



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 174

Externally administered companies: Financial reporting and AGMs

Related instruments: [CO 03/392]; [CO 02/968]

Part 2M.3 — Financial reports and audit

Part 2G.2 Division 8 — AGMs of public companies

Issued 5/6/2003

From 5 July 2007, this document may be referred to as Regulatory Guide 174 (RG 174) or Policy Statement 174 (PS 174). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 174.1) or their policy statement number (e.g. PS 174.1).

What this guide is about

RG 174.1 This guide outlines what relief is available under the *Corporations Act 2001* (Act) for externally administered companies, from:

A the financial reporting obligations in Part 2M.3

see RG 174.6–RG 174.63

B the obligation to hold an annual general meeting (AGM) in Part 2G.2, Division 8

see RG 174.64–RG 174.81

RG 174.2 In this guide, the term “externally administered company” refers to:

- (a) a company under administration;
- (b) a company subject to a deed of company arrangement (DCA);
- (c) a company where a controller has been appointed (whether or not by a Court) and is acting;

Note: These companies are described collectively in this guide as in “controllership”.

- (d) a company in provisional liquidation;
- (e) a company in liquidation; and
- (f) a company that is concurrently in two or more of the forms of external administration referred to in paragraphs (a)–(e).

RG 174.3 This guide does not deal with or affect:

- (a) external administration under Part 5.1 (Arrangements and Reconstructions);
- (b) external administration of entities other than companies;
- (c) any obligation imposed directly on an external administrator under Chapter 5 of the Act or by a Court to prepare and distribute reports to members or contributories, or to convene a meeting of members or contributories, during the course of an external administration; or
- (d) externally administered companies that do not have independent financial reporting obligations, for example because they are wholly-owned subsidiaries that have entered into a deed of cross guarantee and have relief from the financial reporting obligations on that basis.

RG 174.4 This guide supersedes our policy in:

- (a) RG 43.34–RG 43.38 of Regulatory Guide 43 *Accounts and audit relief*;
- (b) RG 44.24–RG 44.25 of Regulatory Guide 44 *Annual general meeting — extension of time*; and
- (c) paragraphs (d) and (e) of RG 95.40 in Regulatory Guide 95 *Disclosing entity provisions relief*.

RG 174.5 This guide is issued as interim policy. We will review our policy when we have more experience with a wider range of

applications by externally administered companies for individual relief from the financial reporting and AGM obligations.

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A Financial reporting relief

Our policy

Class order relief under [CO 03/392]

RG 174.6 We have made a class order granting relief from the financial reporting obligations for companies subject to certain forms of external administration: see Class Order [CO 03/392]. The table below summarises the relief available under our class order.

Type of external administration	Nature of relief	Conditions of relief
Companies in liquidation (including companies concurrently in liquidation and controllership)	Exempt from all financial reporting obligations.	None
Companies under administration: see RG 174.21 <i>OR</i> Companies where a managing controller has been appointed to the whole or substantially the whole of the company's property <i>OR</i> Companies in provisional liquidation	Companies may: (a) defer lodging and (where applicable) distributing the Part 2M.3 reports for a period of 6 months after the date of appointment of the relevant external administrator; and (b) use specified alternative methods for distributing an annual report to members at the end of the deferral period.	Companies must: (a) notify ASIC that they are relying on the class order; (b) if listed, notify the relevant market operator(s) that they are relying on the class order; and (c) answer free of charge reasonable inquiries from members during the deferral period about the external administration.

Individual relief

RG 174.7 We may grant individual relief from the financial reporting obligations on a case-by-case basis. Whether we grant relief, the nature of relief, and the conditions we impose on relief will depend on the circumstances of the externally administered company:

see RG 174.29–RG 174.41. The table below summarises what individual relief may be available.

Note: See RG 174.62–RG 174.63 on how to apply for relief.

Nature of relief	Period of relief	Conditions of relief
Exemption from <i>all</i> or <i>some</i> of the financial reporting obligations <i>OR</i>	Depends on the company's circumstances, and whether the relief is an exemption or a deferral.	Depends on the company's circumstances, and whether the relief is an exemption or a deferral.
Deferral of <i>all</i> or <i>some</i> of the financial reporting obligations <i>AND / OR</i>	If an <i>exemption</i> , the period may be: (a) until the end of the particular external administration; or (b) until the external administrator forms the view that the members have an ongoing economic interest in the company; or (c) for a specified number of years or specified financial reporting periods.	Usual conditions will require: (a) for listed companies — notifying the relevant market operator(s); and (b) notifying ASIC of changed circumstances.
Exemption from s314(1) requirement to send annual report to members, if company is not exempted from preparing and lodging annual report <i>OR</i>		If an exemption is granted from s314(1) but not from preparing and lodging an annual report, we may specify alternative distribution methods for the annual report: see RG 174.40.
No-action letter in the same terms: see RG 174.62	If a <i>deferral</i> , the period may be: (a) for up to 6 months; or (b) for a specified financial reporting period.	

Companies relying on interim class order relief under [CO 02/968]

RG 174.8 Some externally administered companies have had interim financial reporting relief under Class Order [CO 02/968] issued on 5 September 2002. Under [CO 02/968], these companies have until 1 September 2003 (at the latest) to comply with the financial reporting obligations for financial years and half-years which end on or before 31 May 2003.

RG 174.9 The types of companies covered by Class Orders [CO 03/392] and [CO 02/968] and the conditions of relief under those class orders differ. If these differences cause any special difficulties for companies that have been relying on our interim class relief, those difficulties should be raised with us as soon as possible so that we can identify whether any additional relief is appropriate.

Past breaches of financial reporting obligations

RG 174.10 We will not take enforcement action for failure by a company to comply with the financial reporting obligations where that failure first occurred while the company was externally administered and before the date when this guide was issued.

Underlying principles

RG 174.11 The financial reporting obligations are imposed on the company itself. Because a company does not cease to have company status when an external administrator is appointed, the financial reporting obligations continue to apply.

RG 174.12 Our policy seeks to achieve, within the limits of our discretion under s342, an appropriate balance between the statutory objectives of Part 2M.3 and Chapter 5 of the Act.

Explanation

RG 174.13 Under s340 and 341, ASIC may grant individual or class relief from all or specified provisions in Part 2M.3.

RG 174.14 The relief may be:

- (a) subject to conditions; and
- (b) indefinite or limited to a specified period: s340(2) and 341(2).

RG 174.15 Before granting relief under either s340 or 341, we must be satisfied that complying with the financial reporting obligations would:

- (a) make the financial or other reports misleading (s342(1)(a): see RG 174.51–RG 174.53);
- (b) be inappropriate in the circumstances (s342(1)(b): see RG 174.54–RG 174.56); or
- (c) impose unreasonable burdens (s342(1)(c): see RG 174.43–RG 174.50).

Class order relief under [CO 03/392]

RG 174.16 The exemption we have granted for companies in liquidation is based on all three grounds for relief in s342(1). The deferral we have granted for the other three classes of companies is based on the “unreasonable burdens” ground in s342(1)(c).

Deferral relief

RG 174.17 We think that compliance with the financial reporting obligations during the period following the appointment of a voluntary administrator, managing controller or provisional liquidator will impose unreasonable burdens. The burdens arise from the combination of time, financial and human resource constraints imposed on the company and the external administrator in these forms of external administration. We think these burdens are disproportionate to the value the company’s Part 2M.3 reports may have for relevant users during this period. A deferral of the financial reporting obligations for these companies reduces the severity of the burdens during this period and preserves the company’s limited assets for the benefit of all parties, while its prospects are being determined.

RG 174.18 We consider that a deferral of 6 months gives the external administrator time to attend to the most urgent post-appointment matters, become familiar with the affairs of the company and cause the Part 2M.3 reports to be prepared, audited, lodged and (for annual reports) distributed.

RG 174.19 The class order provides relief where the external administrator is appointed during the period that is shortly before or shortly after a reporting date for the company. It does not provide relief where the external administrator is appointed more than 3 months before the company’s reporting date for the next due annual or half-year report. If the external administrator is appointed more than 3 months before a reporting date, the deadlines under Part 2M.3 for lodging and (for annual reports) distributing the reports will already provide a period of approximately 6 months or more. The class order also does not provide relief in relation to an annual or half-year report that should have been lodged by the company before the external administrator was appointed.

RG 174.20 If a company that is relying on our class order relief becomes subject to a second external administration (either concurrent or immediately consecutive) covered by the class order deferral relief, the period of deferral is determined by the date of appointment of the first external administrator. While we acknowledge that each new external administration may create its own burdens, on balance, we

think that a subsequent appointment in itself does not warrant a longer deferral period under the class order.

RG 174.21 In the infrequent case where a voluntary administrator is appointed under s436B by a liquidator, the company technically may be concurrently under administration and in liquidation if the liquidation has not been formally terminated: see s437C(1), (2) and (4)(c). For the purposes of the class order, the company is taken to be solely under administration, and it no longer obtains the exemption granted for companies in liquidation.

RG 174.22 We have excluded from our class order relief companies that are subject to a DCA. DCAs are not an initial form of external administration and usually the deed administrator is the same person as the preceding voluntary administrator: see s444A(2). The initial burdens created by time, financial and human resources constraints are therefore less severe. However, a company subject to a DCA may apply for individual relief if it considers that, in its particular circumstances, compliance with the financial reporting obligations would impose unreasonable burdens: see RG 174.29–RG 174.37 and RG 174.43–RG 174.50.

Alternative distribution methods for annual report

RG 174.23 Our relief allows an externally administered company with more than 100 members to use alternative methods of distributing a deferred annual report to members. The company may advertise in a national or relevant daily newspaper that the annual report has been lodged with ASIC and is available to members free of charge upon written request or (where applicable) from the website of the company or the external administrator's firm. The advertisement must appear in a prominent place in the newspaper.

RG 174.24 The costs involved in sending information to members impose a burden on the company, and the greater the number of members, the greater the burden may be. Companies to which Part 2M.3 applies are permitted under s314(1)(b) to send a concise annual report to members, and they may ask members to make a request for the purpose of s316(1), which includes choosing not to receive any annual reports. Some companies now offer members the option of receiving all company information by email instead of by post.

RG 174.25 When a company is not externally administered, this cost burden is ultimately borne by the members. However, when a company is externally administered, the cost of sending the annual report may be borne by the creditors, even though that information is not sent to creditors. We think that, in the case of the externally

administered companies covered by our class order, the burdens imposed by a requirement to send the deferred annual report to each member are unreasonable.

Conditions of class order relief

Notifying ASIC

RG 174.26 A company that wants to rely on our class order relief must notify us that it is relying on the class order. This condition is intended to prevent the company being sent a penalty notice for failing to lodge Part 2M.3 reports on time or at all.

How to notify ASIC of reliance on class order

Companies should notify ASIC that they are relying on Class Order [CO 03/392]:

- as soon as practicable, and at the latest, before the next Part 2M.3 annual or half-year report must otherwise be lodged
- in writing, addressed to **The Manager, Corporate Finance** at the ASIC office in the State or Territory in which the company has its principal business office.

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

Notifying the market operator

RG 174.27 A listed company must notify the relevant market operator(s) that it is relying on our class order, at or before the time it notifies ASIC. Listing rules of a prescribed financial market may contemplate or require compliance with the financial reporting obligations. These listing rule obligations may not automatically cease upon the appointment of an external administrator, and may continue even though quotation of the company's securities has been suspended.

Note: See, for example, ASX Listing Rule 18.6.

Members' reasonable inquiries

RG 174.28 During the period of relief, the company must answer members' reasonable inquiries about the consequences of the external administration for them. Notice of the appointment of an external administrator must be lodged with us and advertised, usually in a

national or relevant daily newspaper: see, for example, s427, 450A(1) and 450B, and Rules of Court for provisional liquidators under the Federal Court and Supreme Courts of the States and Territories. As a result of these notices, members may contact the external administrator for information about the company. Generally, external administrators already act in a way that would enable the company to comply with our condition about answering members' inquiries. However, the condition clarifies that the information must be given to a member free of charge provided that the member's inquiries are reasonable.

Individual relief

RG 174.29 We will not grant relief from the financial reporting obligations merely because a company is being externally administered. When forming opinions or making recommendations about a company, external administrators and directors should make allowances for all the company's legal obligations including the obligations under Part 2M.3. Creditors should be made aware of the costs of meeting those obligations when considering resolutions about the company's future.

Relief from all the financial reporting obligations

RG 174.30 However, there are some situations where we are likely to be satisfied that compliance by an externally administered company with the financial reporting obligations would impose unreasonable burdens and that relief from all the financial reporting obligations is appropriate. These situations and the nature of relief we will generally provide are described in RG 174.31–RG 174.35.

Exemption

RG 174.31 We are generally likely to grant an exemption from all the financial reporting obligations (including any previously deferred financial reporting obligations) where:

- (a) the external administrator exercises all or most of the management functions and powers; and
- (b) the application for relief contains a declaration by the external administrator that, in their reasonable opinion, the members have no ongoing economic interest in the company; and

Note: For the definition of "ongoing economic interest", see "Key Terms".

- (c) if the external administrator is a deed administrator or a managing controller appointed to the whole or substantially the whole of the

company's property — we are satisfied that the company's business will be carried on only so far as is necessary to enable an orderly disposal of the whole or substantially the whole of the company's business and property.

The period of exemption will depend on the type of external administration: see RG 174.32–RG 174.33.

RG 174.32 If the company is under administration or in provisional liquidation, the exemption will generally be until the earlier of:

- (a) the end of the administration or provisional liquidation; and
- (b) the time when the administrator or provisional liquidator reasonably forms the opinion that the members have an ongoing economic interest in the company: see also RG 174.39.

RG 174.33 If the company is subject to a DCA or a managing controller is appointed, the exemption will generally be until the earlier of:

- (a) 2 years; and
- (b) the termination of the DCA or appointment of the managing controller.

Deferral

RG 174.34 We are generally likely to grant a deferral of all the financial reporting obligations (including any previously deferred financial reporting obligations) for up to 6 months where:

- (a) the external administrator exercises all or most of the management functions and powers but is unable to make the declaration in paragraph (b) of RG 174.31 because it is uncertain whether the members have an ongoing economic interest in the company; or
- (b) a company subject to a DCA does not meet all the requirements in RG 174.31, but we are satisfied that the company should have additional time to prepare, lodge and (for annual reports) distribute the Part 2M.3 reports that were deferred during the preceding voluntary administration (because of our class order relief and/or under individual relief), as well as the Part 2M.3 reports that are next due.

Note: Depending on the company's circumstances, we may also grant an exemption, for one or more financial reporting periods, from any of the obligations set out in RG 174.37.

RG 174.35 We may grant a deferral of all the financial reporting obligations for up to 3 months where:

- (a) a controller has been appointed to property of the company; and
- (b) the directors retain all or most of the management functions and powers; and
- (c) we are satisfied that the appointment of the controller has significantly disrupted the company's management and financial routine and created practical difficulties for the company in complying with the financial reporting obligations.

Relief in other situations

RG 174.36 In other situations, we will consider the key factors set out in RG 174.46 when deciding whether we are satisfied that complying with the financial reporting obligations would impose unreasonable burdens for an externally administered company. If we refuse to grant relief from all the financial reporting obligations, we may in appropriate cases provide relief from some of the financial reporting obligations.

RG 174.37 In particular, we may grant an exemption from any or all of the obligations to:

- (a) provide a directors' declaration under s295 or 303;
- (b) provide a directors' report under s298 or 306;
- (c) obtain an audit report or review under s301 or 302;
- (d) comply with s327(5) on filling a vacancy in the office of auditor, if the company is a public company;
- (e) prepare and lodge half-year reports under s302;
- (f) comply with a member's request under s316(1) for a full financial report, directors' report and auditor's report; and
- (g) send the annual report to members under s314(1): see RG 174.40.

Conditions of individual relief

Notifying market operator

RG 174.38 If the company is listed, we will generally impose conditions on individual relief that:

- (a) require the company to notify the relevant market operator(s) of our relief; and

- (b) prohibit the company from using a transaction specific prospectus under s713 until 12 months after the reporting date of the first Part 2M.3 reports that the company lodges after it ceases to rely on our relief.

Notifying ASIC of changed circumstances

RG 174.39 In some cases, we may grant individual relief from the financial reporting obligations on the basis that certain circumstances continue to exist. In these cases we may, as a safeguard, impose a condition that requires the external administrator on behalf of the company to notify ASIC immediately those circumstances change. For example, we may impose this condition if we grant an exemption until the external administrator reasonably forms the opinion that the members have an ongoing economic interest in the company: see RG 174.32.

How to notify ASIC of changed circumstances

Where this condition is imposed on individual relief, the external administrator should notify ASIC:

- immediately the specified circumstances change
- in writing, addressed to **The Manager, Corporate Finance** at the ASIC office in the State or Territory in which the company has its principal business office.

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

Alternative distribution methods for annual report

RG 174.40 If we grant an exemption from the obligation under s314(1) to send an annual report to members but we have not granted an exemption from the obligation to prepare and lodge an annual report, we may specify alternative methods for distributing the annual report to members, such as those that a company may use under our class order relief: see RG 174.23.

Other conditions

RG 174.41 We will generally not impose a condition requiring an externally administered company, the external administrator or the directors to send to members any document that the external administrator is required under Chapter 5 of the Act to send to creditors or lodge with ASIC.

Grounds for relief

RG 174.42 We expect that an application for financial reporting relief by an externally administered company will usually rely on the “unreasonable burdens” ground in s342(1)(c): see RG 174.43–RG 174.50. However we also briefly discuss, in the specific context of externally administered companies, the other grounds for relief under s342(1) — that complying with Part 2M.3 would:

- (a) make the financial or other reports misleading (s342(1)(a): see RG 174.51–RG 174.53); or
- (b) be inappropriate in the circumstances (s342(1)(b): see RG 174.54–RG 174.56).

“Unreasonable burdens” — s342(1)(c)

RG 174.43 We consider that complying with the financial reporting obligations would only impose “unreasonable burdens” if:

- (a) burdens would be associated with complying with the financial reporting obligations, or would result from having complied with those obligations; and
- (b) those burdens are disproportionate to the value of the resulting financial and other reports for the users of those reports.

RG 174.44 Cases that have considered the meaning of “unreasonable burdens” in s342(1) or its predecessors have not involved an externally administered company. However, we think the interpretation in *Incat Australia Pty Ltd v ASIC* (2000) 33 ACSR 462 can generally be applied to the context of externally administered companies.

RG 174.45 On appeal from the Commonwealth Administrative Appeals Tribunal (AAT), Heerey J in *Incat* agreed with the AAT that a burden need not be “overwhelming”, in the sense of “crushing”, in order for it to be unreasonable. Heerey J also approved the AAT’s statement that whether a burden may be fairly described as unreasonable is a question of fact requiring an evaluation of the evidence, having regard to the nature of the requirement to be performed, keeping in mind the policy objective of Part 2M.3 that companies of economic significance lodge accounts, and the extent of economic detriment (if any) likely to flow from compliance. The AAT in *Re SRKKK & anor and ASIC* (2002) 42 ACSR 551 followed the interpretation in *Incat*.

Key factors

RG 174.46 The “unreasonable burdens” ground requires that the burdens and benefits of compliance with Part 2M.3 be identified and weighed. When we assess “unreasonable burdens” in the context of an externally administered company, we will have regard to the following factors:

- (a) the expected costs of compliance with the financial reporting obligations and the extent to which those costs may affect the outcome of the external administration;
- (b) whether the costs of compliance will be borne by the members or the creditors of the company;
- (c) whether, as a result of the appointment of the external administrator, the management functions and powers are exercised by the external administrator or the directors;
- (d) the extent to which the appointment of the external administrator has disrupted the company’s routine for complying with the financial reporting obligations;
- (e) the expected benefits of having the company comply with the financial reporting obligations (see RG 174.48–RG 174.50); and
- (f) any other relevant factors including, but not limited to:
 - (i) the number of members and creditors;
 - (ii) the total period the company has been externally administered;
 - (iii) the extent to which the company is or will be continuing to carry on business; and
 - (iv) the timing and probability of the likely outcome of the external administration.

Burdens for creditors

RG 174.47 When a company is not externally administered, the members are “the company” and bear the costs of operating the company, including the costs of compliance with Part 2M.3. However, where a company is externally administered, the costs of operating the company may also be borne by the creditors. This is particularly so where the externally administered company’s financial position is such that there are no shareholders’ funds. In this case, the costs of operating the company are borne solely by the creditors and “the company” is (in effect) the creditors. The burdens that will be caused to creditors by compliance with Part 2M.3 are therefore a relevant

factor in determining the balance between the burdens and benefits of compliance for an externally administered company.

Benefits for users

RG 174.48 When we assess the expected benefits of having an externally administered company comply with the financial reporting obligations, we will consider the following factors:

- (a) who would be the relevant users of the Part 2M.3 reports that would result from compliance;
- (b) the ability of creditors and potential creditors to independently obtain financial information about the company from other sources (including the external administrator); and
- (c) the ability of any other relevant users to independently obtain financial information about the company from other sources (including the external administrator).

RG 174.49 We will presume that the members and creditors would be relevant users of an externally administered company's Part 2M.3 reports.

RG 174.50 External administrators (with one exception) are personally required under Chapter 5 to prepare for creditors, or to lodge with ASIC, financial and other information about the company. The exception is a deed administrator where the terms of the DCA exclude clause 10 of Schedule 8A. The content and frequency of the external administrator's information varies according to the type of external administration. Generally, information that is lodged with us is available to the public upon payment of the relevant fee.

"Misleading" — s342(1)(a)

RG 174.51 We consider that complying with the financial reporting obligations would only make the reports "misleading" if:

- (a) a user of the relevant report would form an incorrect conclusion about a feature of the company; or
- (b) a particular piece of information required by the Act would be distorted as a result of compliance.

RG 174.52 In general, it will be difficult for an externally administered company to satisfy us that a case for relief on this ground is made out. Before we will grant relief on this ground, we must be satisfied that the problem could not reasonably be remedied by

including appropriate additional information, explanations and notes in the reports.

RG 174.53 Where a company goes into external administration (other than liquidation) after the reporting date, we consider that a true and fair presentation of the company's financial information can be made in the financial report by:

- (a) reflecting any adjustments to the carrying values of assets and liabilities on the face of the company's Statement of Financial Position, in accordance with paragraph 4.2 of Accounting Standard AASB 1002 "Events Occurring After Reporting Date" and paragraph 6.1 of Accounting Standard AASB 1029 "Interim Financial Reporting"; or
- (b) including appropriate additional disclosures in the notes to the financial statements in accordance with paragraph 5.1(e) of AASB 1002 and paragraph 7.4(c) of AASB 1029.

"Inappropriate in the circumstances" — s342(1)(b)

RG 174.54 We consider that complying with the financial reporting obligations would only be "inappropriate in the circumstances" if:

- (a) there is an anomaly in the Act; or
- (b) compliance would give rise to consequences not intended by Parliament.

RG 174.55 In general, it will be difficult for an externally administered company to satisfy us that a case for relief on this ground is made out. It is not sufficient to assert that the reports would be irrelevant, or of no benefit to users of the reports. However, these factors may be relevant to the ground of "unreasonable burdens": see RG 174.43–RG 174.50.

RG 174.56 We do not take the view (other than for liquidation) that the provisions in Chapter 5 and the statutory obligations of an external administrator under Chapter 5 necessarily demonstrate an anomaly in the Act, or that compliance with Part 2M.3 by an externally administered company is inherently inappropriate. The obligations in Part 2M.3 and Chapter 5 must be read together.

Concurrent administrations

RG 174.57 A company may be under more than one form of external administration at the time when compliance with the financial reporting obligations or the AGM obligations is due, or during the

period when preparations for that compliance would normally be undertaken.

RG 174.58 Because the financial reporting obligations and AGM obligations are imposed on the company, it will be necessary in the case of concurrent appointments to identify the natural person or persons with the legal and practical capacity to:

- (a) cause the company to comply with those obligations;
- (b) apply to ASIC for relief from those obligations;
- (c) cause the company to comply with any conditions imposed on relief from those obligations.

RG 174.59 In certain situations, the directors of the company may retain sufficient legal and practical capacity to do these things. In other cases, one of the external administrators may clearly have the dominant capacity to do these things or cause these things to be done on the company's behalf.

RG 174.60 Where it is not clear which of several external administrators has the dominant legal and practical capacity to do one of these things on the company's behalf, the external administrators will need to act together for this purpose.

Breach of financial reporting obligations

RG 174.61 Contravention of provisions in Part 2M.3 is an offence. The maximum penalty is 5 or 10 penalty units per offence depending on the provision (currently \$110 per penalty unit: s4AA *Crimes Act 1914* (Cth)), or imprisonment for 3 months, or both: see s1311 and Schedule 3 to the Act. A company that is convicted may be fined up to 5 times the applicable pecuniary penalty: s1312.

Applying for relief

RG 174.62 An application for relief may be made:

- (a) under s340, if the application can be made strictly in accordance with s340(3). A voluntary administrator has express power under s437A(1)(d) to exercise all the functions and powers of the directors and therefore can make an application in their own name;
- (b) under s111AT, if the company is a disclosing entity and the application cannot be made strictly in accordance with s340(3); or
- (c) as a request for a no-action letter in any other case.

In each case, we will apply the policy in this guide.

Applications by listed companies

RG 174.63 An application by an externally administered listed company (whether or not quotation of the company's shares is suspended) must also:

- (a) name the financial market(s) on which the company is listed;
- (b) state whether quotation of the company's shares has been suspended and if so, provide particulars; and
- (c) state whether the company has applied or intends to apply for a waiver of any listing rules that are related to the company's obligations under the Act.

Note: For example, companies listed on ASX may need to seek a waiver of listing rules relating to giving financial reports to ASX.

This will enable us to liaise, where necessary, with the relevant market operator about the application.

How to apply for financial reporting relief

- Lodge the application in writing addressed to **The Manager, Corporate Finance** at the ASIC office in the State or Territory in which the company has its principal business office.
- If the application is made under s340 or s111AT, make sure it is accompanied by the prescribed fee (see Item 24(a) of Schedule 1 to the *Corporations (Fees) Regulations 2001*).
- Make sure the application complies with Regulatory Guide 51 *Applications for relief* (RG 51).
- If the company is a listed company, make sure the application includes the information in RG 174.63.
- Make sure the application is appropriately signed.

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

B AGM — Extension of time

Our policy

RG 174.64 We will not take enforcement action in respect of the failure of a public company in liquidation (including a company that is concurrently in liquidation and controllership) to hold an AGM on or after the date this guide was issued: see RG 174.70.

RG 174.65 We will extend, on a case-by-case basis, the time within which an externally administered public company is required to hold an AGM if:

- (a) we receive an application before the end of the period within which the meeting must otherwise be held (s250P(2)); and
- (b) we are satisfied that there is sufficient cause for an extension.

We may impose conditions on any extension of time: s250P(4).

Note: See RG 174.81 on how to apply for an extension of time.

RG 174.66 The table below summarises what extension may be available.

Nature of financial reporting relief	Extension of time for AGM	Conditions of extension
Company has relief from <i>all</i> financial reporting obligations	AGM may be held up to 3 months after financial reporting relief expires <i>OR</i> Individual no-action letter may be granted: see RG 174.71.	First annual report required after financial reporting relief expires must be distributed to members no later than 21 days before the AGM: see s315(1)(a). If the company is listed, it must notify the relevant market operator(s) of the extension. Other conditions will depend on each case and conditions of the financial reporting relief.
Company has relief from <i>some</i> financial reporting obligations	Depending on the circumstances (see RG 174.77): AGM may be held up to 3 months after financial reporting relief expires <i>OR</i>	As above or below, depending on the circumstances and particular extension granted.

Nature of financial reporting relief	Extension of time for AGM	Conditions of extension
	AGM may be held up to 3 months after the deadline for holding an AGM <i>OR</i> Individual no-action letter may be granted: see RG 174.71.	
Company has <i>no</i> financial reporting relief	AGM may be held up to 3 months after the deadline for holding an AGM.	Annual report must be distributed to members within 4 months after the end of the financial year: see s315(1)(b). If the company is listed, it must notify the relevant market operator(s) of the extension. Other conditions will depend on each case.

Past breaches of AGM obligations

RG 174.67 We will not take enforcement action for failure by a public company to hold an AGM where that failure first occurred while the company was externally administered and before the date when this guide was issued.

Underlying principles

RG 174.68 Our policy seeks to balance the regulatory purposes of an AGM and the burdens on the company if we do not grant an extension.

Explanation

RG 174.69 The Act does not set out grounds for relief from the AGM obligations. However, the relief ASIC may provide under s250P is limited because:

- (a) we do not have power to exempt a particular company or class of companies from the obligation to hold an AGM;
- (b) we do not have power to grant an extension of time to a class of companies; and

- (c) we cannot grant an extension of time to a particular company if an application is made outside the period specified in s250P(2).

RG 174.70 We have adopted a no-action policy for companies in liquidation (including companies that are concurrently in liquidation and controllership) because these companies have an unconditional exemption from the financial reporting obligations under our Class Order [CO 03/392]: see RG 174.6.

RG 174.71 We may be prepared to grant an individual no-action letter in respect of a failure to hold an AGM at any time during a particular external administration, where:

- (a) the external administrator exercises all or most of the management functions and powers; and
- (b) we are satisfied that the costs of arranging and holding an AGM at any time during the external administration would be borne solely by the creditors of the company.

We may grant a no-action letter even though we have not exempted the company from the obligations under Part 2M.3 to prepare, lodge and distribute an annual report.

Key factors

RG 174.72 In deciding whether to grant an extension of time to hold an AGM for an externally administered public company, and whether to impose conditions on any such extension, we will consider various factors including:

- (a) whether at the time the AGM is required to be held, the company will be covered by any class order or individual relief from the financial reporting obligations;
- (b) if the company will not be covered by existing financial reporting relief at the time the AGM is required to be held — whether a concurrent application for such relief is made;
- (c) the burdens if an extension is not granted;
- (d) the business that could be conducted at the AGM if an extension is not granted; and
- (e) whether the interests of members would be prejudiced if an extension is granted.

Note: We will also consider the key factors relating to “unreasonable burdens” in Section A as if they referred to the AGM obligations: see RG 174.46.

Members' interests

RG 174.73 An AGM provides an opportunity for members to meet and elect directors of the company, to receive an explanation of the company's operations and financial performance over the past year, and to ask questions and make comments about the company's management. It may also provide members with relevant information about the company's prospects. Where a company is under the control of the directors, the AGM provides an important safeguard for members.

Note: See *Exicom v Futuris Corporation* (1995) 61 FCR 337, 342. See also *Re Gem Exploration & Minerals NL* [1975] 2 NSWLR 584 and *Re Oilmin NL* (1981) 6 ACLR 219.

RG 174.74 However, where a company is no longer under the control of the directors because of the appointment of an external administrator who has all or most of the functions and powers of management of the company, the role of the AGM as a safeguard for members may be reduced, particularly where the members have no ongoing economic interest in the company.

Where a company has relief from all the financial reporting obligations

RG 174.75 We consider that it is appropriate to grant an extension of time to hold an AGM during a period for which we have granted a company relief from all the financial reporting obligations. This is because:

- (a) as a result of our relief, there will be no annual report that directors (or an external administrator) can lay before the meeting;
- (b) if there is still an auditor, they will not have audited any accounts;
- (c) in the types of external administration where we may grant relief from all the financial reporting obligations, the directors generally have little or no practical role in the management of the company and there may be little prospect of persons consenting to act as directors at this time; and
- (d) in the types of external administration where we may grant relief from all the financial reporting obligations, the members generally are not able to influence the performance of the company or direct the conduct or outcome of the external administration.

RG 174.76 If we grant an extension of time for holding the AGM, we will allow a sufficient period after expiry of the financial reporting relief for an annual report to be prepared and distributed to members in advance of the AGM.

Where a company has relief from some financial reporting obligations

RG 174.77 Where we have granted only limited financial reporting relief for a company, our approach to an extension of time to hold an AGM and the type of extension we may grant will depend on our assessment of the key factors set out in RG 174.72, in particular:

- (a) whether financial or other information will be distributed to members;
- (b) the extent to which the external administration affects the ability of the members to influence the management or performance of the company; and
- (c) whether the members or creditors would bear the costs of arranging and holding an AGM.

Where a company has no financial reporting relief

RG 174.78 If we have refused to grant financial reporting relief for an externally administered company, an annual report must be lodged and distributed in accordance with Part 2M.3. For companies that are not externally administered, generally it is not in the interests of members to delay an AGM where the financial reporting obligations must be complied with.

RG 174.79 However, for externally administered companies, even though we decline to grant relief from the financial reporting obligations, we may grant a short extension of time to hold the AGM where we are satisfied that:

- (a) the need for an extension of time is substantially due to the appointment of the external administrator; and
- (b) an extension of time will not unduly prejudice the members.

Breach of AGM obligations

RG 174.80 Contravention of s250N is an offence for which the maximum penalty is 10 penalty units (currently \$110 per penalty unit: s4AA *Crimes Act 1914* (Cth)), or imprisonment for 3 months, or both:

see s1311 and Schedule 3 to the Act. A company that is convicted may be fined up to 5 times the applicable pecuniary penalty: s1312.

Applying for an extension of time

RG 174.81

How to apply

- Lodge the application on Form 2501 with the prescribed fee (see Item 27 of Schedule 1 to the *Corporations (Fees) Regulations 2001*).
- If the externally administered company:
 - has class order relief under [CO 03/392] or individual financial reporting relief;
 - is making concurrent applications for financial reporting relief and an extension of time; or
 - is a listed company,address the application to **The Manager, Corporate Finance** and lodge it at the ASIC office in the State or Territory in which the company has its principal business office.
- For any other externally administered company, send the application to **ASIC Information Processing Centre**, PO Box 4000, Gippsland Mail Centre, VIC 3841.
- Make sure the application complies with Regulatory Guide 51 *Applications for relief* (RG 51).
- If the company is a listed company, make sure the application includes the information in RG 174.63.
- Make sure the application is appropriately signed.

Form 2501 is available from ASIC Business Centres and on the ASIC website at www.asic.gov.au.

If an individual no-action letter is sought, make sure the application complies with Regulatory Guide 108 *No action letters* (RG 108).

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

Key terms

RG 174.82 In this guide, a reference to:

“AASB 1022” (for example) means an accounting standard issued by the Australian Accounting Standards Board (in this example numbered 1022)

“Act” means the *Corporations Act 2001*

“administration” means where a voluntary administrator is appointed

“administrator” has the same meaning as in s9 of the Act

“AGM” means annual general meeting

“AGM obligations” means the obligations in s250N of the Act

“annual report” means the reports referred to in s314(1) of the Act

“ASX” means Australian Stock Exchange Ltd

“[CO 03/392]” (for example) means an ASIC class order (in this example numbered 03/392)

“controller” has the same meaning as in s9 of the Act

Note: It therefore includes “managing controller”, “receiver” and “receiver and manager”

“controllership” means where a controller is appointed to property of a company

“DCA” means deed of company arrangement

“deed administrator” means an administrator of a DCA

“external administration” means where an external administrator is appointed

“external administrator” means a voluntary administrator, deed administrator, controller, provisional liquidator or liquidator

“financial and other reports” has the same meaning as Part 2M.3 reports

“financial reporting obligations” has the same meaning as Part 2M.3 obligations

“half-year report” means the reports referred to in s302 of the Act

“listed” has the same meaning as in s9 of the Act

“listing rules” has the same meaning as in s9 of the Act

“liquidator” means a person appointed by the members or creditors of a company or by the Court to wind up the affairs and distribute the property of a company

“managing controller” has the same meaning as in s9 of the Act

“ongoing economic interest” means, in relation to the members of a company:

- (a) that the monetary value of, or rate of return for, each share in the company is, or is likely to be, more than nominal; or
- (b) that the company is likely to cease being externally administered and to carry on business under the control of the directors

“Part 2M.3 obligations” means the obligations in Part 2M.3 of the Act to prepare, obtain, distribute and lodge the financial and other reports

“Part 2M.3 reports” means the financial reports, directors’ reports, auditor’s reports and concise reports required under Part 2M.3

“provisional liquidator” means a person appointed by the Court under s472(2)

“RG 43” (for example) means a regulatory statement (in this example numbered 43)

“receiver” means a person appointed to receive property of a company who does not manage, and under the terms of the person’s appointment does not have power to manage, affairs of the company

“receiver and manager” has the same meaning as in s9 of the Act

“reg 5.3A.06” (for example) means a regulation of the *Corporations Regulations 2001* (in this example numbered 5.3A.06)

“relevant market operator” has the same meaning as in s9 of the Act

“reporting date” means the end of the reporting period to which the financial and other reports relate

“s250N” (for example) means a section of the Act (in this example numbered 250N)

“Schedule 8A” (for example) means a schedule to the *Corporations Regulations 2001* (in this case numbered 8A)

“voluntary administrator” means an administrator of a company but not of a DCA.

Related information

RG 174.83

Headnotes

AGMs, annual general meetings, administration, administrator, corporations, companies, controllers, deed administrator, deed of company arrangement, extension of time to hold an AGM, external administration, externally administered companies, financial reporting, financial reporting relief, insolvency, liquidation, managing controllers, provisional liquidation, receivers, receivers and managers, voluntary administrator

Class orders

[CO 02/968], [CO 03/392]

Regulatory guides

RG 43 *Accounts and audit relief*

RG 44 *Annual general meeting—extension of time*

RG 51 *Applications for relief*

RG 95 *Disclosing entity provisions relief*

RG 108 *No action letters*

Legislation

Division 8 of Part 2G.2, Part 2M.3, Chapter 5, s250N, 250P, s340–342, s1311, s1312, Schedule 3 to the Act, Schedule 8A to the Corporations Regulations, Schedule 1 to the Corporations (Fees) Regulations 2001, s4AA Crimes Act 1914 (Cth)

Cases

Incat Australia Pty Ltd v ASIC (2000) 33 ACSR 462

Re SRKKK & anor and ASIC (2002) 42 ACSR 551

Exicom v Futuris Corporation (1995) 61 FCR 337

Re Gem Exploration & Minerals NL [1975] 2 NSWLR 584

Re Oilmin NL (1981) 6 ACLR 219

Consultation paper

CP 35 *Financial reporting and AGM obligations for companies in external administration under Part 5.3A* (September 2002)

Media releases

[MR 02/321] (5 September 2002)