



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 109

Assetless Administration Fund: Funding criteria and guidelines

November 2009

About this guide

This guide is for registered liquidators appointed under Chapter 5 of the *Corporations Act 2001* (Corporations Act) as a liquidator in a creditors' voluntary winding up or a court-ordered winding up.

It outlines:

- ASIC's approach to, and criteria for, funding liquidator investigations and reports from the Assetless Administration Fund (AA Fund);
- how to apply for funding from the AA Fund, including guidance on completing an application form; and
- what to include in a funded supplementary s533 report.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act);
- explaining how ASIC interprets the law;
- describing the principles underlying ASIC's approach; and
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This version was issued on 26 November 2009 and is based on legislation and regulations as at 26 November 2009.

Previous versions:

- Superseded Regulatory Guide 109, issued on 23 February 2006;
- Superseded Regulatory Guide 109A, issued 13 June 2006; and
- Superseded Regulatory Guide 109B, issued on 21 December 2007 and effective as of 1 January 2008.

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

The Assetless Administration Fund (AA Fund) finances preliminary investigations and reports into the failure of companies with few or no assets: see RG 109.4–RG 109.6.

The funding process differs depending on whether s206F disqualification proceedings may result or there is evidence of possible offences or other misconduct: see RG 109.7–RG 109.11.

- RG 109.1 When a company fails with few or no assets, the liquidator may not be able to carry out full investigations into the circumstances of the insolvency or prepare full reports for ASIC. As a result possible offences or other misconduct by company officers may not be brought to our attention.
- RG 109.2 A liquidator in a creditors' voluntary winding up or a court-ordered winding up can apply for assistance from the Assetless Administration Fund (AA Fund) to carry out preliminary investigations and prepare supplementary s533 reports.
- RG 109.3 We are providing this guidance for liquidators to outline:
- the criteria for assistance from the AA Fund;
 - how to apply for funding;
 - our approach to funding liquidator investigations and reports; and
 - what to include in a funded supplementary s533 report.

This regulatory guide can be read in conjunction with Regulatory Guide 16 *External administrators: Reporting and lodging* (RG 16).

What is the AA Fund?

- RG 109.4 The AA Fund was established by the Australian Government and is administered by ASIC. It finances preliminary investigations and reports by liquidators into the failure of companies with few or no assets, where it appears to ASIC that enforcement action may result from the investigation and report. A particular focus of the AA Fund is to curb fraudulent phoenix activity.

Note: Phoenix activity does not have a statutory or legal definition. However, phoenix activity can be regarded as typically involving:

- the transfer of assets (such as the business) of a company (the previous company) to a subsequent company in circumstances where the previous company:

- was unable to pay its debts; and
- may have been conducted in a manner so as to deprive unsecured creditors equal access to its assets; and
- there is a connection between the management or shareholding of the previous company and the subsequent company.

RG 109.5 The AA Fund helps close the regulatory gap that arises when a failed company is not properly investigated. This can happen because liquidators are not obliged to incur any expense, other than an expense necessary to comply with their minimum statutory duties, unless the company in liquidation has sufficient available property to fund it. As a result, when a company is left with few or no assets, the liquidator often performs only a perfunctory investigation. This may allow misconduct in the lead up to a formal insolvency to go undiscovered or without sanction.

RG 109.6 The AA Fund enables a liquidator to carry out a proper investigation and report, which then helps ASIC decide whether to commence enforcement action. Addressing the regulatory gap through more rigorous investigation and reporting will improve corporate conduct generally, improve returns for creditors, and reduce the scope for phoenix activity.

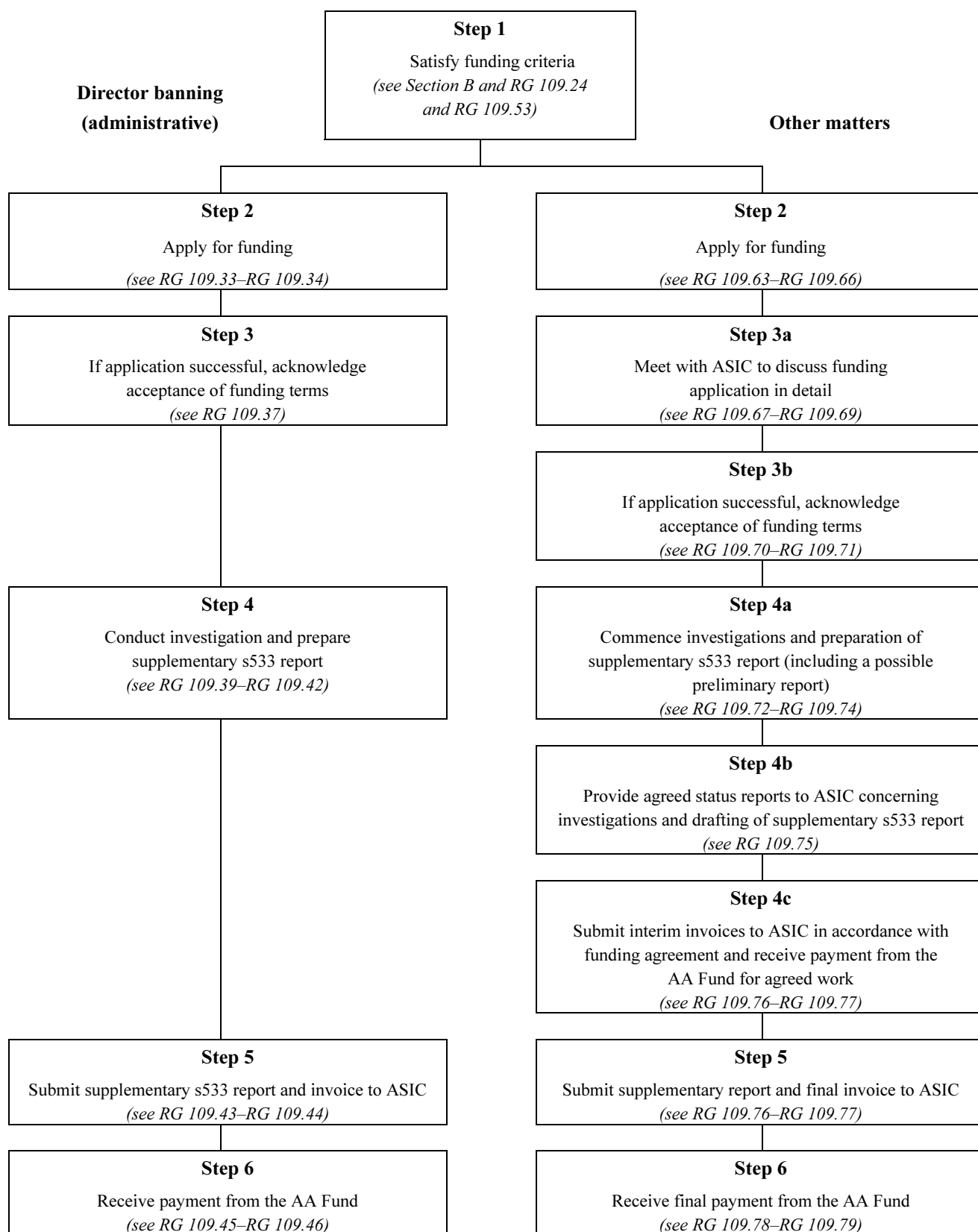
What is the funding process?

RG 109.7 The first step in applying for assistance from the AA Fund is always to determine whether or not the funding criteria are satisfied. Section B of this guide outlines four criteria that must be satisfied:

- (a) the liquidation must be ‘assetless’ (see RG 109.17–RG 109.18);
- (b) the initial s533 report must have been lodged (see RG 109.19);
- (c) the matter must be of a type ASIC may consider actioning (see RG 109.20–RG 109.21); and
- (d) there is or may be material or information available to support any allegations or concerns of the liquidator (see RG 109.22–RG 109.23).

RG 109.8 Once the funding criteria are satisfied, the process differs depending on whether the case may result in s206F administrative proceedings to disqualify a person from managing corporations or there is evidence of possible offences or other misconduct. Figure 1 shows the steps that apply to the two types of funding applications.

Figure 1: Flowchart of the assetless administration funding process



- RG 109.9 In circumstances where s206F administrative proceedings to disqualify persons from managing corporations (director banning) may be appropriate, the process outlined in Section C should be followed.
- RG 109.10 In other cases, such as where there may be evidence of possible offences or other misconduct in relation to the Corporations Act, liquidators should read Section D.
- RG 109.11 The appendices to this guide will also help liquidators prepare their funding applications and supplementary s533 reports.

B Assessment of applications and funding criteria

Key points

ASIC will take a number of factors into account in assessing applications for funding, including:

- the possibility of s206F disqualification proceedings;
- the seriousness of any misconduct;
- the sufficiency of evidence to support enforcement action;
- the currency of the matter or a history of similar conduct;
- the regulatory impact of any resulting action (see RG 109.12–RG 109.16).

To be eligible for funding from the AA Fund, the following criteria must be satisfied:

- the liquidation must be ‘assetless’ (see RG 109.17–RG 109.18);
- the initial s533 report must have been lodged (see RG 109.19);
- the matter must be of a type ASIC may consider actioning (see RG 109.20–RG 109.21); and
- there is or may be material or information available to support any allegations or concerns of the liquidator (see RG 109.22–RG 109.23).

How ASIC assesses funding applications

- RG 109.12 ASIC will assess each application for funding which meets the funding criteria set out at RG 109.17–RG 109.23 on a case-by-case basis.
- RG 109.13 It is anticipated that all applications relating to possible director bannings under s206F that meet the criteria and seek funding of \$7500 (exclusive of GST) or less will be funded, other than in exceptional circumstances. Where these applications meet the criteria but are seeking funding of more than \$7500 (exclusive of GST), approval for funding may only be given where:
- ASIC considers the extent and nature of the work proposed to be undertaken is necessary and justifies the additional cost; and
 - ASIC and the liquidator come to an agreement on the amount of funding.
- RG 109.14 Applications for funding relating to matters other than director banning under s206F that meet the funding criteria in Section B will only be approved where:

- it appears to ASIC that serious possible misconduct is likely to have occurred;
- it appears to ASIC that there is likely to be sufficient evidence arising from the investigation and supplementary s533 report to support enforcement action;
- ASIC considers the extent and nature of the work proposed to be undertaken is necessary and justifies the cost; and
- ASIC and the liquidator come to an agreement on the amount of funding.

RG 109.15 For applications relating to matters other than director banning under s206F, ASIC may also consider the following issues when determining a matter for funding:

- whether the liquidation is current and the relevant conduct is relatively recent;
- whether the relevant conduct is continuing through another company or there is a previous history of such conduct by the relevant person; and
- whether ASIC considers the regulatory impact of any resulting enforcement action will improve corporate conduct generally, or reduce the scope for phoenix activity.

RG 109.16 ASIC reserves the right not to approve an application for funding even though all the criteria have been met.

What are the funding criteria?

Assetless administration

RG 109.17 Table 1 sets out what is an ‘assetless administration’ for the purposes of the AA Fund. When considering which applications to fund, we will give priority to applications in Category 1.

Table 1: What is an assetless administration?

Application category	Explanation
<p>Category 1</p> <p>A liquidation with:</p> <ul style="list-style-type: none"> • no assets; or • only enough assets to cover the basic tasks of an insolvent liquidation, such as: <ul style="list-style-type: none"> – securing books and records; – making initial inquiries to identify and collect assets; – providing a basic report to creditors; – dealing with creditors' inquiries; – lodging an initial s533 report. 	<p>To qualify as an assetless administration under Category 1, the liquidation must have less than \$10,000 of net realisable assets. In such a liquidation, there are usually insufficient resources to enable a liquidator to conduct proper investigations into possible misconduct pursuant to the Corporations Act.</p> <p>For liquidations in Category 1, net realisable assets are the actual or estimated gross proceeds from the realisation of assets, <i>less</i>:</p> <ul style="list-style-type: none"> • actual or estimated direct third-party realisation costs (for example, auctioneer's fees and real estate agent's commission); • proceeds subject to a claim by a secured creditor; and • petitioning creditor's costs paid under s556(1)(b). <p>Note: See also RG 109.18 for what is excluded from net realisable assets for the purposes of the AA Fund.</p>
<p>Category 2</p> <p>A liquidation where some work has been undertaken and, as a result, less than \$10,000 remains in net realisable assets.</p>	<p>To qualify as an assetless administration under Category 2, a liquidation must have less than \$10,000 of net realisable assets.</p> <p>For liquidations in Category 2, net realisable assets are the actual or estimated gross proceeds from the realisation of assets, <i>less</i>:</p> <ul style="list-style-type: none"> • the costs listed under Category 1; and • all other outlays of the liquidation, <p>at the date of lodgement of the application for funding.</p> <p>Note: See also RG 109.18 for what is excluded from net realisable assets for the purposes of the AA Fund.</p>

RG 109.18 For both Categories 1 and 2, net realisable assets exclude:

- choses in action which have not been settled or judicially determined;
- specific purpose funding from creditors (usually for asset recovery purposes); and
- assets which are not readily realisable and which will take longer than 12 months from the date of lodgement of the application for funding to realise.

Note 1: These definitions are for the purposes of the AA Fund only. They do not apply for the purposes of the Corporations Act (e.g. in determining whether there is sufficient available property under s545(1) or if the company has enough property to cover the costs of obtaining a court order for the company's deregistration under s601AB(2)).

Note 2: While assets that will take longer than 12 months from the date of estimation of net realisable assets to realise are generally excluded from the definition of net realisable assets, we still require an estimate of the value of such assets to be provided in the application form.

Section 533 report

RG 109.19 To be eligible to apply for funding from the AA Fund, the liquidator must have lodged an initial s533 report.

Note 1: The statutory requirement to lodge a s533 report is not dependent on whether or not a company is assetless. Liquidators who are required to lodge a s533 report and who are ineligible for funding must still investigate and report on possible misconduct to the required standard.

Note 2: We ask that the initial s533 report be in the form of Schedule B to Regulatory Guide 16 *External administrators: Reporting and lodging* (RG 16).

Types of matters funded

RG 109.20 ASIC will consider funding the liquidator from the AA Fund to undertake investigations and prepare a supplementary s533 report in circumstances where:

- s206F director banning proceedings may be appropriate (see Section C); or
- court proceedings for serious misconduct pursuant to the Corporations Act may be warranted, including matters such as breaches of directors' and officers' duties, insolvent trading, and concealment, misappropriation or removal of company property (see Section D).

Note: After lodging their initial s533 report, a liquidator may lodge a further report under s533(2).

RG 109.21 ASIC will not provide funding to a liquidator to pursue the recovery of assets.

Sufficient evidence

RG 109.22 Funding will only be provided when it appears to ASIC there is likely to be sufficient evidence to support the allegations made in the supplementary s533 report and to enable ASIC to take subsequent enforcement action.

RG 109.23 The extent and nature of evidence required is different for s206F director banning proceedings and court proceedings commenced as a result of possible misconduct in relation to a company: see RG 109.26–RG 109.27 and RG 109.55–RG 109.56.

C Director banning (administrative)

Key points

In addition to the general funding criteria there are certain requirements that must be met for ASIC to consider funding a matter which may result in a director being banned: see RG 109.24–RG 109.25.

While ASIC is not bound by the rules of evidence in such proceedings, there must be sufficient evidence that is relevant and logically probative: see RG 109.26–RG 109.29 and Appendix 10.

Funding will only be approved for future remuneration and disbursements for investigations and preparation of the supplementary s533 report: see RG 109.30–RG 109.32.

Applications for funding are lodged electronically. If successful the liquidator must enter into a funding agreement: see RG 109.33–RG 109.38 and Appendices 1 and 2.

Once the funding agreement is accepted, the liquidator should start their investigations and the preparation of the supplementary s533 report: see RG 109.39–RG 109.42 and Appendix 3.

ASIC's view is that a liquidator does not require creditor approval to draw fees for work funded by the AA fund: see RG 109.43–RG 109.46.

Supplementary s533 reports are confidential and protected by qualified privilege, but may be made available to the director subject to s206F disqualification proceedings: see RG 109.47–RG 109.49.

The liquidator may be required to attend the s206F banning hearing or a subsequent appeal: see RG 109.50–RG 109.52.

Eligibility for funding

RG 109.24 As well as satisfying the criteria in Section B, to be eligible to apply for this category of funding, a liquidator must still be in office for at least one of the companies with which the director has been involved and:

- be aware that the director has been involved with one or more other companies which have gone into liquidation;
- believe that the director meets the requirements of s206F(1)(a);
- believe that there is, or will be, sufficient information or material to support their concerns about the director's conduct, having regard to s206F(2)(b)(i); and

- believe that their concerns may warrant ASIC taking director banning proceedings, having regard to s206F(2)(b)(ii).

RG 109.25 ASIC will consider funding for all matters that meet the above requirements.

Note: Section 206F states:

Power to disqualify

- (1) ASIC may disqualify a person from managing corporations for up to 5 years if:
- within 7 years immediately before ASIC gives a notice under paragraph (b)(i):
 - the person has been an officer of 2 or more corporations; and
 - while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under subsection 533(1)...about the corporation's inability to pay its debts; and
 - ASIC has given the person:
 - a notice in the prescribed form requiring them to demonstrate why they should not be disqualified; and
 - an opportunity to be heard on the question; and
 - ASIC is satisfied that the disqualification is justified.

...

Grounds for disqualification

- (2) In determining whether disqualification is justified, ASIC:
- must have regard to whether any of the corporations mentioned in subsection (1) were related to one another; and
 - may have regard to:
 - the person's conduct in relation to the management, business or property of any corporation; and
 - whether the disqualification would be in the public interest; and
 - any other matters that ASIC considers appropriate.

...

Notice of disqualification

(3) If ASIC disqualifies a person from managing corporations under this section, ASIC must serve a notice on the person advising them of the disqualification. The notice must be in the prescribed form.

Start of disqualification

(4) The disqualification takes effect from the time when a notice referred to in subsection (3) is served on the person.

ASIC power to grant leave

(5) ASIC may give a person who it has disqualified from managing corporations under this Part written permission to manage a particular corporation or corporations. The permission may be expressed to be subject to conditions and exceptions determined by ASIC.

Sufficient evidence

RG 109.26 The administrative hearing conducted under s206F should not be equated to a civil, criminal or quasi-judicial process. In conducting the hearing, ASIC is

performing an administrative function. ASIC is not bound by the rules of evidence and the traditional rules of procedure of courts or quasi-judicial bodies do not apply: see s59(2) of the *Australian Securities and Investments Commission Act 2001* (Cth). A s206F hearing is a critical part of ASIC's decision-making process. The hearing is used both in finding the facts about a matter and in considering the significance of those facts to the law.

RG 109.27 While the rules of evidence do not apply, adverse findings ASIC makes must be based on logically probative material. This means that the available information or material must:

- be relevant;
- logically tend to prove or disprove the matters that ASIC must determine; and
- be probative (i.e. have sufficient weight and cogency to be relied on).

For more information on the conduct of administrative hearings, see ASIC's Hearings Practice Manual at www.asic.gov.au/booklets.

RG 109.28 We have also provided additional guidance in Appendix 10 as to the types of information and supporting documents that could be considered by a liquidator when investigating possible misconduct and reporting to ASIC in a supplementary report.

RG 109.29 If a liquidator experiences difficulties in obtaining relevant information, for example, because the directors have failed:

- to provide a report as to affairs; or
- to deliver the books and records of the company to the external administrator,

we request that the liquidator consider exercising their powers in this regard, or seek our assistance before making an application for funding. If assistance is needed, please notify ASIC in writing: see www.asic.gov.au/liquidatorassistance for further details.

What funding is provided?

RG 109.30 Funding will only be approved for anticipated future remuneration together with actual disbursements reasonably incurred and directly relevant to the additional investigations and preparation of the supplementary s533 report. It will not be available to meet remuneration already incurred.

RG 109.31 It is expected that most liquidator investigations and reports will be funded up to a capped total of \$7500 (exclusive of GST), for remuneration charged on an hourly basis and disbursements combined.

- RG 109.32 If a liquidator considers that the cost of the work to be carried out, including expenses, will be greater than \$7500 (exclusive of GST), this should be stated in the application form. In this case, ASIC will contact the liquidator to discuss the estimated cost.

Funding applications

Lodging an application

- RG 109.33 If a liquidator considers that the liquidation satisfies the funding criteria in Section B and RG 109.24, they may lodge a funding application. For assistance with completing and submitting a funding application see Appendix 1.
- RG 109.34 The funding application (Form EX02) must be lodged electronically through ASIC's Registered Liquidator portal. For help in registering to lodge online, contact the Registered Liquidator portal Client Manager on (03) 5177 3733 or at exad@asic.gov.au.

Assessing the application

- RG 109.35 In assessing the application, ASIC may contact the liquidator to obtain a more detailed understanding of the matter. ASIC may also contact the liquidator to discuss the level of funding sought.
- RG 109.36 ASIC will notify liquidators, in writing, of the outcome of their application.

Funding agreement

- RG 109.37 If an application is successful, a funding agreement will be sent to the liquidator setting out the terms on which the funding is offered. The liquidator must acknowledge acceptance of the terms by returning a signed and dated copy of the agreement within 14 days.
- RG 109.38 A sample funding agreement for director banning investigations and supplementary s533 reports is set out in Appendix 2.

Preparing reports

- RG 109.39 When a liquidator has accepted the terms of the funding offer, they should start their investigation and preparation of the supplementary s533 report. ASIC staff are also available to discuss with the liquidator any issues involved in the preparation of the report.

- RG 109.40 To streamline the preparation of these supplementary s533 reports and ensure they are of a suitable standard, ASIC has developed a sample layout of a report that meets these requirements: see Appendix 3.
- RG 109.41 Further, as noted in RG 109.27, adverse findings by ASIC must be based on logically probative information. Accordingly, to assist ASIC, liquidators should prepare their supplementary s533 reports with this in mind.
- RG 109.42 The supplementary s533 report should focus on matters which go to the person's conduct in relation to the management, business or property of the corporation: see s206F(2)(b)(i).

Payments from the AA Fund

- RG 109.43 The liquidator's tax invoice and detailed fee account for the agreed investigation and supplementary s533 report must be submitted, together with the completed supplementary report, to:
- Team Leader—Misconduct and Breach Reporting
ASIC, GPO Box 9827
In Your Capital City
- RG 109.44 The fee account must disclose the amount of time spent by the liquidator and each employee at the relevant charge-out rate, and detail the disbursements being claimed.
- RG 109.45 Cheques for fees and disbursements that liquidators receive from the AA Fund must be paid into the liquidation bank account. Both the receipt and subsequent payment to the liquidator from the liquidation bank account must be recorded in Form 524 *Presentation of accounts and statement*, broken down into fees and disbursements, and attributed to the 'Assetless Administration Fund'.
- RG 109.46 A question has arisen as to whether creditor approval is required before the liquidator can draw fees for work funded by the AA Fund. ASIC considers the better view is that s473(3) and 499(3) of the Corporations Act do not require a liquidator to seek approval from the committee of inspection, the creditors or the Court, for funding from the AA Fund. ASIC will administer the law on this basis.

Disclosure of liquidators' reports

- RG 109.47 In the absence of malice on the part of liquidators, supplementary s533 reports retain their qualified privilege status in accordance with s535. Supplementary s533 reports are not public documents and are confidential: see s1274(2).

- RG 109.48 As part of any s206F banning proceedings, the director is given the opportunity to have access to those documents that are relied upon by ASIC. To meet the requirements of procedural fairness, it will usually be necessary to provide the s533 report(s) to the director.
- RG 109.49 Access to the s533 reports is usually given on the condition that they only be used for the purposes of the preparation for, and conduct of, the s206F hearing and that the reports cannot be copied or disclosed to a third party without ASIC's written consent.

Other requirements

- RG 109.50 ASIC anticipates that, in most cases, it will require no information or assistance from a liquidator, other than the funded supplementary s533 report.
- RG 109.51 Occasionally a liquidator may be required to attend a s206F banning hearing to give evidence relating to the content of their report. Should the director appeal ASIC's decision, it is possible that a liquidator may be required to attend that hearing. The usual avenue for appeal is to the Administrative Appeals Tribunal (AAT).
- RG 109.52 In the unlikely event that ASIC requires a liquidator to undertake additional work (other than attending the banning or appeal hearing), ASIC will negotiate an amount to be paid for this work based on the same hourly rates as those agreed in the original funding agreement.

D Matters other than director banning

Key points

ASIC will consider funding matters involving possible offences or serious misconduct that may warrant proceedings by ASIC: see RG 109.53–RG 109.54.

The liquidator should consider the material they will need to gather to show an offence or other misconduct has been committed, bearing in mind it may be evidence in subsequent legal proceedings: see RG 109.55–RG 109.58 and Appendix 10.

We will determine the level of funding to undertake investigations and prepare supplementary s533 reports based on the information provided by the liquidator: see RG 109.59–RG 109.62.

Where we decide to fund the matter, we will advise the liquidator of those aspects we are interested in pursuing: see RG 109.63–RG 109.71 and Appendices 4–8.

Once funding is approved and investigations commenced, we may require regular status reports or meetings to discuss progress: see RG 109.72–RG 109.75 and Appendices 9–10.

ASIC's view is that a liquidator does not require creditor approval to draw fees for work funded by the AA fund: see RG 109.76–RG 109.79.

Supplementary s533 reports are confidential and protected by qualified privilege, but may need to be produced in any proceedings relating to the matters alleged: see RG 109.80–RG 109.81.

Where enforcement proceedings are commenced, the liquidator may be required to prepare an affidavit or attend court to give evidence: see RG 109.82–RG 109.85.

Eligibility for funding

RG 109.53 As well as satisfying the criteria in Section B, for a liquidator to be eligible to apply for this category of funding, it must appear to the liquidator that:

- there has been serious misconduct in relation to the company;
- there is, or will be, sufficient material to support their concerns about the relevant conduct; and
- their concerns may warrant the taking of proceedings by ASIC having regard to the age of the relevant conduct and history of such conduct.

- RG 109.54 The most common types of matters that ASIC expects to consider for funding include:
- breaches of directors' and officers' duties (s180–184). Of particular interest to ASIC are breaches arising out of phoenix activity;
 - continuing to take part in the management of a company while disqualified (s206A);
 - failure by a director to take reasonable steps to ensure that the company maintains adequate books and records (Pts 2M.2 and 2M.3, and s344);
 - unauthorised use of an officer's powers following the winding up of the company (s471A);
 - insolvent trading (s588G);
 - fraud, misrepresentation or theft of property (s590); and
 - entering into agreements or transactions to avoid employee entitlements (s596AB).

Sufficient evidence

- RG 109.55 In bringing possible offences (or other misconduct) to ASIC's attention, the liquidator should take into account the extent of the material they may need to gather or consider to form an opinion that an offence or other misconduct may have been committed. The liquidator should be aware that this material might form evidence that may establish the offence or misconduct in subsequent legal proceedings.
- RG 109.56 The liquidator should also be aware that the subject matter of the supplementary s533 report may be used to form the basis of an affidavit from the liquidator, if ASIC commences proceedings arising from allegations made in that report. Accordingly, the liquidator should ensure that any material relied on in the report to support an allegation is credible and relevant.
- RG 109.57 Appendix 10 sets out additional guidance on the types of information and supporting documents that a liquidator could consider when investigating possible misconduct and reporting to ASIC in a supplementary report.
- RG 109.58 If a liquidator experiences difficulties in obtaining relevant information, for example, because the directors have failed:
- to provide a report as to affairs; or
 - to deliver the books and records of the company to the liquidator,

we request that the liquidator consider exercising their powers in this regard, or seek our assistance before making an application for funding. If assistance

is needed, please notify ASIC in writing: see www.asic.gov.au/liquidatorassistance for further details.

What funding is provided?

- RG 109.59 Funding will only be available to meet the costs (including agreed disbursements) directly associated with undertaking the investigations and completing the supplementary s533 report.
- RG 109.60 ASIC will consider the level of funding requested having regard to the information provided by the liquidator. The funding approved will be determined after an assessment of the initial facts of a particular case and after consultation with the liquidator.
- RG 109.61 Applications for funding to complete investigations and prepare a report regarding these other matters will be considered on a case-by-case basis.
- RG 109.62 ASIC recognises that there may be instances where the liquidator does not have sufficient available information to enable a fully informed assessment to be made of the merits of a funding application. In these circumstances, ASIC may consider funding the liquidator to conduct preliminary investigations and prepare a preliminary supplementary s533 report to enable ASIC to decide whether to provide further funding.

Funding applications

Lodging an application

- RG 109.63 If the liquidator considers that the circumstances of the liquidation satisfy the funding criteria in Section B and RG 109.53, they may lodge a funding application. For assistance with completing and submitting a funding application see Appendix 4.
- RG 109.64 The liquidator must provide a summary of the alleged offences and conduct together with details of supporting material in the initial funding application. They will also be required to detail the nature and extent of investigations that they consider necessary to enable the supplementary s533 report to be prepared. This information will need to be sufficiently detailed to enable ASIC to make a preliminary assessment of the matter. An example summary of alleged offences and misconduct has been provided at Appendix 5. This document can be attached to the initial funding application.
- RG 109.65 The liquidator should also provide additional information in the initial funding application in relation to:

- (a) books and records of the company (see Appendix 6); and
- (b) estimated liquidator's fees and disbursements to prepare the supplementary report (see Appendix 7).

These documents can also be attached to the initial funding application.

RG 109.66 The funding application (Form EX03) must be lodged electronically through ASIC's Registered Liquidator portal. For help in registering online, contact the Registered Liquidator portal Client Manager on (03) 5177 3733 or at exad@asic.gov.au.

Assessing the application

RG 109.67 In assessing the application's eligibility for funding against the criteria set out in Section B and RG 109.53, ASIC may contact the liquidator to obtain a more detailed understanding of the issues and to discuss the level of funding sought. If we form the preliminary view that the matter may warrant funding, ASIC will arrange a meeting with the liquidator to discuss the matter further and review the available information.

RG 109.68 Following this meeting, if ASIC is of the view that the matter should be funded, ASIC will write to the liquidator detailing those aspects of the investigation ASIC is interested in pursuing and request the liquidator to provide a detailed estimate of anticipated costs and a schedule of the work to be undertaken. ASIC may contact the liquidator to discuss the detailed estimate of costs after it has been provided.

RG 109.69 On completing its review of the above material and further discussions with the liquidator, ASIC will notify the liquidator, in writing, of the outcome of their application.

Funding agreement

RG 109.70 If an application is successful, a funding agreement will be sent to the liquidator setting out the terms on which funding is offered. The liquidator must acknowledge acceptance of the terms by returning a signed and dated copy of the agreement within 14 days.

RG 109.71 A sample funding agreement is set out in Appendix 8.

Preparing reports

RG 109.72 When a liquidator has accepted the terms of the funding offer, they should start their investigation and preparation of the supplementary s533 report. ASIC staff are also available to discuss with the liquidator any issues involved in the preparation of the report.

- RG 109.73 As noted at RG 109.55–RG 109.56, for ASIC to bring proceedings in relation to possible offences or other misconduct, there must be sufficient evidence that is both credible and relevant to establish the offence or misconduct to the standard required for either civil or criminal proceedings.
- RG 109.74 To streamline the preparation of supplementary s533 reports and ensure they are of a suitable standard, ASIC has developed a sample layout of a report that meets these requirements: see Appendix 9. ASIC also provides guidance on the types of information and supporting documents that a liquidator could consider when investigating possible misconduct and reporting to ASIC in a supplementary report: see Appendix 10.
- RG 109.75 Under the terms of the funding agreement the liquidator may be required to provide regular status reports to ASIC concerning their investigation and progress in completing the supplementary s533 report. The liquidator may also be required to meet with ASIC from time to time to discuss the progress of the matter.

Payments from the AA Fund

- RG 109.76 In accordance with the terms of the funding agreement the liquidator should submit, at such times and to the person specified, their tax invoice(s) and detailed fee account(s) for the agreed investigation and supplementary s533 report. The funding agreement will also provide details for submitting the completed supplementary report.
- RG 109.77 In accordance with the terms of the funding agreement each fee account must disclose:
- the amount of time spent by the liquidator and each employee at the relevant charge-out rate;
 - a description of the work performed; and
 - details of the disbursements being claimed.
- RG 109.78 Cheques for fees and disbursements that liquidators receive from the AA Fund must be paid into the liquidation bank account. Both the receipt and subsequent payment to the liquidator from the liquidation bank account must be recorded in Form 524 *Presentation of accounts and statement*, broken down into fees and disbursements, and attributed to the ‘Assetless Administration Fund’.
- RG 109.79 ASIC considers that s473(3) and 499(3) of the Corporations Act do not require a liquidator to seek approval from the committee of inspection, the creditors or the Court, for funding from the AA Fund. ASIC will administer the law on this basis.

Disclosure of liquidators' reports

- RG 109.80 In the absence of malice on the part of the liquidator, supplementary s533 reports retain their qualified privilege status in accordance with s535. Supplementary s533 reports are not public documents and are confidential: see s1274(2).
- RG 109.81 If ASIC commences proceedings in relation to any of the matters alleged in the supplementary s533 report, the report may be discoverable in those proceedings or ASIC may be required to produce it under a subpoena or other court process.

Other requirements

- RG 109.82 ASIC anticipates that there may be a requirement for further information and assistance from a liquidator after the funded supplementary s533 report has been lodged.
- RG 109.83 Following receipt of the s533 report, ASIC will assess the evidence and determine what further action, if any, it will take.
- RG 109.84 Where ASIC commences enforcement action following receipt of the funded supplementary s533 report, the liquidator may be asked to prepare an affidavit or sworn statement in support of those proceedings. The liquidator may also be required to attend the court proceedings to give evidence relating to the content of their affidavit or sworn statement.
- RG 109.85 When ASIC requires a liquidator to undertake additional work, to the extent the liquidator is paid for this work (including any disbursements directly relevant to undertaking the additional work), any payment will be based on the same hourly rates as those agreed in the original funding agreement.

Appendix 1: Submitting Form EX02

RG 109.86 Appendix 1 is a guide to submitting Form EX02. You must use this form to seek funding from the AA Fund to carry out an investigation and prepare a supplementary s533 report in circumstances where s206F administrative proceedings to ban a director may be appropriate. Appendix 1 contains:

- (a) instructions on how to complete the form;
- (b) details of additional information that should be provided to assist us in the assessment of a funding application; and
- (c) a sample printout of a completed form.

RG 109.87 The form can only be lodged online via ASIC's Registered Liquidator portal. Before lodging, refer to the funding criteria to determine whether you are eligible for funding from the AA Fund: see Section B and RG 109.24.

Download Appendix 1:

www.asic.gov.au/RG109Appendix1

Appendix 2: Sample funding agreement—Director banning

RG 109.88 Appendix 2 is a sample funding agreement between ASIC and the liquidator that can be used in circumstances where s206F administrative proceedings to ban a director may be appropriate.

Download Appendix 2:

www.asic.gov.au/RG109Appendix2

Appendix 3: Sample layout of a supplementary s533 report—Director banning

- RG 109.89 Appendix 3 contains a sample layout of a supplementary report under s533: see Section C for further details. The sample report is in a format that you should use when preparing funded supplementary reports for a director banning (administrative) under s206F.
- RG 109.90 The sample report sets out the information that we require in order to determine whether to disqualify a person from managing a corporation under this section and the term of the disqualification.
- RG 109.91 It is provided as a guide only and is indicative of the minimum information required. You should adapt it to suit the particular circumstances.
- RG 109.92 ASIC staff are available to discuss with you any issues involving the preparation of a supplementary report. Contact officer details will be included in the funding agreement.

Download Appendix 3:

www.asic.gov.au/RG109Appendix3

Appendix 4: Submitting Form EX03

RG 109.93 Appendix 4 is a guide to submitting Form EX03. You must use this form to seek funding from the AA Fund to carry out an investigation and prepare a supplementary s533 report for matters other than a director banning under s206F. Appendix 4 contains:

- (a) instructions on how to complete the form;
- (b) details of additional information that should be provided to assist us in the assessment of a funding application; and
- (c) a sample printout of a completed form.

RG 109.94 The form can only be lodged online via ASIC's Registered Liquidator portal. Before lodging, refer to the funding criteria to determine whether you are eligible for funding from the AA Fund: see Section B and RG 109.53.

Download Appendix 4:

www.asic.gov.au/RG109Appendix4

Appendix 5: Example summary of alleged offences and misconduct—Matters other than director banning

- RG 109.95 Appendix 5 is an example of the summary of alleged offences and misconduct that you should submit when applying for funding to prepare a s533(2) supplementary report, for matters other than a director banning under s206F. The example is a guide only and is indicative of the minimum information we require to consider your funding application appropriately.
- RG 109.96 You should complete a separate summary for each alleged offence or instance of misconduct and attach the document(s) to your application.

Download Appendix 5:

www.asic.gov.au/RG109Appendix5

Appendix 6: Books and records listing and questionnaire—Matters other than director banning

RG 109.97 Appendix 6 is an example of the books and records listing and questionnaire that you should submit when applying for funding to prepare a s533(2) supplementary report, for matters other than a director banning under s206F. The listing and questionnaire supplements the information that is already provided in the funding application. The example is a guide only and is indicative of the minimum information we require to consider your funding application appropriately.

Download Appendix 6:

www.asic.gov.au/RG109Appendix6

Appendix 7: Example schedule of estimated liquidator's fees and disbursements—Matters other than director banning

- RG 109.98 Appendix 7 is an example of the schedule of estimated fees and disbursements that you should submit when applying for funding to prepare a s533(2) supplementary report, for matters other than a director banning under s206F. The schedule is a guide only and is indicative of the minimum information we require to consider a funding application appropriately.
- RG 109.99 You should provide as much information as you consider adequately demonstrates how you calculated your estimated fees and disbursements.

Download Appendix 7:

www.asic.gov.au/RG109Appendix7

Appendix 8: Sample funding agreement—Matters other than director banning

RG 109.100 Appendix 8 is a sample funding agreement between ASIC and the liquidator that can be used in relation to matters other than a director banning under s206F.

Download Appendix 8:

www.asic.gov.au/RG109Appendix8

Appendix 9: Sample layout of a supplementary s533 report—Matters other than director banning

- RG 109.101 Appendix 9 contains a sample layout of a supplementary report under s533: see Section D for further details. The sample report is in a format that you should use when preparing funded supplementary reports for matters other than a director banning under s206F.
- RG 109.102 The sample report sets out the information that we require in order to determine whether to take action against any relevant persons in relation to the misconduct reported by you.
- RG 109.103 It is provided as a guide only and is indicative of the minimum information required. You should adapt it to suit the particular circumstances.
- RG 109.104 ASIC staff are available to discuss with you any issues involving the preparation of a supplementary report. Contact officer details will be included in the funding agreement.

Download Appendix 9:

www.asic.gov.au/RG109Appendix9

Appendix 10: Allegations of possible misconduct— Substantiation guide

- RG 109.105 Appendix 10 is a guide to the types of information and supporting documents that could be considered when you are investigating possible misconduct and reporting to ASIC. It is set out as a series of tables, each listing the elements of a contravention or offence under the Corporations Act and the likely sources of evidence or information that will need to be considered to prove each element, if we commence a formal investigation.
- RG 109.106 By providing guidance on the types of information and supporting documents that could be considered when investigating possible misconduct and reporting to ASIC, we are not asking you to form or obtain a legal opinion as to whether an offence or other misconduct has occurred. The guidance in Appendix 10 is simply to alert you to the evidence that may be useful in supporting formal action over a possible offence. If you do not possess or are unaware of any available evidence to support an allegation, you should consider whether it does, in fact, appear that an offence or other misconduct may have been committed and whether the allegation should, in fact, be made.
- RG 109.107 Appendix 10 is provided solely to assist you and your staff and is not intended to serve as a definitive list of:
- (a) the facts that may amount to an offence or other misconduct;
 - (b) the sources of material that may support allegations of offences or misconduct; or
 - (c) the searches, inquiries or sources of information that we may rely on in the conduct of an investigation.
- RG 109.108 You are encouraged to make your own inquiries into any possible misconduct from the material available to you.
- RG 109.109 The most credible and useful sources of evidence will generally be the books and records that a company is required to keep under the Corporations Act. A list of the books and records that a company is required to keep can be obtained from our website at www.asic.gov.au/companyrecords. These documents may provide a contemporaneous record or account of the relevant act or matter.

Download Appendix 10:

www.asic.gov.au/RG109Appendix10

Key terms

Term	Meaning in this document
AA Fund	Assetless Administration Fund
AAT	Administrative Appeals Tribunal
ASIC	Australian Securities and Investments Commission
Chapter 5 (for example)	A chapter of the Corporations Act (in this example, numbered 5)
Corporations Act	<i>Corporations Act 2001</i> including any regulations made for the purposes of the Act
liquidation bank account	A liquidator's general account under reg 5.6.06
Pt 2M.2 (for example)	A Part of the Corporations Act (in this example, numbered 2M.2)
RATA	Report as to affairs
reg 5.6.06 (for example)	A regulation of the Corporations Regulations 2001 (in this example, numbered 5.6.06)
registered liquidator	A person registered by ASIC under s1282(2)
RG 16 (for example)	An ASIC regulatory guide (in this example, numbered 16)
s533 (for example)	A section of the Corporations Act (in this example, numbered 533)

Related information

Headnotes

assetless administration fund, assessing an application, funding criteria, funding application, director banning, funding process, assetless administration, supplementary report, eligibility for funding, funding agreement, preparing reports, payments, sufficient evidence, lodging an application, qualified privilege, liquidators

Regulatory guides

RG 16 *External administrators: Reporting and lodging*

RG 103 *Confidentiality and release of information*

Legislation

Corporations Act, Pts 2D.6, 2M.2 and 2M.3, s9, 50, 50AAA, 180, 181, 182, 183, 184, 206A, 206B, 206F, 286, 344, 471A, 473(3), 475, 499(3), 530A, 533, 535, 538, 545(1), 566(1)(b), 588E(4), 588G, 588H, 590, 596AB, 597, 601AB(2) and 1274(2); Corporations Regulations 2001, regs 1.0.07 and 5.6.06; *Australian Securities and Investments Commission Act 2001*, s59(2)

Cases

Powell v Fryer (2000) 18 ACLC 480 at 482

ASIC forms

EX01 *Report to ASIC under s422, 438D or 533 of the Corporations Act 2001 or for statistical purposes*

EX02 *Assetless administration funding request (Section 206F – Director banning)*

EX03 *Assetless administration funding request (Matters other than Section 206F – Director banning)*

524 *Presentation of accounts and statement*