

REPLACEMENT EXPLANATORY STATEMENT

Issued by Authority of the Attorney-General

Foreign Influence Transparency Scheme Act 2018

Replacement for the Explanatory Statement to the Foreign Influence Transparency Scheme Amendment (2019 Measures No. 1) Rules 2019

Authority

The *Foreign Influence Transparency Scheme Amendment (2019 Measures No. 1) Rules 2019* (the Rules) amend the *Foreign Influence Transparency Scheme Rules 2018* (the FITS Rules). The Rules are made under section 71 of the *Foreign Influence Transparency Scheme Act 2018* (the Act), for the purposes of sections 30 and 43 of the Act.

The Act establishes the Foreign Influence Transparency Scheme (the scheme). The objective of the scheme is to provide transparency to the public and decision makers about the nature, level and extent of foreign influence on Australia's governmental and political processes.

Section 71 of the Act provides that the Minister may, by legislative instrument, make rules prescribing matters that are required or permitted by the Act to be prescribed by the rules, or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Division 4 of Part 2 of the Act sets out a number of exemptions from registering under the scheme. If any of the exemptions apply to an activity, then a person is not required to register under the scheme in relation to that activity, even if the activity would otherwise fall within one of the categories of registrable activities set out in Division 3 of Part 2 of the Act.

The categories of exemptions are set out in sections 24 to 29F of the Act. Section 30 also provides that a person is exempt in relation to an activity the person undertakes on behalf of a foreign principal in the circumstances prescribed by the rules for the purposes of section 30. This provides for flexibility in the operation of the scheme, and ensures that the scheme can adapt and be responsive to new scenarios in which an exemption may be justified.

Section 43 of the Act relates to information about the scheme that is to be made publically available on a website. Subsection 43(2) requires that the website must not include information that the Secretary is satisfied:

- (a) is commercially sensitive; or
- (b) affects national security; or
- (c) any other information prescribed by the rules for the purposes of subsection 43(2).

Purpose and operation of the Rules

The Rules will prescribe matters for the purposes of sections 30 and 43 of the Act.

Section 30

The Rules prescribe an exemption in relation to an activity a person undertakes on behalf of a foreign principal when the following circumstances apply:

- The activity is covered by item 2 of the table in subsection 21(1) of the Act (about general political lobbying in Australia for the purpose of political or governmental influence); and
- The foreign principal or the person is taking part in a process relating to a federal government decision within the meaning of paragraph 12(1)(b) of the Act in order to comply with a law of the Commonwealth; and
- The process involves the foreign principal or the person providing information in accordance with that law to the maker of the decision or another person assisting the maker of the decision, for the purposes of making the decision; and
- At the time the activity is undertaken, the identity of the foreign principal is either apparent to all persons with whom the person is dealing or disclosed to them.

The exemption applies only in relation to general political lobbying activities, and not to other registrable activities under the scheme. Further, for the exemption to apply it is necessary for the identity of the relevant foreign principal to be apparent or disclosed to all persons with whom the person is dealing.

This exemption ensures that where a person is required to provide information to a government decision maker or person assisting the decision maker as part of a process relating to a government decision, in order to comply with a law of the Commonwealth, and the identity of the foreign principal is apparent or disclosed to the government decision maker with whom they are interacting, that activity will not be registrable.

The exemption is consistent with the intention of the Act, which is to ensure that there is transparency for the public and government decision makers in political and governmental processes where the interests of a foreign principal are being advanced by an intermediary. The exemptions in the Act are crafted in recognition of the fact that, in some cases, the scheme's transparency objective can be met without the need for registration. In general, that is done by specifying that the exemption will only apply where the identity of the foreign principal and the relationship between the foreign principal and the person undertaking the activity are made apparent to decision makers.

Similarly, this exemption will only apply in specific circumstances – importantly, where the person or the foreign principal is required by law to participate in a process and when the identity of the foreign principal is clear and apparent to those with whom the person is dealing. Where the activity is not a requirement of the law of the Commonwealth, the exemption does not apply.

In the absence of this exemption, people who are acting in compliance with other Commonwealth laws, and who may undertake such activities in very high volumes on a regular basis, would need to register and also comply with the reporting and record keeping obligations required by the Act. For example, in the absence of this exemption, entities which are engaged by a foreign principal to prepare and submit applications for the import or export of goods to Australia (and who are not exempt as customs brokers under section 29F of the FITS Act) would need to register large number of general political lobbying activities on behalf of those foreign principals. This could have a significant and disproportionate impact on Australian businesses and industry and would not materially contribute to transparency for the officials making those decisions.

The making of this rule ensures that the scheme does not impose an unnecessary administrative burden and enables the scheme to operate in an adaptable and responsive manner.

Section 43

The Rules prescribe, for the purposes of paragraph 43(2)(c) of the Act, that information provided by a scheme registrant must not be published if the Secretary is satisfied that:

- The information is sensitive; and
- The activity is or was undertaken in the context of a confidential consultation of the foreign principal or person by a Commonwealth public official, Commonwealth entity or Commonwealth company (or person undertaking functions relating to such a person or body); and
- The consultation was initiated by the Commonwealth person or body and relates or related to a proposed policy or proposed change to an existing policy; and
- At the time the activity is or was undertaken the identity of the foreign principal was apparent or disclosed.

Section 43 of the Act imposes a continuing obligation on the Secretary to publish scheme information in relation to both past and current registrants. This means that once the Secretary is satisfied that the information is no longer sensitive, the Secretary would be required to publish the information.

This limitation on the requirement to publish scheme information ensures that where the government is actively seeking the views of stakeholders on proposed new policies or changes to existing policies, and the participation by stakeholders is a registrable activity under the scheme, stakeholders can be reassured that the information will not be published for as long as the Secretary is satisfied that it is sensitive.

OTHER ISSUES

More information

An explanation of the provisions of the Rules is provided in [Attachment A](#).

Regulatory impact analysis

The Office of Best Practice Regulation (OBPR) in the Department of the Prime Minister and Cabinet considers this proposal to be machinery in nature and has confirmed that a Regulation Impact Statement is not required. The OBPR ID is 24619.

Statement of compatibility with human rights

A statement of compatibility with human rights has been prepared for the Rules and is provided in [Attachment B](#).

Matter incorporated by reference

These Rules do not apply, adopt or incorporate other matters by reference.

Consultation

Before the Rules were made, the Attorney-General considered the general obligation to consult imposed by section 17 of the *Legislation Act 2003* (the Legislation Act). The

Attorney-General was satisfied that consultation was appropriate and reasonably practicable to be undertaken. The Rules have been developed following extensive consultation with relevant government and non-government stakeholders on the scope and operation of the scheme both prior to the commencement of the FITS Act and during its implementation.

NOTES ON PROVISIONS

Part 1 – Preliminary

Section 1 – Name

This section provides that the name of this instrument is the *Foreign Influence Transparency Scheme Amendment (2019 Measures No. 1) Rules 2019* (the Rules).

Section 2 – Commencement

This section provides for the whole of the Rules to commence the day after the Rules are registered.

Section 3 – Authority

This section provides that the Rules are made under the *Foreign Influence Transparency Scheme Act 2018* (the FITS Rules).

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the Rules is amended or repealed as set out in the applicable items in the Schedule concerned, and that any other item in a Schedule to the Rules has effect according to its terms.

Schedule 1 – Amendments

Clause 1 – Amendment to Section 5

This clause amends section 5 of the FITS Rules to provide that “(1)” be inserted before the word “For”. This facilitates the insertion of subsection 5(2) (at clause 2, detailed below).

Clause 2 – At the end of section 5

This clause adds new subsection 5(2) to section 5 of the FITS Rules, to prescribe an additional exemption for the purposes of section 30 of the Act. Subsection 5(2) provides that a person is exempt in relation to an activity the person undertakes on behalf of a foreign principal if:

- the activity is covered by item 2 of the table in subsection 21(1) of the Act (about general political lobbying in Australia for the purpose of political or governmental influence); and
- the foreign principal or the person is taking part in a process relating to a federal government decision within the meaning of paragraph 12(1)(b) of the Act in order to comply with a law of the Commonwealth; and
- the process involves the foreign principal or the person providing information in accordance with that law to the maker of the decision or another person assisting the maker of the decision, for the purposes of making the decision; and
- at the time the activity is undertaken, the identity of the foreign principal is either apparent or disclosed to all person with whom the person is dealing.

Clause 3 – After section 6

This clause amends section 6 of the FITS Rules to insert new section 6A into the FITS Rules. Section 6A prescribes information for the purposes of paragraph 43(2)(c) of the Act (about information not to be included on the website providing information on persons who are or have been registered in relation to a foreign principal). Subsection 43(2) of the Act provides that the website must not include information that the Secretary is satisfied is commercially sensitive, affects national security, or is prescribed by the rules for the purposes of that subsection.

Subsection 6A(1) prescribes, for the purposes of paragraph 43(2)(c) of the Act, information:

- that is sensitive; and
- that:
 - was contained in an application for registration of a person, or a notice given by a person under section 31, 34, 35, 36 or 37 of the Act in connection with registration of a person, or a renewal of registration of a person, relating to a foreign principal and an activity described in subsection 6A(2); or
 - accompanied such an application, notice, or renewal; or
 - was contained in a document accompanying such an application, notice or renewal.

Subsection 6A(2) provides that subparagraph 6A(1)(b)(i) applies in relation to an activity for which all the following conditions are met:

- the activity is or was undertaken on behalf of the foreign principal by the person;
- the activity is or was undertaken in the context of confidential consultation of the foreign principal or the person by the person (the *consulter*) described in subsection 6A(3) that:
 - was initiated by the consultant; and
 - relates or related to a proposed policy or proposed change to an existing policy;
- at the time the activity is or was undertaken, the identity of the foreign principal is or was either apparent to all persons with whom the person is or was dealing, or disclosed to them.

Subsection 6A(3) provides that for the purposes of paragraph 6A(2)(b), each of the following is a consultant:

- a Commonwealth public official;
- a Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013*) or a subsidiary of a Commonwealth entity (within the meaning of that Act);
- a Commonwealth company (within the meaning of the *Public Governance, Performance and Accountability Act 2013*);
- an individual in the course of performing the individual's functions in relation to a person or body mentioned above.

Statement of Compatibility with Human Rights

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

Foreign Influence Transparency Scheme Amendment (2019 Measures No. 1) Rules 2019

The Rules are 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 of the Rules

The *Foreign Influence Transparency Scheme Amendment (2019 Measures No. 1) Rules 2019* (the Rules) amends the *Foreign Influence Transparency Scheme Rules 2018* (the FITS Rules). The Rules are made under section 71 of the *Foreign Influence Transparency Scheme Act 2018* (the Act), for the purposes of sections 30 and 43 of the Act. The Act establishes the Foreign Influence Transparency Scheme (the scheme). The objective of the scheme is to provide transparency to the public and decision makers about the nature, level and extent of foreign influence on Australia's governmental and political processes.

Section 71 of the Act provides that the Minister may, by legislative instrument, make rules prescribing matters that are required or permitted by the Act to be prescribed by the rules, or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Division 4 of Part 2 of the Act sets out a number of exemptions for registering under the scheme. If any of the exemptions apply, then a person will not be required to register under the scheme in relation to that activity, even if the activity would otherwise fall within one of the categories of registrable activities set out at Division 3 of Part 2 of the Act. Section 30 provides that a person is also exempt in relation to an activity the person undertakes on behalf of a foreign principal in the circumstances prescribed by the rules for the purposes of section 30.

Section 43 of the Act relates to information about the scheme that is to be made publically available. Subsection 43(2) requires that the Secretary must not publish on the website information that the Secretary is satisfied:

- (a) is commercially sensitive; or
- (b) affects national security; or
- (c) any other information prescribed by the rules for the purposes of subsection 43(2).

The Rules prescribe, for the purposes of section 30 of the Act, an exemption in relation to an activity a person undertakes on behalf of a foreign principal when the following circumstances apply:

- The activity is covered by item 2 of the table in subsection 21(1) of the Act (about general political lobbying in Australia for the purpose of political or governmental influence); and
- The foreign principal or the person is taking part in a process relating to a federal government decision within the meaning of paragraph 12(1)(b) of the Act in order to comply with a law of the Commonwealth; and

- The process involves the foreign principal or the person providing information in accordance with that law to the maker of the decision or another person assisting the maker of the decision, for the purposes of making the decision; and
- At the time the activity is undertaken, the identity of the foreign principal is either apparent to all persons with whom the person is dealing or disclosed to them.

The exemption applies only in relation to general political lobbying activities, and not to other registrable activities under the scheme. Further, for the exemption to apply it is necessary for the identity of the relevant foreign principal to be apparent or disclosed to all persons with whom the person is dealing.

This exemption ensures that where a person is required to provide information to a government decision maker or person assisting the decision maker as part of a process relating to a government decision, in order to comply with a law of the Commonwealth, and the identity of the foreign principal is apparent or disclosed to the government decision maker with whom they are interacting, that activity will not be registrable. This ensures that the scheme does not impose an unnecessary administrative burden in circumstances where a person is complying with legislative requirements and is interacting with government in a transparent manner. Where the activity is not a requirement of the law of the Commonwealth, the exemption does not apply.

The Rules prescribe, for the purposes of paragraph 43(2)(c) of the Act, that information provided by a scheme registrant must not be published if the Secretary is satisfied that:

- The information is sensitive; and
- The activity is or was undertaken in the context of a confidential consultation of the foreign principal or person by a Commonwealth public official, Commonwealth entity or Commonwealth company (or person undertaking functions relating to such a person or body); and
- The consultation was initiated by the Commonwealth person or body and relates or related to a proposed policy or proposed change to an existing policy; and
- At the time the activity is or was undertaken the identity of the foreign principal was apparent or disclosed.

Section 43 of the Act imposes a continuing obligation on the Secretary to publish scheme information in relation to both past and current registrants. This means that once the Secretary is satisfied that the information is no longer sensitive, the Secretary would be required to publish the information.

This limitation on the requirement to publish scheme information ensures that where the government is actively seeking the views of stakeholders on proposed new policies or changes to existing policies, and the participation by stakeholders is a registrable activity under the scheme, stakeholders can be reassured that the information will not be published for as long as the Secretary is satisfied that it is sensitive.

Human rights implications

The Rules promote the right to privacy as contained in article 17 of the International Covenant on Civil and Political Rights (ICCPR). Further, the scheme as a whole promotes the following rights:

- the right to opinion and freedom of expression as contained in article 19; and

- the right to freedom of association as contained in article 22; and
- the right to take part in public affairs and elections as contained in article 25.

How the scheme engages with each of these rights is examined in detailed in the Explanatory Memorandum for the Foreign Influence Transparency Scheme Bill 2017, considered by the Parliamentary Joint Committee in 2018.

Right to privacy

Pursuant to Article 17 of the ICCPR, no-one should be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honour or reputation. The Rules promote the right to privacy by prohibiting the publication of information that is sensitive and acquired in certain circumstances as prescribed in the Rules.

The Rules also promote the right to privacy by providing an exemption from registration of activities that would ordinarily fall within the definition of ‘general political lobbying’ under the Act but are undertaken in compliance with legally required administrative or regulatory compliance processes.

Conclusion

The Rules are compatible with human rights because they promote the right to privacy and do not place a limitation on other human rights.