



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 106

Controller duties and bank accounts

Chapter 5 — External administration (Section 421)

Issued 6/5/1996

From 5 July 2007, this document may be referred to as Regulatory Guide 106 (RG 106) or Policy Statement 106 (PS 106). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 106.1) or their policy statement number (e.g. PS 106.1).

Headnotes

Controllers and bank accounts; s421; 421(1)(a); money belonging to the debtor company; receivers; receivers and managers of property; charge; power to exempt from or modify s421(1)(a); enforcement of national scheme laws; failure to open and maintain a bank account; money to be accounted for under Pt 5.2 of the Law.

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Purpose

RG 106.1 This guide sets out the ASC's views on s421. This section requires controllers of property to open and maintain a bank account for depositing money that belongs to a debtor company. Money from the sale of encumbered assets in the possession of a controller must be deposited in such an account.

RG 106.2 In this guide references to statutory provisions are to those in the Corporations Law.

Background

RG 106.3 A controller of property of a corporation is defined as:

- (a) a receiver, or receiver and manager of that property; or
- (b) anyone else who (whether or not as agent for the corporation) is in possession of, or has control of, that property for the purpose of enforcing a charge (see s9).

RG 106.4 The wide definition of controller includes those who enforce mortgages or charges registered at land titles offices, the ASC and other government bodies, as well as those who enforce unregistered charges. The mortgage or charge may relate to only a small part of the assets of the company.

RG 106.5 On one interpretation of s421 the obligations imposed on controllers to open and maintain a bank account arises on the actual appointment of the controller (s421(1)(a)). This is irrespective of whether there is, or will be, any money belonging to the company which must be deposited into that bank account.

RG 106.6 It has been suggested to the ASC that requiring controllers to open and maintain a bank account in such circumstances imposes unnecessarily onerous and costly requirements on them without any corresponding practical benefits. The issues surrounding the obligations imposed by s421 were recently discussed in two separate papers released by the Attorney-General's Department. The discussion papers considered, among other matters, amending this section so that it would not be necessary to open and maintain a bank account when there is no money belonging to the debtor company.

ASC's enforcement of s421

RG 106.7 The ASC has no specific power to modify or exempt persons from the duties imposed on controllers by s421. The only discretionary power the ASC has in relation to this section, is how it exercises its enforcement powers under the national scheme laws to ensure compliance with the section.

RG 106.8 The ASC considers that no policy objectives are advanced by requiring a bank account to be opened when there is no money belonging to the debtor company to be deposited under s421.

RG 106.9 Therefore, until the Parliament considers this section, the ASC will not take any enforcement action against a controller who fails to open and maintain a bank account. It will not take action if no money of the debtor company should be, or is likely to be, accounted for under s421.

RG 106.10 However, if money of the debtor company is required to be accounted for under s421, it is clear that the intention of the Law is that the controller should keep a full record and account of all such moneys. A controller of a debtor company should therefore carefully examine whether at any time during which they act in this capacity they are in control of "money of the corporation" (see s421(1)(b)). This is because in such circumstances they are required to:

- (a) pay that money into a bank account maintained by the controller, within three business days after coming in control of money of the debtor company;
- (b) ensure that this bank account does not contain any money other than money of the debtor company under the control of the controller; and
- (c) keep such financial records as correctly record and explain all transactions that the controller enters into as controller (s421(1)).

RG 106.11 It has been suggested to the ASC that money held by a controller will only be money of the corporation if it exceeds the amount secured by the charge being enforced by the controller. The ASC does not endorse this as a general view. Whether this is true in any particular case depends on the relevant security documentation evidencing the charge and the transactions entered into under such documentation.

RG 106.12 This should not be seen as pre-empting the outcome of the review being undertaken by the government. The ASC will review this guide in light of any final recommendations, if any, made by the proposed legislative review of s421.