



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Bidder Giving Substantial Holding Notice) Instrument 2023/685

This is the Explanatory Statement for *ASIC Corporations (Bidder Giving Substantial Holding Notice) Instrument 2023/685 (Instrument)*.

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

Summary

1. Part 6C.1 of the *Corporations Act 2001* imposes an obligation on a person to disclose details of their substantial holdings in listed entities. The Part is designed to ensure that investors have access to information about the identity, interests and dealings of persons who may be in a position to influence or control a listed entity. The information required under Part 6C.1 must be set out in a substantial holding notice that is in the form prescribed in Schedule 2 to the Corporations Regulations 2001 (*Regulations*) (Forms 603, 604 and 605) and must include the details set out in those Forms: see subsection 671B(4) of the Act and regulation 1.0.03, Schedules 1 and 2 to the Regulations.
2. A substantial holding notice must also be accompanied by documents, in writing and readily available, setting out the terms of any relevant agreement contributing to the situation giving rise to the need for substantial holding disclosure. Throughout a takeover bid, a bidder will generally acquire relevant interests in securities in respect of which the holders accept the bid and as such, will be required to provide substantial holding notices in the prescribed form disclosing details, and attaching relevant documentation, in relation to the acceptances.
3. The Instrument provides relief to a bidder under a takeover bid so that a bidder:
 - (a) does not need to give copies of the bidder's statement, offer document and acceptance forms with a substantial holding notice for acquisitions under the bid; and
 - (b) does not need to specify in the substantial holding notice the name and address of a person who has accepted an offer under the takeover bid and who, at the time the substantial holding notice is given, remains a registered holder of the securities.

-
4. The *Legislative Instruments Act 2003* (the **LIA**) provides for the periodic expiry of legislative instruments (‘sunsetting’) to ensure that they are kept up to date and only remain in force for so long as they are needed. [Class Order \[CO 13/524\]](#) *Bidder giving substantial holding notice* ([CO 13/524]) is a legislative instrument and was scheduled to eventually expire under the sunsetting provisions of the LIA. ASIC’s reissuing of the relief underlying [CO 13/524] has given ASIC the opportunity to deal with its eventual expiry. The modifications in the Instrument are to the same as those in [CO 13/524].
 5. [CO 13/524] is repealed by *ASIC Corporations, Credit and Superannuation (Amendment and Repeal) Instrument 2023/699*.

Purpose of the instrument

6. The purpose of the Instrument is to remove the requirement for a bidder under a regulated takeover bid to disclose two kinds of interrelated matters in a substantial holding notice where the disclosure is not required to achieve the regulatory purpose underlying the disclosure requirement.
7. First, without relief, a bidder would be required to give copies of the bidder’s statement, offer document and acceptance forms with substantial holding notices detailing acquisitions under the bid. This obligation is considered to be disproportionately burdensome because the bidder is required to lodge the bidder’s statement and offer document with ASIC and send it to the relevant market operator for release to the market. In other words, the substantive documents that would be required to accompany the substantial holding notice are publicly available.
8. Secondly, without relief, a bidder would also be required under the relevant prescribed forms (Forms 603 and 604) to identify the name and address of every person who has accepted an offer under the takeover bid and who, at the time the substantial holding notice is given, remains a registered holder of the securities. This will commonly be the case for persons who accept the offers under the bid because securities which they hold will not generally be transferred to the bidder before the substantial holding notice must be given by the bidder.
9. ASIC recently reviewed the policy underlying [CO 13/524] as part of a wider review of legislative instruments relating to takeover provisions in Chapters 6–6C. ASIC considers that the relief provided in [CO 13/524] is still both necessary and appropriate. ASIC has decided to reissue the relief underlying [CO 13/524] in the Instrument.

Consultation

10. On 30 November 2022, ASIC released Consultation Paper 365 (**CP 365**) seeking feedback on proposals to remake nine class orders relating to takeovers, compulsory acquisitions and relevant interests (including [CO 12/1209], [CO 13/519], [CO 13/520], [CO 13/521], [CO 13/522], [CO 13/524], [CO 13/525], [CO 13/526], and [CO 13/528]). The consultation period closed on 23 January 2023.

-
11. CP 365 invited feedback as to whether [CO 13/524] *Bidder giving substantial holding notice* was operating effectively and efficiently, or whether there were issues or improvements that should be considered to improve its operation.
 12. ASIC received 4 submissions in response to CP 365, one of which addressed [CO 13/524]. We took that submission into account in making the Instrument. Details of the submissions received are contained in REP 773 Response to submissions on CP 365 which is available on ASIC's website at www.asic.gov.au.

Operation of the instrument

13. The Instrument provides relief to a bidder under a takeover bid so that a bidder:
 - (a) does not need to give copies of the bidder's statement, offer document and acceptance forms with a substantial holding notice for acquisitions under the bid; and
 - (b) does not need to specify in the substantial holding notice the name and address of a person who has accepted an offer under the takeover bid and who, at the time the substantial holding notice is given, remains a registered holder of the securities.
14. The removal of the requirement to specify in the substantial holding notice the name and address of a person who has accepted an offer under the takeover bid and who remains a holder, only applies to the extent the person would not otherwise need to be identified in the notice. For example, a bidder would need to specify in the substantial holding notice a person who is a counterparty to an agreement with the bidder that is unconnected with the bid and which gives the bidder a relevant interest in securities, even though that person has accepted an offer under the takeover bid.
15. A bidder that does not specify in the substantial holding notice the name and address of a person who has accepted an offer under the takeover bid and who, at the time the substantial holding notice is given, remains a registered holder of the securities, must provide the information to the target if the target requests the information in writing. The request must be complied with no later than the next business day after receiving the request. This condition of the exemption ensures the target is still able to promptly obtain this information if the bidder omits it from the substantial holding notice in reliance on this Instrument.

Legislative instrument and primary legislation

16. The subject matter and policy implemented by the Instrument is more appropriate for a legislative instrument rather than primary legislation because it provides administrative relief in circumstances where strict compliance with the primary legislation produces an unintended or unforeseen result.
17. It will be a matter for the Government and for Parliament as to whether the Act or Regulations may be amended in future to include the relief in the Instrument.

Duration of the Instrument

18. The Instrument expires after 5 years. This allows sufficient time for the Government and for Parliament to determine whether to amend the primary legislation or regulations to include the relief.

Legislative authority

19. This Instrument is made under sections 655A and 673(1) of the *Corporations Act 2001*. Paragraphs 655A(1)(b) and 673(1)(b) provide that ASIC may declare that Chapter 6 of the Act apply as if specified provisions were omitted, modified or varied as specified in the declaration.
20. The Instrument commences on the day after it is registered on the Federal Register of Legislation and continues in force for 5 years until 1 October 2028.
21. Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make any instrument, 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 any such instrument.
22. As a legislative instrument, the Instrument is disallowable under section 42 of the *Legislation Act 2003*.

Statement of Compatibility with Human Rights

23. 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 (Bidder Giving Substantial Holding Notice) Instrument 2023/685

Overview

1. Part 6C.1 of the Corporations Act 2001 imposes an obligation on a person to disclose details of their substantial holdings in listed entities. The Part is designed to ensure that investors have access to information about the identity, interests and dealings of persons who may be in a position to influence or control a listed entity.
2. The operation of Part 6C.1 of the Act in the context of a regulated takeover bid may require a bidder with a substantial holding in a listed target to include information in a substantial holding notice that is publicly available or whose inclusion in such a notice is not required to achieve the regulatory purpose underlying the disclosure requirement.
3. The Instrument provides relief to a bidder under a takeover bid so that a bidder:
 - a. does not need to give copies of the bidder's statement, offer document and acceptance forms with a substantial holding notice for acquisitions under the bid; and
 - b. does not need to specify in the substantial holding notice the name and address of a person who has accepted an offer under the takeover bid and who, at the time the substantial holding notice is given, remains a registered holder of the securities.

Assessment of human rights implications

4. This Instrument does not engage any of the applicable rights or freedoms.

Conclusion

5. 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*.