



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 21

How ASIC charges fees for relief applications

Chapter 2L—Debt securities, Chapter 2M—Financial reports and audit, Chapter 6—Takeovers, Chapter 6D—Fundraising, Chapter 7—Financial Services and markets

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Previous version: Superseded Practice Note 58 (issued 24/7/1995, amended 1/7/1996, superseded 11/1/2006): see [SPN 58] in the ASIC Digest on CD-ROM.

From 5 July 2007, this document may be referred to as Regulatory Guide 21 (RG 21) or Practice Note 58 (PN 58). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 21.1) or their practice note number (e.g. PN 58.1).

What this guide is about

RG 21.1 This guide describes the way fees are calculated for applications for ASIC to exercise its discretionary powers. It describes:

A our approach to charging fees for relief applications

see RG 21.3-RG 21.9

B the principles we use to calculate fees

see RG 21.10-RG 21.22

C what fees we charge for standard applications

see RG 21.23-RG 21.28

RG 21.2 The examples used in this guide refer to powers commonly exercised by ASIC, such as the powers under s340, 601QA, 741, 911A(2)(1), 951B, 992B and 1020F of the *Corporations Act 2001* (the Corporations Act). However, the principles in this guide apply equally to ASIC's other discretionary powers.

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Important note: The content of this guide is based on the law as at 1 January 2006. If there are relevant changes to the Corporations Act, we will consider revising our policy to take them into account. Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements. This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act applies to you. It is your responsibility to determine your obligations under the Corporations Act.

A Our general approach

RG 21.3 The fee that ASIC will charge for an application depends on the number of substantive matters raised in the application, and whether the application requires the use of more than one head of power.

RG 21.4 Generally, ASIC considers that an application will involve as many substantive matters as it involves separate decisions to either exercise or refuse to exercise one of its discretionary powers.

RG 21.5 We will apply the following principles when calculating fees payable for applications:

- (a) One fee will be charged for each substantive matter raised by an application.
- (b) However, where an application requires ASIC to exercise two or more heads of power, the prescribed fee must be charged for each head of power.
- (c) In general, and subject to the principle in (b), additional fees will not be charged for relief which is merely ancillary to a substantive matter.

RG 21.6 We will treat a standard pro forma instrument as relating to only one substantive matter. However, in accordance with principle (b), we will charge one fee for each head of power invoked by the pro forma instrument.

When are fees payable?

RG 21.7 Fees are payable to the Commonwealth for 'chargeable matters' as defined in s9 of the Corporations Act. 'Chargeable matters' include 'the making of ... an application to ... ASIC in relation to a matter arising under [the Corporations Act]': s4(g) of the *Corporations (Fees) Act 2001* (the Fees Act). ASIC may collect the fees on behalf of the Commonwealth under Pt 9.10 of the Corporations Act.

RG 21.8 The fees to be charged are specified in Schedule 1 of the *Corporations (Fees) Regulations 2001* (the Fees Regulations).

RG 21.9 ASIC may refuse to do an act which requires payment of a fee until the fee has been paid: s1355. For the purposes of s5 and 6 of the Fees Act, fees have been prescribed for applications made under numerous heads of powers, including for example s601QA, 741, 911A(2)(l) and 1020F: see Schedule 1 of the Fees Regulations.

B What principles do we apply?

RG 21.10 Applications must be in writing: see s102 of the Corporations Act. One written communication may contain more than one application. This section sets out the principles we rely on to calculate the fees we will charge.

Fee for each substantive matter

RG 21.11 As stated in RG 21.5, a fee will be charged for each substantive matter raised in an application. A substantive matter is a matter requiring ASIC to make a separate decision. The one substantive matter may also involve one or more ancillary matters, but the defining feature of such groups of relief is that only one substantive decision is made.

RG 21.12 To determine whether an application requires a separate decision, and is therefore a substantive matter, we consider whether that relief may stand by itself, without the need for additional relief. By contrast, a merely ancillary matter will, by itself, normally require additional relief to have the effect for which it is sought, and it would generally be insufficient or futile to grant the application in the ancillary respect only.

Fee for each head of power

Different powers

RG 21.13 In general, an application to ASIC to exercise powers under two provisions comprises two chargeable matters. One fee is prescribed for each matter. The applicant must pay, and ASIC must collect, each of those prescribed fees. So, for example, if an applicant seeks relief under both s951B and 1020F, they must pay the fee referable to each of those sections.

Same power

RG 21.14 When more than one exemption or modification is sought under the same power (for example, two or more modifications to Chapter 5C under s601QA(1)(b)), one or more fees may be charged, depending upon the number of substantive decisions which arise from the application. If there are multiple substantive decisions to be made, a multiple of the prescribed fee will be payable.

RG 21.15 If, however, there is only one substantive decision involved, and only one power invoked, then it will not matter how many provisions of the legislation may be affected by the instrument. So, for example, an application to modify several provisions of Chapter 5C at the same time using the power in s601QA(1)(b) may require

ASIC to make only one substantive decision, in which case only one fee will be charged.

Ancillary matters

RG 21.16 In many cases, an instrument affects more than one provision, although it deals with only one substantive matter. We will charge only one fee if a suite of exemptions or modifications is needed to deal with one substantive matter, however many merely ancillary matters may be involved (subject always to principle (b) in RG 21.5).

RG 21.17 For example, if ASIC decides to modify the effect of Part 5C.6 of the Corporations Act dealing with the withdrawal rights provisions and procedures for illiquid schemes, an ancillary modification of s601GA(4) of the Corporations Act is also likely to be necessary to give effect to the substantive decision. In such a case, we will charge only one fee.

More than one managed investment scheme or company

RG 21.18 Where ASIC receives a request to exercise one or more heads of power for more than one managed investment scheme or company, a separate decision is needed for each head of power for each scheme or company, to the extent that the decision is not for ancillary relief. The number of substantive matters raised (and therefore the number of fees charged) equals the number of heads of power to be exercised multiplied by the number of schemes or companies affected.

RG 21.19 For example, if a responsible entity of 10 different schemes sought the same modification to s601GA under s601QA(1)(b) for each scheme, the applicable fee would be 10 times the prescribed fee for the exercise of that head of power. Similarly, if a number of wholly-owned subsidiaries of one holding company require financial reporting and audit relief under s340, the applicable fee would be the fee attracted by s340 multiplied by the number of wholly-owned subsidiaries that required relief.

Revocations or variations

RG 21.20 An instrument which varies or revokes a previous instrument is made under the same power as the original instrument: s33(3) of the *Acts Interpretation Act 1901*. Therefore, the fee for a fresh application to vary or revoke an existing instrument will be assessed on the same principles as are set out above.

RG 21.21 When an instrument needs to be amended or revoked to deal effectively with the original application, no fee will be charged. This is because the fresh instrument is needed to deal with the original matter. An example is where, because of some misunderstanding or

error on ASIC's part, the original instrument of relief contains some erroneous particular.

RG 21.22 However, if a fresh instrument is needed because the original application was erroneous or deficient, or because the scope of the original application has changed, an additional fee will be charged. This is because a corrected or changed application will raise a new substantive matter.

How to apply for relief

- Lodge your application at any ASIC office.
- Include the prescribed fee.
- Ensure that your application complies with Regulatory Guide 51 *Applications for relief* RG 51.
- Specify and quantify any financial and other benefits and costs (including any loss of consumer protection) of the relief as far as you can.
- If you cannot quantify the benefits and costs, explain why this is so and how the scale of the effects of the relief can be estimated.
- Candidly set out all information that may be relevant to your application including your commercial objectives and how you will address any loss of consumer protection.
- Applications are not needed if a class order applies.

You can also contact ASIC Infoline on 1300 300 630 for information and assistance.

C Fees for standard applications

RG 21.23 The procedures we adopt for standard applications often involve instruments which give exemption from, or modify, more than one provision. This section deals with the fees for these instruments.

Pro forma applications

RG 21.24 We have published policies on matters which commonly require ASIC to use its discretionary powers. We have also published pro forma instruments for use in applications consistent with these policies: see Regulatory Guide 51 *Applications for relief* (RG 51).

RG 21.25 Some pro formas group together different exemptions and modifications. They are grouped this way for the convenience of ASIC and applicants. Some of them are grouped together because one commercial initiative can only be implemented with several exemptions from, or modifications to, various provisions.

Fees for pro formas

RG 21.26 Our view is that each pro forma relates to one substantive matter. This is so, even if a particular pro forma modifies or provides an exemption from several different provisions, or relates to the operation of one provision in different fact situations. Therefore, only one fee will be charged for an application for a pro forma instrument where that application only requires ASIC to make an exemption or declaration under one head of power.

RG 21.27 However, where a pro forma application requires the exercise of powers under more than one head of power, the prescribed fee will be charged for each head of power affected. So, for example, in the case of Pro Forma 187 *Management rights schemes where the strata unit cannot be used as a residence* [PF 187] the following fees are payable as at the date of issue of this guide:

- (a) for the exemption under s601QA(1)(a), \$1000;
- (b) for the exemption under s911A(2)(l), \$270 (where the applicant is a body corporate, partnership or non-corporate trustee) or \$150 (for a natural person);
- (c) for the exemptions under s992B(1)(a), \$270; and
- (d) for the exemption under s1020F(1)(a), \$270.

RG 21.28 Paragraph 3 of [PF 187] gives an exemption from s992AA to a person (other than a promoter referred to in Schedule A of the instrument) in the case of an offer to sell an interest in the relevant managed investment scheme. This is considered an ancillary matter to the other relief in the instrument given under s992B(1)(a) and so does not attract an additional fee.

Related information

RG 21.29

Headnotes

Fees, applications, chargeable matters, substantive matters, ancillary matters

Pro formas

[PF 187] *Management rights schemes where the strata unit cannot be used as a residence*

Regulatory guides

RG 51 *Applications for relief*

Legislation

Acts Interpretation Act s33(3), Corporations (Fees) Act, Corporations (Fees) Regulations, Corporations Act s340, 601QA, 741, 911A(2)(1), 951B, 992B and 1020F.