



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Amendment) Instrument 2021/506

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2021/506*.

The Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

Summary

1. *ASIC Corporations (Amendment) Instrument 2021/506* (the **amending instrument**) implements measures aimed at reducing the regulatory burden on certain externally administered companies by relieving them of certain statutory obligations. Compliance with financial reporting obligations by externally administered companies during the period of external administration will generally impose unreasonable burdens.
2. While users of financial reports may benefit from the company complying with its financial reporting and annual general meeting (**AGM**) obligations during external administration, this needs to be balanced with the costs associated with preparing financial reports. As companies in external administration are under financial distress, compliance with financial reporting and AGM obligations may unnecessarily protract the external administration and reduce the amount of cash available for distribution to creditors.
3. The relief provided under the amending instrument removes the need for certain companies under external administration to seek the following types of individual relief from the *Corporations Act 2001* (the **Act**):
 - (a) a deferral of the requirement to comply with the financial reporting obligations under Part 2M.3 of the Act and any continuing obligations under Part 2M.3 of the Act (**deferral relief**) - for a minimum period of six months and a maximum period of up to 24 months after the appointment of the voluntary administrator, managing controller, or provisional liquidator (i.e. a relevant external administrator); and/or
 - (b) a deferral of the requirement to hold an AGM under section 250N of the Act and any continuing obligations under section 250N of the Act (**AGM deferral relief**).

-
4. The amending instrument amends *ASIC Corporations (Externally-Administered Bodies) 2015/251* (**principal instrument**) so that it conditionally grants deferral relief for a minimum period of six months and up to a maximum period of 24 months, and AGM deferral relief until two months after the deferral relief expires to certain companies under external administration.
 5. The amending instrument also amends the principal instrument so that the deferral relief commences from when a voluntary administrator or provisional liquidator, or a managing controller over the whole or substantially the whole of the property of the company, is appointed and will cease after 24 months or when the external administration ends (with a minimum deferral period of six months). If a voluntary administration is followed by a deed of company arrangement (DOCA), the deferral relief will continue up to 24 months after the voluntary administration commenced, so long as the deed administrator exercises all or most of the management functions and powers of the company under the DOCA. The deferral relief and the AGM deferral relief are not available to companies in liquidation. Companies in liquidation may have the benefit of exemption relief under the principal instrument.

Purpose of the instrument

6. Companies have financial reporting obligations under Part 2M.3 of the Act, and public companies that have more than one member must hold an AGM under section 250N of the Act. These obligations apply even if a company is under external administration.
7. Prior to making the amending instrument, the principal instrument conditionally granted a deferral of financial reporting obligations under Part 2M.3 of the Act falling due within six months from the date of the first appointment of a relevant external administrator. The principal instrument also granted a deferral of any outstanding financial reporting obligations which were due before the appointment of the first relevant external administrator.
8. Externally administered companies often apply to ASIC for individual deferral relief seeking a deferral period longer than six months. Where the externally administered company is a public company, the externally administered company will also apply for individual AGM deferral relief.
9. In making these applications, externally administered companies must pay ASIC fees and are also likely to incur external administrator and/or legal fees for the preparation of the relief applications (and more if relief is sought for a corporate group).
10. ASIC routinely grants individual deferral relief for a deferral period of up to 24 months from the expiry of deferral relief under the principal instrument, on the basis that compliance with the financial reporting obligations under Part 2M.3 of the Act will impose unreasonable burdens on externally administered companies. ASIC also routinely grants individual AGM deferral relief where an externally administered public company has been granted individual deferral relief, because the consideration of financial reports is one of the primary functions of the AGM. This reflects ASIC's policy on providing individual

deferral relief and AGM deferral relief as outlined in Regulatory Guide 174: *Relief for externally administered companies and registered schemes being wound up.*

11. Externally administered companies are under financial distress and compliance with the financial reporting obligations will generally impose unreasonable burdens. The burdens arise from the combination of financial and human resource constraints imposed on the company and the relevant external administrator in these forms of external administration. The overall burden is disproportionate to the value that the company's financial reports may have for relevant users during the period of the external administration. Often the burden of compliance with the financial reporting obligations by an externally administered company will ultimately be borne by either its members or creditors or both.
12. A deferral of the financial reporting obligations for these companies reduces the severity of the burden during this period and preserves the company's limited assets for the benefit of all parties while its prospects are being determined. Where there will be no financial reports to consider at the AGM, the business ordinarily conducted at an AGM will be less relevant and the AGM will be an unnecessary expense.
13. The policy outcome of the amending instrument is to:
 - (a) formalise ASIC's policy on the most common circumstances where ASIC has granted individual deferral relief and AGM deferral relief to certain externally administered companies; and
 - (b) reduce the compliance costs for externally administered companies.
14. The amending instrument amends the principal instrument by:
 - (a) granting conditional AGM deferral relief to all public companies in external administration that are relying on the deferral relief up until two months after the deferral relief expires;
 - (b) amending the language of section 6 of the principal instrument to bring the description of section 250N into conformity with the Act, and noting that the amendment to section 6 does not change the operation of the principal instrument;
 - (c) conditionally extending the deferral relief for a minimum period of six months and a maximum period of up to 24 months from the date of the appointment of a relevant external administrator, and ending earlier than 24 months where, after the initial six-month deferral period, either:
 - (i) a deed administrator is appointed following the appointment of a relevant external administrator - ending on the day on which a director of the company subject to a DOCA has the right to, or is able to, perform or exercise most or all of the management power

or functions of a director of the company under the DOCA or with the consent of the deed administrator; or

- (ii) the external administration of the company ends;
- (d) enabling ASIC to exclude certain companies from relying on the deferral relief and the AGM deferral relief by providing a notice to the company stating that the company is excluded from relying on the relief; and
- (e) making a decision by ASIC to exclude a company from relying on the deferral relief or the AGM deferral relief reviewable by the Administrative Appeals Tribunal (AAT).

Consultation

- 15. On 28 January 2021, ASIC released Consultation Paper 337 *Externally administered companies: Extending financial reporting and AGM relief (CP 337)*, which sought feedback from stakeholders on ASIC's proposal for the amending instrument. The consultation period closed on 11 March 2021.
- 16. ASIC received five submissions in response to CP 337. Most of the respondents were supportive of ASIC's proposals. The submissions and ASIC's response to the submissions contained in REP 703 *Response to submissions on CP 337 Externally administered companies: Extending financial reporting and AGM relief*, are available on ASIC's website at www.asic.gov.au.

Operation of the instrument

- 17. The legislative instrument commences on the day after it is registered on the Federal Register of Legislation.
- 18. The amending instrument amends the definition of *relevant external administrator* in the principal instrument. *Relevant external administrator*, in relation to a company means:
 - (a) an administrator of the company appointed by:
 - (i) the company under section 436A of the Act; or
 - (ii) a liquidator or provisional liquidator of the company under section 436B of the Act; or
 - (iii) a person who is entitled to enforce a security interest in the whole, or substantially the whole, of the company's property under section 436C of the Act; or
 - (b) a managing controller appointed to the whole, or substantially the whole, of the property of the company; or
 - (c) a provisional liquidator of the company;

where no other person was acting in one of those capacities in relation to the company at the time of the appointment.

19. For the purposes of the definition of *relevant external administrator*, a person appointed as a deed administrator or liquidator of the company is not a relevant external administrator.
20. The amending instrument inserts a new definition of *deferral period* into the principal instrument. *Deferral period* means:
- (a) where a relevant external administrator has been appointed and the external administration of the company subsequently ends between the date of appointment of the relevant external administrator and the day that is six months after the appointment of the relevant external administrator – the period starting on the day of appointment of the relevant external administrator and ending on the day that is six months after the appointment of the relevant external administrator; or
 - (b) where a relevant external administrator has been appointed and the company is still under external administration on the day after the day that is six months after the appointment of the relevant external administrator – the period starting on the day of appointment of the relevant external administrator and ending on the earlier of either:
 - (i) 24 months after the day of appointment of the relevant external administrator; or
 - (ii) where a deed of administrator is appointed following the appointment of the relevant external administrator, the day (if any) on which a director of the company has the right to, or is able to, perform or exercise all or most of the management powers or functions of a director of the company under the DOCA or with the consent of the deed administrator; or
 - (iii) the day the external administration of the company ends.

Deferral of AGM obligations

21. The amending instrument inserts a new section 6A in the principal instrument which exempts public companies that are relying on the deferral relief in subsection 8(1) or 8(2) of the amending instrument from the obligation under section 250N of the Act to hold an AGM, or any continuing obligation on the company to hold an AGM that the company had not complied with prior to the appointment of the relevant external administrator, until the end of the deferral period.
22. A company relying on the AGM deferral relief in section 6A must:
- (a) hold an AGM within two months after the end of the deferral period, and lay before that AGM all the deferred financial reports;

-
- (b) before the end of the period within which the company would otherwise be required to hold its next AGM after the start of the deferral period, but for the AGM deferral relief, arrange for a notice of the company's intention to rely on section 6A to be published:
- (i) in a prominent place on the company's website (if any);
 - (ii) in a place that is readily accessible on a website (if any) maintained by the relevant external administrator or any external administrator appointed after the relevant external administrator; and
 - (iii) if the company is listed—on a website maintained by the financial market operator; and
- (c) have adequate arrangements in place during the deferral period to answer, within a reasonable period of time and without charge, any reasonable questions asked by a member of the company about its external administration and its obligations to hold any deferred AGM.
23. The AGM deferral relief in section 6A does not apply where ASIC has given the company a notice stating that the company is excluded from relying on the AGM deferral relief and ASIC has not withdrawn the notice. ASIC will give the company an exclusion notice under section 6A where ASIC considers it is in the public interest for members of the company to have the opportunity to meet with and ask questions of the external administrator and any directors.

Deferral of financial reporting obligations

24. The amending instrument amends section 8 of the principal instrument by extending the time by which a company, in relation to which a relevant external administrator has been appointed, does not have to comply with any financial reporting obligations under Part 2M.3 of the Act, or any continuing obligation on the company to comply with any financial reporting obligations that the company had not complied with prior to the appointment of the relevant external administrator, until the end of the deferral period.
25. The amending instrument inserts a new condition in subsection 8(3) of the principal instrument which requires a company relying on the deferral relief in section 8 of the amending instrument to:
- (a) arrange for a notice of the company's intention to rely on the deferral relief to be published before the financial reporting obligations under Part 2M.3 of the Act would otherwise have arisen, but for the deferral relief, after the start of the deferral period:
 - (i) in a prominent place on the company's website (if any); and
 - (ii) in a place that is readily accessible on a website (if any) maintained by the relevant external administrator or any external administrator appointed after the relevant external administrator; and

-
- (iii) if the company is listed on a prescribed financial market, on a website maintained by the operator of the financial market.
26. The amending instrument inserts a new paragraph 8(5)(d) in the principal instrument which provides that the deferral relief does not apply where ASIC has given the company a notice stating that the company is excluded from relying on the deferral relief and ASIC has not withdrawn the notice. ASIC will give the company an exclusion notice under paragraph 8(5)(b) where ASIC considers it is in the public interest for users of the financial report to have access to audited financial information on a timely basis or when the benefit of financial reporting outweighs the costs to the company of preparing and lodging financial reports while the company is in external administration.

Merits review to AAT

27. The amending instrument inserts a new section 8A in the principal instrument to expressly provide that applications may be made to the AAT for review of a decision by ASIC to give a notice stating that a company is excluded from relying on the deferral relief or the AGM deferral relief.

Legislative instrument and primary legislation

28. The subject matter and policy implemented by this instrument is more appropriate for a legislative instrument rather than primary legislation because:
- (a) it amends an existing legislative instrument which will sunset on 1 October 2025. As the legislative instrument will sunset on 1 October 2025, the amendments made by the amending instrument will also expire on that date; and
 - (b) the matters contained in the instrument are a specific amendment designed to ensure the application of primary legislation remain flexible to adapt to market developments and applies in a way consistent with the intended policy and the enabling provisions in the primary legislation.
29. Prior to the making of the amending instrument, ASIC consulted with Treasury on its proposal for the amending instrument and the duration of the relief to be provided under the amending instrument.
30. In the lead up to 1 October 2025, the date on which the legislative instrument will sunset, ASIC will review the legislative instrument and consult on options for amending, remaking or revoking it. As part of this consultation, ASIC will engage with Treasury to ensure the relief provided under the legislative instrument remains appropriate for delegated legislation.

Legislative authority

31. The amending instrument is made under subsections 250PAA(1), 341(1) and 992B(1) having regard to subsection 342(1) of the Act and subsection 33(3) of the *Acts Interpretation Act 1901* (the **AIA**).

-
32. Subsection 250PAA(1) of the Act provides that ASIC may, by legislative instrument, make an order exempting companies under administration and companies subject to deeds of company arrangement from section 250N. Subsection 250PAA(2) of the Act further provides the order may be unconditional or subject to one or more specified conditions. Subsection 250PAA(3) of the Act requires the order to be published in the *Gazette*.
 33. Section 341(1) of the Act provides that ASIC may make an order in writing in respect of a specified class of companies, registered schemes or disclosing entities, relieving companies, registered schemes or disclosing entities themselves from all or specified requirements of Parts 2M.2, 2M.3 and 2M.4 (other than Division 4). Subsection 341(2) further provides the order may be expressed to be subject to conditions and be indefinite or limited to a specified period. Subsection 341(3) requires the notice of the making of the order to be published in the *Gazette*.
 34. In making the order under section 341(1), ASIC is satisfied that compliance with the relevant financial reporting obligations under Part 2M.3 would impose unreasonable burdens on certain companies under external administration, fulfilling the requirement in section 342(1).
 35. Subsection 992B(1) of the Act provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.8, or exempt a financial product or class of financial products from all or specified provisions of Part 7.8, or declare that Part 7.8 applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions of Part 7.8 were omitted, modified or varied as specified in the declaration. Subsection 992B(4) requires such an exemption or declaration to be published in the *Gazette*.
 36. Under subsection 33(3) of the AIA, where an Act confers a power to make an instrument of a legislative or administrative character, the power is to be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to amend or vary the instrument.
 37. The instrument is a disallowable legislative instrument.

Statement of Compatibility with Human Rights

38. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the [Attachment](#).

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Corporations (Amendment) Instrument 2021/506

Overview

1. *ASIC Corporations (Amendment) Instrument 2021/506* applies to companies that have an administrator, managing controller, deed administrator or provisional liquidator appointed. The instrument gives relief from requirements in the *Corporations Act 2001* in relation to annual general meetings and financial reporting.

Assessment of human rights implications

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

Conclusion

3. This instrument 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*.