

Attachment to CP 248: Draft instrument



ASIC

Australian Securities & Investments Commission

ASIC Corporations (Foreign Entity Reports) Instrument 2016/XX

I, <insert name>, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 2016

<signature>

<insert name>

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Part 1—Preliminary

1 Name of legislative instrument

This instrument is *ASIC Corporations (Foreign Entity Reports) Instrument 2016/XX*.

2 Commencement

This instrument commences on the later of:

- (a) the day after it is registered on the Federal Register of Legislative Instruments; and
- (b) the day after it is gazetted.

Note: The register may be accessed at www.comlaw.gov.au.

3 Authority

This instrument is made under subsections 341(1) and 601CK(7) of the *Corporations Act 2001*.

4 Definitions

In this instrument:

Act means *Corporations Act 2001*.

combined revenue of the group means the sum of the revenue of all of the entities in the group, while they are members of the group, making all adjustments as would be required in preparing consolidated financial statements under accounting standards in force at the relevant time (even if the standard does not otherwise apply to the financial year of some or all of the companies concerned).

combined value of gross assets of the group means the sum of the value of the gross assets of all of the entities in the group, making all adjustments as would be required in preparing consolidated financial statements under accounting standards in force at the relevant time (even if the standard does not otherwise apply to the financial year of some or all of the companies concerned).

control has the same meaning as in Australian Accounting Standard AASB 10 *Consolidated Financial Statements*.

entity means a company, a registered scheme, a disclosing entity, any other corporation, a partnership, an unincorporated body or a trust.

group means, in relation to an entity for a financial year, the entity together with all of the following:

- (a) any other entity which controlled the entity at any time during, or at the end of, the financial year and which was incorporated or formed in Australia or carries on business in Australia;
- (b) any other entity (a **corresponding entity**) which is:
 - (i) controlled at any time during, or at the end of, the financial year by any foreign company which at the same time controls the entity; and
 - (ii) incorporated or formed in Australia or carries on business in Australia during that part of the financial year when it is controlled by the same foreign company as controls the entity;
- (c) any entity which is controlled at any time during, or at the end of, the financial year by the entity;
- (d) any entity which is controlled by a corresponding entity during that part of the financial year when the corresponding entity is controlled by the same foreign company as controls the entity.

large group means a group which, for a financial year, satisfies at least 2 of the following paragraphs:

- (a) the combined revenue of the group for the financial year is \$25 million or more, or any other amount prescribed for the purposes of paragraph 45A(2)(a) of the Act, or more;
- (b) the combined value of gross assets of the group at the end of the financial year is \$12.5 million or more, or any other amount prescribed for the purposes of paragraph 45A(2)(b) of the Act, or more;
- (c) the group has 50 or more employees (part-time employees being counted as an appropriate fraction of a full-time equivalent) at the end of the financial year.

Part 2—Order

5 Relief from the requirement to prepare and lodge an audited financial report

Relief

- (1) A small proprietary company (the **Company**) which is controlled by a foreign company for all or part of a financial year (the **relevant financial year**) does not have to comply with Part 2M.3 of the Act as it applies because of paragraph 292(2)(b) of the Act in relation to the relevant financial year.

Where relief applies

- (2) The relief in subsection (1) may be relied on where all of the following apply:
- (a) the Company is not part of a group which is a large group for the relevant financial year;
 - (b) the directors of the Company have resolved, no earlier than 3 months before the start of the relevant financial year, that the relief in subsection (1) be relied on in respect of the relevant financial year;
 - (c) one of the following applies:
 - (i) the Company relied on the relief in subsection (1) in respect of the financial year immediately before the relevant financial year; or
 - (ii) notice of the resolution mentioned in paragraph (b) signed by a director or company secretary is lodged with ASIC using Form 384 during the period commencing 3 months before the commencement of the relevant financial year and ending 4 months after the end of the relevant financial year; or
 - (iii) both of the following apply:
 - (A) the Company relied on the relief in subsection (1) in respect of a previous financial year (the **last reliance year**);
 - (B) the company was not able to rely on that relief in respect of each financial year since the last reliance year and before the relevant financial year because of the operation of paragraph (e);
 - (d) one of the following applies:

- (i) the relief in subsection (1) is not relied on other than because of the operation of paragraph (e) in respect of the financial year (the *first non-reliance year*) immediately after a financial year in which the relief was relied on and the Company lodges an annual financial report prepared under Chapter 2M of the Act for the first non-reliance year; or
 - (ii) notice the Company has stopped relying on the relief in subsection (1) signed by a director or company secretary is lodged with ASIC using Form 394:
 - (A) during the period starting 3 months before the commencement of the first non-reliance year and ending 4 months after the end of the first non-reliance year; or
 - (B) at a later time if ASIC has given the entity written notice approving that time;
- (e) ASIC has:
- (i) not notified the Company in writing that it may not rely on this order or may not rely on this order for the relevant financial year; or
 - (ii) notified the Company in writing that it may not rely on this order or may not rely on this order for the relevant financial year but has subsequently revoked or varied that notice so that it does not cover the relevant financial year.

Part 3—Declaration

6 Relief from lodging financial statements

Declaration

- (1) Subsections 601CK(1) to (6) inclusive do not apply in relation to a calendar year (the *relevant calendar year*) commencing on or after 1 January 2017 in respect of a foreign company (the *Company*) that satisfies subsection (2).
- (2) A registered foreign company satisfies this subsection if all of the following apply:
 - (a) the Company is registered under Division 2 of Part 5B.2 of the Act;
 - (b) the Company is subject to restrictions, limitations and prohibitions of the kind that section 113 of the Act imposes on proprietary companies that are:
 - (i) contained in the law of the place of origin of the Company or in the Company's constitution as required by that law; and
 - (ii) no less strict than those in that section;
 - (c) the Company is not required by the law in its place of origin to prepare any of the following:
 - (i) a balance sheet at the end of its last financial year;
 - (ii) a profit and loss statement for its last financial year;
 - (iii) a cash flow statement for its last financial year;
 - (d) the Company has not been a disclosing entity, borrower in relation to a debenture or guarantor of such a borrower at any time during the calendar year;
 - (e) the Company satisfies at least 2 of the paragraphs in subsection 45A(2) (small proprietary companies) of the Act in relation to its last financial year;
 - (f) either of the following applies:
 - (i) the Company is not part of a group which is a large group in relation to its most recent financial year; or
 - (ii) the Company was consolidated in financial statements which:
 - (A) cover the whole of that financial year; and

- (B) were lodged with ASIC by a company, registered foreign company, registered scheme or disclosing entity which controlled the Company for the whole of that financial year (or by two or more such entities which controlled the Company at different times during that financial year provided that at any time during the financial year the Company was controlled by at least one of those entities.

Where declaration applies

- (3) The declaration in subsection (1) applies in relation to a foreign company where ASIC has:
 - (a) not notified the foreign company in writing that it may not rely on subsection (1) or may not rely on that subsection for the relevant calendar year; or
 - (b) notified the foreign company in writing that it may not rely on subsection (1) or may not rely on that subsection for the relevant calendar year but has subsequently revoked or varied that notice so that it does not cover the relevant calendar year.