

Guidance Note

COVID-19 EXEMPTIONS

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**TAKEOVERS
PANEL**
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In light of COVID-19 related developments, the Panel recently approved the granting of temporary class exemptions to assist Code companies in raising capital. This Guidance Note sets out the Panel's guidance on capital raising under the [Takeovers Code \(Facilitation of Capital Raising in Response to COVID-19\) Exemption Notice 2020](#) which takes effect from 10 April 2020.

Appendix A provides worked examples of a number of scenarios. The [Panel executive](#) is available to discuss any questions in relation to the COVID-19 Exemption.

1 Introduction

- 1.1 The Panel is aware that the COVID-19 pandemic is causing significant issues within the economy and that a number of companies have come, or are expected to come, under financial pressure as a result of rapidly changing economic conditions. As a result, some Code companies may have an urgent requirement to raise additional capital.
- 1.2 In these unprecedented circumstances, the Panel has granted a suite of temporary class exemptions from the Takeovers Code aimed at assisting Code companies in raising capital. The exemptions (the **COVID-19 Exemptions**) are set out in the [Takeovers Code \(Facilitation of Capital Raising in Response to COVID-19\) Exemption Notice 2020](#) (the **COVID-19 Notice**).
- 1.3 Some of the COVID-19 Exemptions are novel. Others build on pre-existing exemptions under:
 - (a) the [Takeovers Code \(Class Exemptions\) Notice \(No 2\) 2001](#) (the **Class Notice**); or
 - (b) the [Takeovers Code \(Professional Underwriters\) Exemption Notice 2004](#) (the **Professional Underwriters Notice**).
- 1.4 Parties seeking to rely on the COVID-19 Exemptions should read and consider the COVID-19 Notice and not merely rely on the summary in this Guidance Note. The [Panel executive](#) is available to discuss any questions in relation to the COVID-19 Notice.

2 Relief under the COVID-19 Exemptions

Timing

- 2.1 The COVID-19 Exemptions apply to certain capital raisings conducted on or after 10 April 2020 and before the close of 31 October 2020. The Panel will review and may extend the COVID-19 Exemptions if the current unprecedented circumstances persist.

Summary

- 2.2 The COVID-19 Exemptions only apply to certain allotments of voting securities (including certain pro rata and non-pro rata allotments). They do not apply to increases of voting control by way of acquisition.
- 2.3 The COVID-19 Exemptions comprise (in summary):
 - (a) **General Increase Exemption:** An exemption which permits increases in voting control of up to 10% in addition to that which would be able to be acquired under the Code.
 - (b) **Rights Offer Exemptions:** A series of exemptions for allotments of voting securities pursuant to pro rata offers (which provide further relief over and above what is provided under the Class Notice).



- (c) **Pro rata Underwriter Exemption:** An exemption for persons who underwrite pro rata offers (this is not limited to professional underwriters).
 - (d) **Professional Underwriter Exemption:** An exemption for professional underwriters (which provides further relief over and above what is provided under the Professional Underwriters Notice).
- 2.4 The exemptions in (a) through (c) are referred to in this Guidance Note as the **10% Increase Exemptions** given the nature of the conditions to these exemptions (discussed below). Importantly, the 10% Increase Exemptions allow certain movements into, and within, the “no-fly zone” of 20% to 50% without sell down obligations.
- 2.5 More than one 10% Increase Exemption may be relied on in respect of an offer, although there is a maximum aggregate amount by which voting control may be increased before encountering control reduction requirements and voting restrictions – see the conditions described below.
- 2.6 Each of the COVID-19 Exemptions is subject to a number of general conditions:
- (a) Each of the 10% Increase Exemptions is subject to a series of general conditions which (broadly):
 - (i) permit an aggregate increase of up to 10% by a person and their associates, over and above that which would be permitted under the Code, to be retained and voted (this 10% figure applies across all increases under the 10% Increase Exemptions)¹;
 - (ii) permit temporary increases above the 10% threshold described in (i), subject to voting restrictions and control reduction requirements applying to increases above that threshold; and
 - (iii) restrict increases by other means while a person holds or controls voting securities which are subject to a control reduction requirement.
 - (b) Various other conditions apply to the COVID-19 Exemptions. In very general terms, these mirror the terms of the exemptions under the Class Notice and the Professional Underwriters Notice, but allow for a longer control reduction period (24 months as opposed to 12 months or 6 months).
- 2.7 We have summarised below:
- (a) the COVID-19 Exemptions (as well as the specific conditions which apply to them); and
 - (b) the general conditions (including, most importantly: the control reduction requirement, voting restrictions and restrictions on other-means increases).

3 The COVID-19 Exemptions

General Increase Exemption (clause 5 of the COVID-19 Notice)

- 3.1 Clause 5 of the COVID-19 Notice permits any person (together with associates) to increase their aggregate voting control of a Code company through an allotment of voting securities to either 10% above their starting aggregate control percentage or 30% (whichever is greater).
- 3.2 By way of example, a person with no associates:
- (a) with 15% voting control would be able to increase their voting control to up to 30%; and
 - (b) with voting control of 25% would be able to increase their voting control to up to 35%.

¹ In certain circumstances, this 10% figure will be 15% to account for the Creep Rule Allowance (see paragraph 4.6(a)(ii)).



- 3.3 The General Increase Exemption applies to pro rata allotments and to non-pro rata allotments. Accordingly, increases in control through placements and other non-pro rata offers are permitted under this exemption.
- 3.4 If a person only relies on the General Increase Exemption, no control reduction requirement or voting restrictions will apply. However, if the person also increases their voting control under other exemptions (as is possible), control reduction requirements and voting restrictions may apply (see below at paragraphs 4.4 to 4.15).
- 3.5 As noted, the General Increase Exemption applies to a person's aggregate voting control – i.e., the voting control of a person together with their associates. Accordingly, if a person has associates which hold or control voting rights in the Code company, the associates' voting control (and any increase in that voting control) will limit the amount by which the person can increase their voting control under the General Increase Exemption. Such a person might be able to increase further under another of the 10% Increase Exemptions, but the control reduction requirement and voting restrictions are likely to apply in that situation (see paragraphs 4.4 to 4.15 below).

Rights Offer Exemptions (clauses 7 – 10 of the COVID-19 Notice)

- 3.6 The Rights Offer Exemptions largely replicate the exemptions in the Class Notice in relation to shareholders who increase their voting control through pro rata rights offers, but with several key changes:
- (a) The usual obligation to reduce voting control and not exercise voting rights attached to that increase which applies under the Class Notice is relaxed. Generally, increases in a control percentage of up to 10% beyond what is usually permitted under the Code can be retained and voted (see the commentary on the control reduction requirement and voting restrictions below at paragraphs 4.4 to 4.15).
 - (b) In addition, the period before the control reduction requirement applies (during which the shareholder must not exercise the relevant voting rights) is extended from 12 months to 24 months.
 - (c) The conditions have been drafted in a manner that permits non-renounceable structures.
- 3.7 As with the corresponding provisions in the Class Notice, these exemptions are subject to the conditions that the person seeking to rely on the Rights Offer Exemption:
- (a) acquired no more than the allottee's pro rata share of the securities offered under the pro rata rights offer;² and
 - (b) if applicable, acquired on behalf of a beneficiary no more than the beneficiary's pro rata share of the securities offered.

Pro rata Underwriter Exemption (clauses 12 and 13 of the COVID-19 Notice)

- 3.8 The Pro rata Underwriter Exemption facilitates underwriting of pro rata offers only.
- 3.9 This exemption replicates many of the provisions from the current Professional Underwriters Notice, but with several key changes:
- (a) Any person can act as an underwriter.
 - (b) Taking voting securities under an over acceptance facility and via a shortfall bookbuild has been included as a permissible form of allotment to an underwriter.
 - (c) The obligation under the Professional Underwriters Notice to reduce and not exercise voting rights attached to an increase in voting control is relaxed. Generally, increases in voting control of up to 10% beyond what is

² This condition does not prevent an increase in voting control under another exemption.



usually permitted under the Code can be retained and voted (see the commentary on the control reduction requirement and voting restrictions below at paragraphs 4.4 to 4.15).

- (d) The period before the control reduction requirement applies (during which the shareholder must not exercise the relevant voting rights) is extended from 6 months to 24 months.

Professional Underwriters Exemption (clause 20 of the COVID-19 Notice)

- 3.10 The Professional Underwriters Exemption largely mirrors the Professional Underwriters Notice, but with several key changes:
- (a) Professional underwriters may rely on this exemption if they and their associates hold or control 20% or less of the voting rights in the Code company at the time of underwriting (as opposed to the usual 5%).
 - (b) Professional underwriters will have 24 months to reduce their control percentage (as opposed to the usual 6 months).
- 3.11 Control reduction obligations and voting restrictions apply more strictly under the Professional Underwriters Exemption than under the 10% Increase Exemptions. Professional underwriters relying on this exemption (together with their associates) will not be able to exercise more than 20% of the voting rights in the Code company (and will have to reduce their voting control so that it is 20% or less in aggregate).
- 3.12 However, the Professional Underwriters Exemption is more permissive than the Pro rata Underwriters Exemption in that the offer does not have to be pro rata.

4 General conditions to the COVID-19 Exemptions

- 4.1 The COVID-19 Exemptions are subject to several overarching conditions (see clauses 14 to 20 of the COVID-19 Notice). In summary, these conditions are:
- (a) in the case of the 10% Increase Exemptions:
 - (i) the control reduction requirement;
 - (ii) voting restrictions; and
 - (iii) restrictions on “other-means increases” before compliance with the control reduction requirement; and
 - (b) in all cases:
 - (i) restrictions on increasing control under rule 7(e) of the Code (the **Creep Rule**); and
 - (ii) prohibitions on becoming a dominant owner in reliance on the exemptions.
- 4.2 Each overarching condition is summarised below.
- 4.3 Please note that the operation of the conditions that relate to the 10% Increase Conditions can be very complex. We have provided a number of worked examples in Appendix A of this Guidance Note.

Control reduction requirement (clause 15 of the COVID-19 Notice)

- 4.4 A person who relies on a 10% Increase Exemption must comply with the control reduction requirement.

Date for compliance with the control reduction requirement

- 4.5 The date by which control must be reduced is 2 years after the “first increase date” – i.e., 2 years after the person first increased their voting control in reliance on the COVID-19 Notice.



Amount of the reduction required by the control reduction requirement

- 4.6 There are two limbs to the test that determines the amount of the control reduction requirement:
- (a) The first limb applies before the consideration of associates' control percentages and requires that the person reduces their control percentage so that they do not increase their control percentage by more than:
 - (i) 10% over and above the greater of 20% or their previous control percentage; plus
 - (ii) an additional 5% allowance where the amount referred to above would be more than 50% (a **Creep Rule Allowance**) – this reflects the fact that a person with this control percentage would ordinarily be able to increase their control percentage by 5% under rule 7(e) of the Code.³
 - (b) The second limb is the aggregate increase cap. Generally, this applies a similar test as (a), but aggregates the shareholder's control percentage with that of its associates. As a result, a group of associates cannot increase their aggregate voting control by more than they could under the COVID-19 Exemptions if they were one person.
- 4.7 The control reduction requirement works differently depending on a person's aggregate voting control before any increase. A number of examples have been included in Appendix A in order to demonstrate how this can operate in practice.
- 4.8 In general terms though, if a person increases their voting control in reliance on one of the 10% Increase Exemptions and that person's associate also increases their voting control, then those persons must, in aggregate, comply with the control reduction and voting restriction conditions. Each of the associates must procure that the other associates comply with those requirements. The effect of this aggregated responsibility is crucial to understand before a person relies on one of these exemptions. The worked examples in Appendix A illustrate the effect of these conditions when a person has associates and the person and one or more of the associates increase their voting control in a Code company.
- 4.9 The control reduction requirement applies to all increases under all of the 10% Increase Exemptions, other than the Professional Underwriters Exemption (which has a separate analogous requirement with a lower limit).
- 4.10 The control reduction requirement (and the ability to increase a person's control percentage before application of the control reduction requirement) applies in aggregate across all the 10% Increase Exemptions relied on, if the person relies on more than one.
- 4.11 The control reduction requirement is agnostic as to how control is reduced. For example, it is possible for a shareholder to comply with the control reduction requirement (in whole or in part) by having their voting control diluted and/or by selling securities.
- 4.12 No shareholder approval will be required to retain additional voting securities that are not subject to a control reduction requirement.

Voting restriction (clause 16 of the COVID-19 Notice)

- 4.13 In general terms:
- (a) if a person is not subject to a control reduction requirement, they will not be subject to any voting restrictions; and
 - (b) to the extent that a person is subject to a control reduction requirement, they will not be able to exercise their voting rights in respect of the relevant voting securities.

³ Note that different voting restrictions apply where the Creep Rule Allowance applies (see paragraph 4.14).



- 4.14 In addition, if the Creep Rule Allowance applies (see above at paragraph 4.6(a)(ii)), the voting rights attached to the additional 5% control percentage that can be retained under the Creep Rule Allowance can only be exercised after 1 year following the first increase date.
- 4.15 No shareholder approval will be required to exercise votes in respect of voting securities that are not subject to a control reduction requirement.

Other-means increases (clauses 17 and 18 of the COVID-19 Notice)

- 4.16 A person who relies on a 10% Increase Exemption must not increase their control percentage until they have complied with any applicable control reduction requirement except as permitted under clauses 17 and 18 of the COVID-19 Notice. Those persons must also procure that their associates do not increase other than in this manner.
- 4.17 Generally speaking, other-means increases are permitted:
- (a) with shareholder approval;
 - (b) under the Creep Rule (see further below); or
 - (c) under a specific exemption.
- 4.18 Importantly, increases in voting control by way of a takeover offer are not permitted before any control reduction condition has been satisfied (or an individual exemption is sought and granted). Similarly, if a shareholder who was restricted from making acquisitions under this clause sought to increase control through a scheme of arrangement, the Panel would need to consider such proposal carefully in determining whether to issue a no objection statement. An individual exemption may well be required in this situation to avoid a historic breach of the Code by failing to comply with the conditions to the relevant COVID-19 Exemption, and the decision as to whether or not to grant such an exemption would be at the Panel's discretion.

Creep Rule restriction (clause 19 of the COVID-19 Notice)

- 4.19 If a person increases their voting control by 10% or more in reliance on the COVID-19 Notice, they must not increase their voting control in reliance on the Creep Rule until 1 year after the first increase date. (This reflects how the Creep Rule would be very likely to operate in any event – generally if a person increases by more than 5%, it will take 1 year for “headroom” to become available under the Creep Rule.)

Restriction on becoming a dominant owner (clause 20 of the COVID-19 Notice)

- 4.20 A person may not use the COVID-19 Notice to become a dominant owner for the purposes of the Code.

5 Care should be taken to consider association

- 5.1 The Panel is aware that these exemptions are unusual, but the Panel has sought to take a pragmatic approach in light of the circumstances and the realities of business relationships. Nevertheless, to maintain the integrity of the Code, the exemptions intentionally apply to aggregate increases in voting control by a person and their associates.
- 5.2 Care should be taken when considering associate relationships. While it is possible that associates who rely on the 10% Increase Exemptions could cease to be associated, the Panel will look closely at any such purported changes in association.
- 5.3 Further, the Panel expects any person who relies on the COVID-19 Notice who has associates to ensure that they have appropriate enforceable agreements in place with their associates (both at the time of the reliance and subsequently). A party who fails to do this may later find themselves disadvantaged by an associate's actions.



- 5.4 The Panel will monitor Code companies that undertake transactions in which investors seek to rely on the COVID-19 Notice. If the Panel suspects that parties are seeking to manipulate their relationships so as to take inappropriate advantage of the COVID-19 Exemptions, the Panel will investigate such matters. Such investigations may take the form of a formal enforcement hearing under section 32 of the Takeovers Act 1993.



APPENDIX A

Worked examples for illustrative purposes

In the examples below, unless otherwise noted:

- 1 All percentages refer to control percentages or aggregate control percentages (as applicable).
- 2 All parties are associates.
- 3 There are no “other-means increases” after the increase in reliance on the COVID-19 Exemption.
- 4 There has not been any other dilution of any person’s control percentage.
- 5 Shareholders are referred to as A, B, C and D.

#	Scenario	Clause 15(1)	Aggregate Increase Cap	Effect of clauses 17 and 18	Control reduction requirement	Control percentage subject to voting restrictions
1	A increases from 10% to 30% (20% increase). No associates.	Upper limit: 30% Maximum increase: 20%	20% (10% + 10%)	n/a	None A’s increase is within what is permitted by both limbs of the control reduction requirement test.	None
2	A increases from 10% to 35% (25% increase). No associates.	Upper limit: 30% Maximum increase: 20%	20% (10% + 10%)	n/a	5% A’s increase is 5% more than what is permitted by both limbs of the control reduction requirement test.	5%



#	Scenario	Clause 15(1)	Aggregate Increase Cap	Effect of clauses 17 and 18	Control reduction requirement	Control percentage subject to voting restrictions
3	A and B (in aggregate) increase from 15% to 40% (25% increase). A increases from 10% to 30% (20% increase). B increases from 5% to 10%. A and B agree that B will retain and vote a 5% increase.	A Upper limit: 30% Maximum increase: 15% B Upper limit: 30% Maximum increase: 25%	15% (10% + 5% Creep Rule Allowance).	n/a	10% A and B's aggregate control is 10% more than what is permitted. Given that B will retain 5%, A cannot increase by more than 10% before encountering control reduction requirements and voting restrictions.	A 10% B 0%
4	A increases from 25% to 35% (10% increase). No associates.	Upper limit: 35% Maximum increase: 10%	10%	n/a	None A's increase is permitted by both limbs of the control reduction requirement test.	None
5	A increases from 25% to 40% (15% increase). No associates.	Upper limit: 35% Maximum increase: 10%	10%	n/a	5% A's increase is 5% more than what is permitted by both limbs of the control reduction requirement test.	5%
6	A increases from 45% to 65% (20% increase). No associates.	Upper limit: 60% Maximum increase: 15%	15% (10% + 5% Creep Rule Allowance)	n/a	5% A's increase is 5% more than what is permitted by both limbs of the control reduction requirement test.	Year 1 10% (see clause 16(3)) Year 2 5%



#	Scenario	Clause 15(1)	Aggregate Increase Cap	Effect of clauses 17 and 18	Control reduction requirement	Control percentage subject to voting restrictions
7	<p>A increases from 15% to 20% (5% increase).</p> <p>B increases from 10% to 12%</p> <p>Aggregate increases from 25% to 32% (7% increase).</p>	<p>A</p> <p>Upper limit: 30%</p> <p>Maximum increase: 15%</p> <p>B</p> <p>Upper limit: 30%</p> <p>Maximum increase: 20%</p>	10%	n/a	<p>None.</p> <p>A and B's aggregate control has only increased by 7%. The aggregate increase cap is 10%</p>	None
8	<p>A increases from 45% to 65% (20% increase).</p> <p>B increases from 5% to 10% (5% increase). B agrees it will reduce this to 5% and not vote.</p> <p>Aggregate increases from 50% to 75% (25% increase).</p>	<p>A</p> <p>Upper limit: 65%</p> <p>Maximum increase: 15%</p> <p>B</p> <p>Upper limit: 30%</p> <p>Maximum increase: 25%</p>	15% (10% + 5% Creep Rule Allowance)	n/a	<p>10% in aggregate.</p> <p>A and B's aggregate control is 10% more than what is permitted by both limbs of the control reduction requirement test.</p> <p>Given that B will reduce by 5%, A must also reduce by 5%.</p>	<p>Year 1</p> <p>15% in aggregate (the Creep Rule Allowance cannot be voted yet – see clause 16(3)).</p> <p>As per A and B's agreement, A may not vote 10% and B will not vote any of its 5% increase.</p> <p>Year 2</p> <p>10% in aggregate (the Creep Rule Allowance can be voted now – see clause 16(3)).</p> <p>As per A and B's agreement, A will now only be subject to a 5% restriction. B will continue to not vote any of its 5% increase.</p>



#	Scenario	Clause 15(1)	Aggregate Increase Cap	Effect of clauses 17 and 18	Control reduction requirement	Control percentage subject to voting restrictions
9	<p>A increases from 10% to 30% (20% increase).</p> <p>B increases from 10% to 30% (20% increase).</p> <p>Aggregate increases from 20% to 60% (40% increase).</p> <p>Although A and B are associates, A and B cannot agree on which one of them will not exercise voting rights or reduce their control.</p>	<p>A</p> <p>Upper limit: 30%</p> <p>Maximum increase: 20%</p> <p>B</p> <p>Same as for A.</p>	10%	n/a	<p>30% (by either or both of A and B)</p> <p>A and B’s aggregate increase is 30% more than what is permitted by the aggregate increase cap.</p> <p>A and B are both obligated to reduce to the appropriate aggregate control level.</p> <p>A failure by either to do so will result in both A and B being in breach of the conditions to the COVID-19 Notice, and therefore in breach of the Code.</p>	<p>30% (by either or a combination of A and B)</p> <p>This mirrors the control reduction requirement analysis.</p>
10	<p>A increases from 10% to 30% (20% increase).</p> <p>On 1 April 2022, a further 10% allotment to A is approved as an other-means increase (i.e., approved by shareholders in accordance with Code requirements (as modified by clause 18(6) of the COVID-19 Notice)): A increases from 30% to 40%.</p> <p>No associates.</p>	<p>Initial upper limit: 30%</p> <p>Initial maximum increase: 20%</p> <p>Note: both these figures apply as at the date of the first allotment.</p>	<p>20%</p> <p>(10% + 10%)</p> <p>Note: again, this applies as at the date of the first allotment.</p>	<p>As at 1 April 2022 the upper limit under clause 15(1) increases to 40% and the Aggregate Increase Cap increases to 30%.</p>	<p>None</p> <p>A’s increase is within what is permitted by both limbs of the control reduction requirement test.</p> <p>On 1 April 2022, A remains within what is permitted by both limbs of the control reduction requirement test.</p>	<p>None</p>



#	Scenario	Clause 15(1)	Aggregate Increase Cap	Effect of clauses 17 and 18	Control reduction requirement	Control percentage subject to voting restrictions
11	<p>A increases from 10% to 35% (25% increase).</p> <p>On 1 April 2022, a further 10% allotment to A is approved as an other-means increase (i.e., approved by shareholders in accordance with Code requirements (as modified by clause 18(6) of the COVID-19 Notice)). A increases from 35% to 45%.</p> <p>No associates.</p>	<p>Initial upper limit: 30%</p> <p>Initial maximum increase: 20%</p> <p>Note: both these figures apply as at the date of the first allotment.</p>	<p>20% (10% + 10%)</p> <p>Note: again, this applies as at the date of the first allotment.</p>	<p>As at 1 April 2022 the upper limit under clause 15(1) increases to 40% and the Aggregate Increase Cap increases to 40%.</p>	<p>5%</p> <p>Before the other-means increase: A's increase is 5% more than what is permitted by both limbs of the control reduction requirement test (35% as opposed to 30%).</p> <p>As at 1 April 2022, A's increase is 5% more than what is permitted by both limbs of the control reduction requirement test (45% as opposed to 40%).</p>	<p>5%</p>
12	<p>A increases from 10% to 35% (25% increase).</p> <p>No associates.</p> <p>After 18 months, B (not an associate) is issued shares equal to 20% of the company after the issue.</p> <p>A is diluted to 28%.</p>	<p>Upper limit: 30%</p> <p>Maximum increase: 20%</p>	<p>20% (10% + 10%)</p>	<p>n/a</p>	<p>Before placement to B</p> <p>5%</p> <p>A's increase is 5% more than what is permitted by both limbs of the control reduction requirement test.</p> <p>After placement to B</p> <p>None – A (at 28%, an increase of 18%) is now below the upper limit under clause 15.</p>	<p>Before placement to B</p> <p>5%</p> <p>After placement to B</p> <p>0%</p>