



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 44

Annual general meeting— extension of time

Chapter 2G — Meetings

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From 5 July 2007, this document may be referred to as Regulatory Guide 44 (RG 44) or Policy Statement 44 (PS 44). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 44.1) or their policy statement number (e.g. PS 44.1).

Editor's note: This guide replaces Superseded Policy Statement 13 [SPS 13] issued on 9 December 1991.

Headnotes

Annual general meetings; public companies; s250N statutory requirements; application for extension of time under s250P; lodgment of applications; administrative policy; s323D; changes in financial year; companies in receivership; applications; review of ASIC's decision.

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Purpose

RG 44.1 This guide sets out the procedural requirements to be followed by a public company applying for an extension of time to hold its annual general meeting (AGM) and the criteria ASIC uses to determine the application. It replaces Superseded Policy Statement 13 [SPS 13].

RG 44.2 This statement does not comprehensively cover a public company's statutory obligations in relation to AGMs. These are contained in Div 8 of Pt 2G.2 of the Corporations Law (Law).

Statutory requirements

RG 44.3 Every public company that has more than one member must hold an AGM:

- (a) at least once in each calendar year; and
- (b) within five months after the end of its financial year (s250N(2) and s250N(4)).

RG 44.4 The penalty for failing to hold an AGM on time is \$1000 or imprisonment for three months or both.

RG 44.5 Section 250N(1) sets out ~~the~~ certain AGM requirements for newly-registered companies but these requirements are redundant because such companies are also subject to the requirements of s250N(2) (see Superseded Policy Statement 68 *New financial reporting and procedural requirements* at [SPS 68.128]–[SPS 68.130]. *The application of s250N(2)* in certain circumstances where a public company changes its balance date is discussed at [SPS 68.123]–[SPS 68.127].

[*Historical note:* RG 44.5 was amended 2/6/1999 by replacing the word “the” before the word “AGM” with the word “certain” and inserting all the words after the phrase “newly registered companies”.]

Application for extension of time

RG 44.6 A public company may apply to ASIC to extend the date by which its AGM must be held. ASIC Form 2501 covers applications for an extension to hold an AGM at a later date and is available from law stationers or ASIC Business Centres. Applicants should follow the directions specified in that form. In particular, the form should:

- (a) be signed by a director or a secretary; and

- (b) provide full details of the reasons for seeking an extension of time.

RG 44.7 An application made under s250P to extend the date of the AGM must be made before the end of the period within which the meeting would otherwise be required to be held.

Lodgment of applications

RG 44.8 Under s250P(2), if a company applies before the end of the period within which the company would otherwise be required to hold an AGM, ASIC may extend the period. Companies are advised to lodge applications well in advance of the due date for holding the AGM. Sufficient time should be allowed to enable ASIC to consider the application and to enable the public company to hold the AGM by the ordinary due date if the application is refused. Applicants should not assume that the submission of an application will automatically lead to the granting of an extension.

RG 44.9 The question has arisen as to whether a company which has been granted an extension of time and which seeks a further extension needs to lodge a subsequent application before the expiration of the original due date or before the extended date. Subsequent applications need not be made by the unextended date but must be made prior to the expiration of any extended date.

RG 44.10 Applications for extension of time may be lodged at any ASIC office. However, applications relating to listed public companies will be dealt with more quickly if they are lodged at the Regional Office in the state in which the company has its principal place of business (or the Regional Office the company usually deals with). Applications relating to unlisted public companies should be sent to ASIC's Information Processing Centre, Customer Service Branch, Gippsland Mail Centre, Morwell, Victoria 3841. If a number of companies in a group all require extensions of time and the group contains a mix of listed and unlisted public companies, all applications should be lodged at one Regional Office.

RG 44.11 An application (Form 2501) should be accompanied by the prescribed fee (see Item 27 in the Schedule to the Corporations (Fees) Regulations for the appropriate fee). ASIC may refuse to deal with the application until the fee is paid.

RG 44.12 Applications which have not been:

- (a) made by the company;

(b) signed by a director or secretary; and

(c) lodged in time,

will be rejected.

Applications must be received by ASIC before the date on which the AGM is due to be held: see RG 44.8 and RG 44.9.

Administrative policy

General

RG 44.13 ASIC can deal with an application as it sees fit and will consider each on its merits within the guidelines specified in RG 44.17–RG 44.25.

RG 44.14 ASIC is guided by the judgment of Bowen CJ in *Re Gem Explorations and Minerals Ltd* [1975] 2 NSWLR 584. In refusing to grant an extension of time, his Honour held that the obligation to hold an AGM formed “an important safeguard for shareholders, investors and creditors of companies” which “should be relaxed only for good cause shown”.

RG 44.15 This decision was reached after his Honour considered and rejected the following arguments in support of the application:

- (a) the company’s records were up to date;
- (b) the company had engaged a reputable firm of chartered accountants to act as its auditors;
- (c) the relationship between the company and other companies in the group was complex because of cross-shareholdings and intercompany debts;
- (d) the company (an exploration company) faced valuation problems each year; and
- (e) the company’s shareholders would not be prejudiced by a two-months delay in the holding of the AGM.

RG 44.16 In *Re Oilmin NL* (1982) 1 ACLC 279, Kelly J agreed to a short extension of time because his Honour believed it would be in the interests of shareholders to do so. The incumbent directors had been accused of inefficient management by a substantial shareholder. Kelly J agreed that on the one hand the directors needed time to answer this allegation and on the other, shareholders needed time to

consider whether they should vote for a person nominated as a director by the dissident shareholder.

RG 44.17 An AGM is the forum at which a company's members meet with those entrusted with the company's management to review the company's operations for the past year. Typically, they consider the company's prospects, elect directors, declare dividends (if any), appoint auditors if necessary and consider any other business. An AGM is therefore an important meeting for the members. ASIC will usually be inclined to grant an extension of time only if:

- (a) the inability of a company to hold its AGM on time is due to factors beyond its control, eg temporary or permanent loss of key personnel including the external auditor (although even in such a case the likelihood of an extension being granted will decrease as the extent of external interest in the company increases); or
- (b) ASIC is persuaded that it is in the interests of the shareholders to do so (as per the *Oilmin* judgment referred to above).

Change in a financial year

RG 44.18 A public company's first financial year starts on the day when it is registered or incorporated, and may last for any period of up to 18 months as determined by its directors (s323D(1)). Each of its subsequent financial years must:

- (a) start at the end of a previous financial year; and
- (b) be 12 months long (s323D(2)).

[*Historical note:* RG 44.18 amended 7/7/1999 by replacing in the first sentence, the words "a period of between 12 and 18 months" with the words "any period of up to 18 months".]

RG 44.19 There are a few exceptions to the general rule that a public company's financial year must be 12 months long. One exception is that the directors of the company may determine that the financial year is to be shorter or longer than 12 months by a period of no more than seven days (s323D(2)).

RG 44.20 A public company might also seek to apply to ASIC for relief under s340 from the requirements of s323D(2). In accordance with s342, the applicant would generally have to demonstrate to the satisfaction of ASIC that complying with the requirement for the company's financial year to be a period of 12 months would impose unreasonable burdens. Applications should comply with the requirements of the Law and applicants should also refer to

Superseded Policy Statement 43 *Financial reports and audit relief* [SPS 43] and to Regulatory Guide 51 *Applications for relief* (RG 51).

RG 44.21 A third exception is provided by s323D(3) which may have the effect of compelling a change in the financial year of a public company. Section 323D(3) requires a company, registered scheme or disclosing entity that has to prepare consolidated financial statements to do whatever is necessary to ensure that the financial years of its consolidated entities are synchronised with its own financial years. To facilitate the synchronisation, the financial year of a controlled entity may be extended or shortened. An extended financial year cannot be longer than 18 months (s323D(4)).

RG 44.22 A fourth exception results from ASIC Class Order [CO 98/96] which may allow a foreign controlled public company to have a financial year of up to 18 months in order to synchronise its financial year with that of its foreign parent (see Regulatory Guide 58 *Reporting requirements — registered foreign companies and Australian companies with foreign company shareholders* (RG 58)).

RG 44.23 It may be that the effect of:

- (a) a determination of the directors, as referred to in RG 44.19;
- (b) a successful application for ASIC relief, as referred to in RG 44.20;
- (c) a synchronisation which is required by s323D(3), as referred to in RG 44.21; or
- (d) application of Class Order [CO 98/96], as referred to in RG 44.22,

will be such that a public company is not able to hold an AGM in a particular calendar year. Where that occurs ASIC will generally grant an application under s250P to allow the AGM to be held in the following calendar year.

Companies in receivership

RG 44.24 If a company is in receivership and the receiver has control over the management of all the day-to-day operations of the company, ASIC will be inclined to grant an extension of up to six months to hold the AGM. This relief will be conditional on the directors ensuring that a copy of the *Report as to affairs* (Form 507) and *Accounts by a scheme administrator/controller/administrator of Deed of Company Arrangement* (Form 508) are sent to every member in lieu of financial statements (made out in accordance with Chapter 2M of the Law) at about the same time as these documents are lodged with ASIC. Further

extensions may be granted, subject to a full reassessment of the circumstances.

RG 44.25 In cases where the directors retain some control over the management of the company, an extension of up to two months may be given if the applicants demonstrate that the receivership has resulted in the delay in holding the AGM. ASIC believes that an extension beyond this would generally deny the members of the company access to information at a critical time and be contrary to their interests.

Applications

RG 44.26 Applications must address all factors in support of the grant of relief as outlined in this guide. (Applicants should also refer to RG 51.) Applications which do not sufficiently address these matters will not be considered by ASIC until all relevant information is provided. See RG 44.10 for where to send applications.

Review of ASIC's decision

RG 44.27 A company may apply to the Administrative Appeals Tribunal under s1317B(1) of the Law for a review of an ASIC decision not to allow an extension of time. If ASIC grants an extension, other persons affected by the decision may apply for a review of the decision.