the participant discontinues, any deductions must cease and any deductions made after the election must be repaid to the participant within 45 days of the election (together with unused amounts standing to the credit of the participant's account).
- 38 We received feedback that companies relying on third-party service providers to manage payroll and the acquisition of financial products for ESS contribution plans will find it difficult to process opt-out notices and halt deductions and the acquisition of financial products without a reasonable amount of notice.
- 39 Due to the unreasonable administrative burden associated with a participant's ability to discontinue contributions at any time, [\[CO 14/1000\]](#) specifies that a discontinuance takes effect no more than 45 days after the participant gives notice: see paragraph 21(e) of [\[CO 14/1000\]](#) and [CP 218](#) at paragraphs 146 and 147.

40 However, we do not consider that it would be an appropriate use of our powers to limit the rights of ESS participants to immediately discontinue payments or deductions. Unlike ASIC's class order relief for ESS, the new ESS provisions allow employees of unlisted companies to provide significant monetary contributions. ESS participants may wish to urgently discontinue these contributions and the acquisition of ESS interests, for example, due to a change in personal circumstances.

Issue cap

41 Offers that are made for monetary consideration must comply with the issue cap in s1100V: s1100Q(1)(e). Under s1100V(2), the issue cap is 5% unless the entity's constitution specifies another percentage. We received feedback that the issue cap in s1100V(1) should not apply where:

- (a) the offer is received outside Australia;
- (b) the offer is covered by s1100P (offers for no monetary consideration);
or
- (c) the offer is covered by s1100R(1) (offers that do not need disclosure).

42 Section 1100V does not apply if an entity only makes offers for no monetary consideration under s1100P or only relies on s1100R. However, if some offers are also made in reliance on s1100Q, then equity issued for no monetary consideration or under another disclosure exemption subject to s1100R must also be included when calculating the issue cap.

43 Entities are able to increase the issue cap in their constitution and this means the issue cap is already sufficiently expansive. For this reason, we do not consider it would be appropriate to expand it further by carving out offers referred to in paragraph 41.

Monetary cap

44 Under s1100Q(2)(b), offers made by an unlisted company must comply with the monetary cap in s1100ZA. Section 1100ZA provides a monetary cap for each primary participant of \$30,000 (the basic cap amount) plus other amounts specified in s1100ZA(5)(b)–(d).

Exit events

45 Section 1100ZB specifies amounts that are excluded from the monetary cap. The main exclusion relates to amounts that are payable during a 'liquidity period': s1100ZB(3)–(6). 'Liquidity period' is defined as a period during which the relevant ESS interests trade on a financial market or there is an executed sale agreement to acquire ESS interests in the same class: s1100ZB(7).

- 46 We have had feedback that the concept of ‘liquidity period’ is too narrow, particularly for technology companies who need to offer options upfront when first making employment offers to provide prospective employees with some certainty about the number of options that will be granted over a period of years.
- 47 Stakeholders have submitted that ‘liquidity period’ should cover:
- (a) asset sales (i.e. an agreement for sale of all or substantially all of the assets of the business); and
 - (b) agreements to acquire ESS interests that could be acquired on exercise of the relevant ESS interests—so that, for example, an ESS participant can exercise their options to acquire ESS interests that are in the same class of ESS interests to which the agreement relates.
- 48 We consider that it would not be an appropriate use of our powers to significantly modify the concept of ‘liquidity period’, given the clear intention for it to only apply to certain exit events relating to the same class of ESS interest and the significant monetary cap already provided under s1100ZA.

Related participants

- 49 In calculating the monetary cap, amounts paid by related persons of the participant are counted: s1100ZA(3)(b). We have had feedback that the monetary cap in s1100ZA may be too restrictive for family businesses where employees are related to each other. However, we do not consider that s1100ZA should be interpreted so that one primary participant’s acquisitions limit the monetary cap of another primary participant just because they are related to each other.
- 50 It is the intention of s1100ZA that each primary participant has a monetary cap of \$30,000 plus the other amounts specified in s1100ZA(5) and that amounts paid by another primary participant for their ESS interests do not need to be included, even if the primary participants are related to each other. For example, if A is a sibling of B and both A and B are ‘primary participants’, then amounts that B pays for an ESS offer accepted by B do not count towards compliance with s1100ZA(1) for A.
- 51 The monetary cap under s1100ZA and 1100ZB is already expansive and we do not consider that it requires any further expansion.

D Regulatory and financial impact

52 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:

- (a) facilitating offers of ESS interests under Div 1A of Pt 7.12 of the Corporations Act; and
- (b) protecting the interests of ESS participants and other retail investors.

53 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).

54 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.

55 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
ADI	An authorised deposit-taking institution—a corporation that is authorised under the <i>Banking Act 1959</i> . ADIs include: <ul style="list-style-type: none"> • banks; • building societies; and • credit unions
ASIC	Australian Securities and Investments Commission
[CO 14/1000] (for example)	An ASIC class order (in this example numbered 14/1000) 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
CP 218 (for example)	An ASIC consultation paper (in this example numbered 218)
ESS	Employee share scheme
ESS contribution plan	As defined in s1100T of the Corporations Act
ESS provisions	The provisions in Div 1A of Pt 7.12 of the Corporations Act
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
Pt 7.12 (for example)	A part of the Corporations Act (in this example numbered 7.12)
RG 51 (for example)	An ASIC regulatory guide (in this example numbered 51)
s1100ZK (for example)	A section of the Corporations Act (in this example numbered 1100ZK)

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to notionally modify s1100ZD to expand the secondary sale exemption for financial products that are quoted on a financial market covered by s1100K and where the issuer had no on-sale purpose at the time of issue: notional s1100ZD(2). We will also notionally modify s1100ZD for unquoted products so that a person who acquired the product from the original recipient can on-sell it to ESS participants: notional s1100ZD(1)(c).</p> <p>See paragraph 18 for our proposed requirements and paragraph 7 of the draft instrument.</p>	<p>B1Q1 Do you agree with the proposed modification to s1100ZD to expand the secondary sale exemption for quoted products?</p> <p>B1Q2 What costs are you likely to incur if ASIC does not expand the on-sale exemption in s1100ZD in the way proposed? Are there additional costs associated with ASIC's proposal to grant relief? Please specify in both cases how such costs are likely to be incurred.</p> <p>B1Q3 Are there any requirements in our proposed modification that will cause difficulties?</p>
<p>B2 We propose to notionally modify s1100X(2) so that foreign companies not registered under the Corporations Act can provide a balance sheet and profit and loss statement prepared in accordance with accounting standards the company is required or permitted to use in the company's place of origin. This will be acceptable if the foreign company discloses either:</p> <p>(a) confirmation that there is no material difference between the financial statements prepared under the foreign standard and the financial statements that would otherwise be required under paragraph 2(c); or</p> <p>(b) a reconciliation of the material differences.</p> <p>See paragraphs 6(a) and 6(b) of the draft instrument.</p>	<p>B2Q1 Do you agree with the proposed relief?</p> <p>B2Q2 What are the financial or cost implications if ASIC does not modify s1100X(2) by legislative instrument to permit information prepared under foreign accounting standards? For example, please specify the costs associated with a foreign company providing financial information that complies with s1100X(2)(c) and the costs associated with a foreign company providing the information we have proposed (including the confirmation as to no material difference or a reconciliation of the material differences).</p> <p>B2Q3 Should our relief require a reconciliation of net assets and profit after tax rather than the condition proposed (i.e. that the company either confirms there is no material difference between information prepared under the applicable foreign standard and Australian accounting standards or a reconciliation of the material differences)?</p>

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<p>B3 Section 1100X(3)(a) provides that ESS interests may be valued in accordance with an applicable method approved by the Commissioner of Taxation under s960-412 of the ITAA 1997. Currently the method specified under that provision only covers ordinary shares: Income Tax Assessment (Methods for Valuing Unlisted Shares) Approval 2015 (ESS 2015/1). For other types of ESS interests, we are proposing legislative relief that allows a company to provide a valuation of the ESS interests in an independent expert report.</p> <p>See paragraph 6(c) of the draft instrument, which notionally inserts s1100X(3)(aa).</p>	<p>B3Q1 Do you agree with our proposal to permit valuations prepared by an independent expert?</p> <p>B3Q2 If another valuation method was specified, what valuation method would you recommend and why do you consider it a reliable alternative?</p>
<p>B4 We propose to make minor modifications to s1100T, primarily so that salary sacrifice arrangements can comply with requirements for contribution plans. Consistent with [CO 14/1000], the proposed changes would exempt salary sacrifice payments from:</p> <p>(a) the requirement to be held in an account with an Australian authorised deposit-taking institution (ADI); and</p> <p>(b) the repayment requirement applying to unused contributions if the ESS participant discontinues participation.</p> <p>See paragraph 5 of the draft instrument.</p>	<p>B4Q1 Do you agree with the changes proposed above in relation to salary sacrifice arrangements—so that they can comply with the s1100T requirements for contribution plans? If not, please explain why, including any difficulties and costs associated with salary sacrifice arrangements complying with s1100T as modified.</p> <p>B4Q2 Section 1100T refers to ‘payments’ and ‘deductions’. Do you agree that salary sacrifice arrangements are a ‘payment’?</p> <p>B4Q3 Do you agree that salary sacrifice payments should be exempt from the repayment requirement in s1100T(d)?</p> <p>B4Q4 Section 1100T(d)(i) refers to deductions ceasing and being repaid after an election to discontinue. Do you agree that s1100T(d)(i) should also refer to payments ceasing and being repaid after an election to discontinue? If not, please explain why.</p>
<p>B5 We are open to considering other technical relief if our stakeholders have identified unintended difficulties with the way the ESS provisions apply to standard employee share schemes (i.e. that are not covered in Section B or Section C of this paper).</p>	<p>B5Q1 Are you encountering any technical difficulties that are not covered in this paper as you apply Div 1A of Pt 7.12 to your employee share scheme? If so, please provide feedback.</p>