

Grandfathered large proprietary companies		
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Key Messages

The Government and Greens voted together in early August 2022 to repeal the legislative exemption for certain large proprietary companies from lodging financial reports ('grandfathering'). Following amendments made by the Treasury Laws Amendment (2022 Measures No.1) Act 2022, the exemption is only available to grandfathered large proprietary companies for financial years ended before 9 August 2022.

ASIC first supported repeal of the exemption in a public report to the Senate in 1998 and more recently in a submission to a Senate Estimates tax inquiry in 2015. While the exemption may have had regard to privacy considerations, creditors and others were not able to access important information on the financial condition of a company.

It is unlikely that ASIC would give individual lodgement relief to any previously grandfathered companies.

Background

Proprietary companies that are large or controlled by foreign companies are generally required to prepare and lodge financial reports with ASIC under Chapter 2M of the Corporations Act 2001. A proprietary company is large if it meets two or more of three size criteria based on revenue, gross assets, and the number of employees of the company and its controlled entities.

In 1995 an ownership-based test for lodgement of financial reports by proprietary companies was replaced by a size test. Many large proprietary companies that were exempt from lodging under the ownership-based test were given an ongoing legislative exemption from lodging reports ('grandfathered large proprietary companies'). These companies are still required to prepare financial reports and make them available to members.

There have been attempts over the years to remove the grandfathering exemption. The then Labor Opposition and Greens attempted to remove the exemption through changes to Bills dealing with other matters in June 2020 and August 2021. The Coalition Government did not support the amendments.

There were up to 1,104 grandfathered companies in August 2021. This figure could include some companies that have ceased to meet all of the conditions to be grandfathered (e.g. a requirement to have their reports audited every year before the statutory deadline) or are exempt from lodging financial reports for another reason (e.g. they are no longer large companies). ASIC provided a list of grandfathered companies in March 2020 in response to a Senate Estimates Question on Notice. The list was made public by Senate Estimates.

The Senate Economics References Committee Inquiry Report into Tax Minimisation and Avoidance in 2014 and 2015 (Tax Inquiry) had raised concerns that the lack of transparency for grandfathered companies could create incentives for tax minimization. Tax legislation has required Country-by-Country Reporting Entities and Significant Global Entities (entities that are parts of global groups with more than A\$1 billion of revenue) to lodge financial reports with the ATO. The ATO sends the reports to ASIC for the public record. Twelve grandfathered companies had lodged reports under this requirement.

Background - past ASIC relief

Some may have incorrectly assumed that ASIC supported the exemption because there was an ASIC instrument that preserved the grandfathering exemption for some companies (most recently ASIC Corporations (Exempt Proprietary Companies) Instrument 2015/840). The Treasury Laws Amendment (2022 Measures No.1) Act 2022 repealed that ASIC instrument and specifically prohibits ASIC from giving similar relief to the formerly grandfathered companies.

The instrument dealt with a technical issue that arose when ASIC gave companies an additional month to lodge financial reports due to the Sydney Olympics and COVID-19 conditions. A grandfathered large proprietary company that used the relief would no longer be exempt from lodging its financial reports with ASIC. One of the conditions to be exempt from lodging financial reports is reporting to members within the statutory deadline (pursuant to Item 7 in the table in s1408(6) of the Corporations Act 2001 which preserves the old ss319(4) to (6) of the Corporations Law). Instrument 2015/840 allowed grandfathered companies that used the extensions of time to remain exempt from lodging their financial reports with ASIC.

Background - individual relief applications

While formerly grandfathered companies can apply to ASIC for individual relief from lodging their financial reports, they would need to demonstrate that lodgement would impose unreasonable burdens on the company (s341 of the Corporations Act 2001). Applicants might seek to argue that lodgement would cause privacy issues or put the company at a competitive disadvantage. ASIC will assess these applications by reference to ASIC Regulatory Guide 43 Financial Reports and Audit Relief which explains why privacy and competitive disadvantage concerns are not expected to satisfy the unreasonable burdens pre-condition for relief.