

EXPLANATORY STATEMENT for

ASIC Corporations (Exempt Proprietary Companies) Instrument 2015/840

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes *ASIC Corporations (Exempt Proprietary Companies) Instrument 2015/840* under subsection 341(1) of the *Corporations Act 2001* (the Corporations Act). Subsection 341(1) provides that ASIC may make an order in writing in respect of a specified class of companies, registered schemes or disclosing entities, relieving any of the directors, the companies, registered schemes or disclosing entities themselves, or the auditors of the companies, registered schemes or disclosing entities from all or specified requirements of Parts 2M.2, 2M.3 and 2M.4 (other than Division 4) of the Corporations Act.

1. Background

Under subsections 319(4)–(6) of the Corporations Law (as preserved in the *Corporations Act 2001* (Corporations Act) through the transition provision in the table in subsection 1408(7) of the Corporations Act), certain large proprietary companies are not required to lodge financial reports with ASIC if they meet certain conditions (exempt proprietary companies). Commonly referred to as ‘grandfathered’ large proprietary companies, these exempt proprietary companies are required to have their financial reports audited before the reporting deadlines specified in Chapter 2M of the Corporations Act in order to maintain their exemption from lodging financial reports.

In broad terms, exempt proprietary companies were proprietary companies where there was no direct or indirect public ownership; that is, they were essentially owned by private individuals. The companies were not required to lodge financial reports where those financial reports were subject to audit and sent to members. The legislation had regard to the close ownership of the companies, possible privacy concerns, and a perceived level of comfort to creditors and others from the existence of an audit. Their status was preserved on transition to the Corporations Act.

2. Purpose of the instrument

To preserve their status, exempt proprietary companies have continuing obligations to ensure their financial reports are audited before the deadline for reporting to members and their ownership structures remain private.

Financial reports of companies, registered schemes and disclosing entities under Chapter 2M were required to be prepared in accordance with the Australian equivalents to International Financial Reporting Standards (AIFRS) for the first time for years commencing on or after 1 January 2005.

Class Order [CO 05/637] *Additional month for first financial reports under AIFRS* (made under subsection 341(1)) allowed non-disclosing entities an additional month to distribute to members their financial report for a financial year commencing between 1 January 2005 and 31 December 2005 (inclusive) and to lodge it with ASIC. The relief was not extended to small proprietary companies that prepare financial reports under a shareholder direction under s293.

A legislative condition for grandfathering is that financial reports are sent to members within four months of the end of each financial year. In the absence of *ASIC Corporations (Exempt Proprietary Companies) Instrument 2015/840*, grandfathered large proprietary companies would have lost their grandfathered status if they took advantage of the additional time to report provided by [CO 05/637].

In addition, *ASIC Corporations (Exempt Proprietary Companies) Instrument 2015/840* allows certain large proprietary companies to retain their grandfathered status despite not having met the grandfathering conditions in particular circumstances that do not detract from the conditions underlying their exempt status. These circumstances include, for example, the company having a foreign company shareholder (provided the company is not controlled by a foreign company), or having an authorised trustee company as a non-beneficial member.

Class Order [CO 05/638] is repealed by Schedule 2 to the *ASIC Corporations (Amendment and Repeal) Instrument 2015/843*.

3. Operation of the instrument

The instrument relieves a large proprietary company from the obligation to lodge its annual report with ASIC under subsection 319(1). The relief is conditional upon the company being an exempt proprietary company within the meaning of the Corporations Law on 30 June 1994 and continuing to meet that definition of exempt proprietary company at all times until the deadline for reporting to members for the relevant financial year.

The company must have had its financial statements and financial reports for the financial year ending during 1993 and each later financial year audited before the deadline for reporting to members. An exception from that requirement applies in the specific circumstances where preparation, audit, lodgement or sending to members of the financial statements, directors' report and auditor's report was deferred in compliance with relief given by ASIC.

The company must not have been a disclosing entity, a borrowing corporation or a borrower or guarantor at any time after 9 December 1995 and before the deadline for reporting to members for the relevant financial year.

4. Consultation

ASIC has consulted with stakeholders through Consultation Paper 233 which was issued on 16 June 2015 and was open for comment to 17 August 2015.

ASIC has assessed that a Regulatory Impact Statement is not necessary for this instrument as it is operating effectively and efficiently, as informed by the consultation process, and is being remade without significant changes.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Exempt Proprietary Companies) Instrument 2015/840

ASIC Corporations (Exempt Proprietary Companies) Instrument 2015/840 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.

Overview

The objective of this legislative instrument is to allow certain large proprietary companies to retain their exemption from lodging financial reports with ASIC in circumstances that do not detract from the conditions underlying their exempt status.

Human rights implications

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

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

Australian Securities and Investments Commission