

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Social Services

Social Security Act 1991

*Social Security (Attributable Stakeholders and Attribution Percentages) Principles
2017*

Summary

Section 1209E of the ***Social Security Act 1991*** (the Social Security Act) provides that the Secretary may formulate principles to be complied with by him or her when making decisions under a number of sections of the Social Security Act, including section 1207X.

The purpose of this instrument is to set out decision-making principles that the Secretary must comply with in making determinations under section 1207X of the Social Security Act. Such determinations relate to whether an individual should not be assessed as an attributable stakeholder of a trust or company and, if they are to be assessed, the asset and income attribution percentages that are applicable.

The Principles commence on 1 April 2017 following the cessation of the *Social Security (Attributable Stakeholders and Attribution Percentages) Principles 2000* on that date.

The *Social Security (Attributable Stakeholders and Attribution Percentages) Principles 2000* cease operation on 1 April 2017 due to the sunset provisions in the *Legislation Act 2003*.

Background

Part 3.18 of the Social Security Act specifies the means test treatment of private companies and private trusts. The provisions in Part 3.18 aim to ensure that people who hold their assets in private companies or private trusts receive comparable treatment under the means test to those who hold their assets directly. The assets and income of the structure will be attributed to the person or persons who control the company or trust, or to the person or persons who were the source of the capital or corpus of the company or trust.

Section 1207X of the Social Security Act states that where a company is a controlled private company in relation to an individual, or a trust is a controlled private trust in relation to an individual, then, unless the Secretary otherwise determines, the individual will be attributed with 100% of the assets and income of the controlled structure. These decision-making principles will assist the Secretary in determining whether an individual should not, in fact, be attributed with any of the assets or income of the controlled structure, or should be attributed with a percentage of the assets and income of the structure which is less than 100%.

Commencement

This instrument commences on 1 April 2017.

Consultation

Consultation regarding this instrument was undertaken with the Department of Human Services.

Regulation Impact Statement (RIS)

This instrument is not regulatory in nature and will have no regulatory impact on individuals, business, activity or competition.

Explanation of the provisions

Part 1

Section 1 of the Principles states the name of the instrument and **section 2** states that the Principles commence on 1 April 2017. **Section 3** contains interpretation provisions. **Section 4** sets out the purpose of the instrument.

Part 2

Section 5 sets out the purpose of Part 2 of the instrument, which is to provide decision-making principles that can be used in making a determination, under paragraph 1207X(1)(a) or 1207X(2)(c), that an individual is not an attributable stakeholder of a trust or company.

Section 6 states that this Part applies if an individual would be an attributable stakeholder, but for a determination by the Secretary under this Part. The Secretary must consider the relationship between the individual and the company or trust, having regard to the circumstances mentioned in this Part and also the reason why, but for a determination under this Part, the individual would be an attributable stakeholder of the company or trust. Taking these considerations into account, the Secretary must consider whether there is a sufficient basis to determine that an individual should not be an attributable stakeholder of the company or trust.

Section 7 provides that the Secretary must consider whether there are relevant circumstances that make it inappropriate for an individual to be an attributable stakeholder of a company or trust. In particular, the Secretary must consider the effect of circumstances arising from the legal structure of the company or trust, the administrative arrangements of the company or trust, and finally, whether the individual can reasonably be expected to exercise effective control in relation to the company or trust.

Section 8 states that where an individual has made a contribution to a company or trust, the Secretary must consider the circumstances in which that contribution was made. Those circumstances include the value of the contribution, the proportion that the value of the contribution has to the total assets of the company or trust, the effect of the contribution on the financial position of the company or trust and the amount of any consideration received by the individual for the contribution.

Section 9 provides that the Secretary must consider past distributions from the company or trust to the individual, including the number of times, and frequency, that distributions have been made to the individual and the value of those distributions. For the purposes of this section “distribution” is defined to include a distribution of capital or income of a company, or the corpus or income of a trust.

Section 10 states that the Secretary must consider the reasonable foreseeability of the individual receiving future distributions from the company or trust, and the possible value of those distributions. In considering this matter the Secretary must have regard to the constituent documents of the company or trust. For the purposes of this section “distribution” is defined as for section 9.

Section 11 allows the Secretary to consider whether an individual receives any other kind of benefit from the company or trust. For the purposes of this section “benefit” is defined to include a benefit received or derived in the form of property or services, but is not limited to a benefit to which the individual has a legal or equitable entitlement.

Section 12 provides that the Secretary must consider whether an individual has been assessed as an attributable stakeholder of any other company or trust under the Social Security Act, or as an attributable stakeholder of any company or trust under the *Veterans’ Entitlements Act 1986* and, if so, the Secretary can then consider the asset and income attribution percentages applied to the individual in relation to any of those companies or trusts.

Section 13 states that the Secretary must consider any other circumstances that relate to the individual’s involvement with the activities or administration of the company or trust.

Part 3

Section 14 sets out the purpose of Part 3 of the instrument, which is to provide decision-making principles that can be used in making a determination under subparagraph 1207X(1)(b)(ii) or 1207X(2)(d)(ii) of the Social Security Act that an individual has an asset attribution percentage, in relation to the company or trust, of less than 100%.

Section 15 states that this Part applies if an individual would, but for a determination by the Secretary under this Part, have an asset attribution percentage of 100%. The Secretary must consider the relationship between the individual and the company or trust, having regard to the circumstances mentioned in this Part and whether any of those circumstances provide a sufficient basis to determine that the individual should have an asset attribution percentage of less than 100%.

Section 16 provides that the Secretary must consider whether there are relevant circumstances that make it appropriate for an individual to have an asset attribution percentage of less than 100% in regard to the company or trust. In particular, the Secretary must consider the effect of circumstances arising from the legal structure of the company or trust, the administrative arrangements of the company or trust, and finally, whether the individual can reasonably be expected to exercise effective control, and, if so, the extent of that control, in relation to the company or trust.

Section 17 states that where an individual has made a contribution to a company or trust, the Secretary must consider the circumstances in which that contribution was made. Those circumstances include the value of the contribution, the proportion that the value of the contribution has to the total assets of the company or trust, the effect of the contribution on the financial position of the company or trust and the amount of any consideration received by the individual for the contribution.

Section 18 provides that the Secretary must consider past distributions from the company or trust to the individual, including the number of times, and frequency, that distributions have been made to the individual and the value of those distributions. For the purposes of this section “distribution” is defined to include a distribution of capital or income of a company, or the corpus or income of a trust.

Section 19 states that the Secretary must consider the reasonable foreseeability of the individual receiving future distributions from the company or trust, and the possible value of those distributions. In considering this matter the Secretary must have regard to the constituent documents of the company or trust. For the purposes of this section “distribution” is defined as for section 18.

Section **20** allows the Secretary to consider whether an individual receives any other kind of benefit from the company or trust. For the purposes of this section “benefit” is defined to include a benefit received or derived in the form of property or services, but is not limited to a benefit to which the individual has a legal or equitable entitlement.

Section 21 provides that the Secretary must consider whether an individual has been assessed as an attributable stakeholder of any other company or trust under the Social Security Act, or as an attributable stakeholder of any company or trust under the *Veterans’ Entitlements Act 1986* and, if so, the Secretary can then consider the asset and income attribution percentages applied to the individual in relation to any of those companies or trusts.

Section 22 states that the Secretary must consider any other circumstances that relate to the individual’s involvement with the activities or administration of the company or trust.

Part 4

Section 23 sets out the purpose of Part 4 of the instrument, which is to provide decision-making principles that can be used in making a determination under subparagraph 1207X(1)(c)(ii) or 1207X(2)(e)(ii) that an individual has an income attribution percentage, in relation to the company or trust, of less than 100%.

Section 24 states that this Part applies if an individual would, but for a determination by the Secretary under this Part, have an income attribution percentage of 100%. The Secretary must consider the relationship between the individual and the company or trust, having regard to the circumstances mentioned in this Part and whether any of those circumstances provide a sufficient basis to determine that the individual should have an income attribution percentage of less than 100%.

Section 25 provides that the Secretary must consider whether there are relevant circumstances that make it appropriate for an individual to have an income attribution percentage of less than 100% in regard to the company or trust. In particular, the Secretary must consider the effect of circumstances arising from the legal structure of the company or trust, the administrative arrangements of the company or trust, and finally, whether the individual can reasonably be expected to exercise effective control, and, if so, the extent of that control, in relation to the company or trust.

Section 26 states that where an individual has made a contribution to a company or trust, the Secretary must consider the circumstances in which that contribution was made. Those circumstances include the value of the contribution, the proportion that the value of the contribution has to the total assets of the company or trust, the effect of the contribution on the financial position of the company or trust and the amount of any consideration received by the individual for the contribution.

Section 27 provides that the Secretary must consider past distributions from the company or trust to the individual, including the number of times, and frequency, that distributions have been made to the individual and the value of those distributions. For the purposes of this section “distribution” is defined to include a distribution of capital or income of a company, or the corpus or income of a trust.

Section 28 states that the Secretary must consider the reasonable foreseeability of the individual receiving future distributions from the company or trust, and the possible value of those distributions. In considering this matter the Secretary must have regard to the constituent documents of the company or trust. For the purposes of this section “distribution” is defined as for section 27.

Section 29 allows the Secretary to consider whether an individual receives any other kind of benefit from the company or trust. For the purposes of this section “benefit” is defined to include a benefit received or derived in the form of property or services, but is not limited to a benefit to which the individual has a legal or equitable entitlement.

Section 30 provides that the Secretary must consider whether an individual has been assessed as an attributable stakeholder of any other company or trust under the Social Security Act, or as an attributable stakeholder of any company or trust under the *Veterans’ Entitlements Act 1986* and, if so, the Secretary can then consider the asset and income attribution percentages applied to the individual in relation to any of those companies or trusts.

Section 31 states that the Secretary must consider any other circumstances that relate to the individual’s involvement with the activities or administration of the company or trust.

Statement of Compatibility with Human Rights

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

Social Security (Attributable Stakeholders and Attribution Percentages) Principles 2017

The Principles 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 legislative instrument

Section 1207X of the *Social Security Act 1991* (the Social Security Act) provides that an individual who is a controller of a controlled private trust or controlled private company, then a person is attributed with 100 per cent of its income and assets, or a lesser amount as determined by the Secretary.

The *Social Security (Attributable Stakeholders and Attribution Percentage) Principles 2017 (the Principles)* specifies the matters that the Secretary must consider when deciding whether a person's attribution percentage should be less than 100 per cent.

The purpose of a determination under section 1207X is to ensure that a person's attribution percentage accurately reflects their degree of control over the trust or company. The matters specified in the Principles determine whether there are multiple controllers, and if the person's attribution percentage should be reduced to reflect the proportion of control they hold relative to the other controllers.

Social security assessment measures a person's current capacity to contribute towards their own support. As such, the person should only be attributed with as much of the income and assets as they could draw on for their own support.

Human rights implications

The Principles engage the right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system.

The social security scheme must provide a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

The Principles are compatible with human rights as they ensure a person's current resources are appropriately assessed for the purposes of ascertaining the person's assessable income for means testing purposes under Part 3.18 of the Act.

Conclusion

The Principles are compatible with human rights as they do not raise any human rights issues.

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Department of Social Services