

**EXPLANATORY STATEMENT for**  
**ASIC Corporations (Foreign-Controlled Company Reports) Instrument**  
**2017/204**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (ASIC) makes *ASIC Corporations (Foreign-Controlled Company Reports) Instrument 2017/204* under subsections 341(1) and 601CK(7) of the *Corporations Act 2001* (the Corporations Act).

Subsection 341(1) provides that ASIC may make an order in writing in respect of a specified class of companies, registered schemes or disclosing entities, relieving any of the directors, the companies, registered schemes or disclosing entities themselves, or the auditors of the companies, registered schemes or disclosing entities from all or specified requirements of Parts 2M.2, 2M.3 and 2M.4 (other than Division 4) of the Corporations Act.

Subsection 601CK(7) provides that ASIC may declare that section 601CK does not apply to specified foreign companies.

**1. Background**

Paragraph 292(2)(b) of the Corporations Act requires a small proprietary company that was controlled by a foreign company for all or part of a financial year to comply with the financial reporting obligations under Pt 2M.3 of the Corporations Act unless it was consolidated for that period in financial statements lodged with ASIC by a registered foreign company, a company, a disclosing entity or a registered scheme.

Paragraph 292(2)(b) results in more onerous financial reporting requirements applying to small foreign-controlled proprietary companies than apply to their Australian counterparts that are not foreign controlled. This particularly applies where a company's foreign controller is not required by the law in its place of origin to prepare financial statements.

A registered foreign company must lodge with ASIC a copy of its balance sheet, cash flow statement and profit and loss statement ('financial statements') for its last financial year at

least once in every calendar year. These financial statements are those required by the law in the registered foreign company's place of origin. If these statements do not sufficiently disclose the company's financial position, ASIC may require further disclosure.

If the law in the registered foreign company's place of origin does not require these financial statements to be prepared, then they must be prepared and lodged by the foreign registered company as if it were a public company incorporated in Australia. ASIC may also require the financial statements to be audited.

The requirements are set out in section 601CK of the Corporations Act.

## **2. Purpose of the instrument**

*ASIC Corporations (Foreign-Controlled Company Reports) Instrument 2017/204* puts the reporting requirements of small foreign-controlled proprietary companies on a par with other Australian small proprietary companies.

The instrument also relieves a registered foreign company with characteristics similar to a small Australian proprietary company from the requirements of section 601CK.

## **3. Operation of the instrument**

To qualify for relief the directors of a small foreign-controlled proprietary company must resolve to apply the relief no earlier than three months before the commencement of the financial year to which it is to apply. If the relief was not applied to the immediately preceding financial year, a copy of the resolution must be lodged using Form 384. Form 384 must be lodged in the period commencing three months before the commencement of the financial year and ending four months after the end of the financial year.

If the company does not or cannot apply the relief in a subsequent financial year, it must lodge an annual financial report prepared under Chapter 2M for that financial year or lodge Form 394 during the period commencing three months before the commencement of that financial year and ending four months after the end of that financial year. Failure to lodge the financial report or Form 394 means the company will not be able to reapply the relief in future years.

The relief also applies to a registered foreign company which is subject to restrictions, limitations and prohibitions corresponding to, and no less strict than, those applicable to an Australian proprietary company under section 113 of the Act. The company must also meet the definition of a small proprietary company as if subsection 45A(2) of the Corporations Act applied.

However, a condition of the relief is that the company seeking relief cannot be part of a large group in Australia. This condition prevents disaggregation of foreign-controlled companies into smaller companies to avoid financial reporting obligations.

For the purposes of the instrument, "large" in relation to the company or the group is determined in a manner similar to subsection 45A(3) of the Corporations Act. A "group" comprises:

- (a) the company in question;
- (b) entities that control the company in question and are incorporated or formed in Australia or carry on business in Australia;
- (c) any other entities (the other entities) controlled by any foreign company that controls the company in question, that are incorporated or formed in Australia or carry on business in Australia; and
- (d) any entities that are controlled by the company in question or the other entities.

The controlled entities of the company and the other entities need not be formed or incorporated in Australia or carry on business in Australia to be included in the group.

Control is determined using the definition in Accounting Standard AASB 10 *Consolidated Financial Statements*.

*ASIC Corporations (Foreign-Controlled Company Reports) Instrument 2017/204* specifically provides that ASIC may give notice to a small proprietary company controlled by a foreign company or a registered foreign company that it cannot rely on the relief for a particular financial year.

In deciding whether to notify an entity that it may not rely on the relief for a specified financial year, we will consider the information needs of users and potential users of the financial report. Users are read broadly to include, for example, creditors, suppliers, other regulators and the public, as relevant.

ASIC will ordinarily allow a company a reasonable opportunity to show cause as to why ASIC should not give notice. In deciding whether to give notice, ASIC will have regard to any reasons given by the company. If ASIC gives notice to a company, it will allow the company a reasonable period of time to comply with Part 2M.3 of the Act.

#### **4. Consultation**

ASIC has consulted with stakeholders through Consultation Paper 248 which was issued on 22 December 2015 and was open for comment to 29 February 2016.

ASIC has assessed that a Regulatory Impact Statement is not necessary for this instrument as it is operating effectively and efficiently, as informed by the consultation process, and is being remade without significant changes.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **ASIC Corporations (Foreign-Controlled Company Reports) Instrument 2017/204**

*ASIC Corporations (Foreign-Controlled Company Reports) Instrument 2017/204 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.*

#### **Overview**

This instrument provides financial reporting relief to some foreign companies and some foreign-controlled Australian companies provided they have characteristics similar to a small proprietary company.

#### **Human rights implications**

This legislative instrument does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

**Australian Securities and Investments Commission**