



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 64

Failure to lodge documents

Chapter 1 — Introductory and general topics

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Previous version: *Superseded Policy Statement 64 [SPS 64]*

From 5 July 2007, this document may be referred to as Regulatory Guide 64 (RG 64) or Policy Statement 64 (PS 64). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 64.1) or their policy statement number (e.g. PS 64.1).

What this guide is about

RG 64.1 This guide explains:

A what we will do if a company fails to lodge documents

see RG 64.2–RG 64.13

B when we will withdraw proceedings against a company secretary

see RG 64.14–RG 64.16

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A What we will do if a company fails to lodge documents

Our policy

Annual returns and changes to officeholders

RG 64.2 The Law imposes on company secretaries particular responsibility for the lodgment of:

- (a) annual returns (Form 316);
- (b) notification of change to officeholders (Form 304); and
- (c) the company's registered office (Form 203).

Summary proceedings

RG 64.3 When a company fails to lodge these documents, we may issue a penalty notice to the company secretary. Where the document is not lodged after a penalty notice has been issued, we will prosecute the secretary. If a company has more than one secretary, a penalty notice will be issued to each secretary.

RG 64.4 If, in contravention of the Law, no secretary has been appointed, or the address given for the secretary is patently inaccurate, we may bring a proceeding under s232 (breach of director's duties), s240 (failure to appoint a secretary) or s1274 (court orders to lodge documents) against each director. We will issue a penalty notice to a director in these circumstances if we can.

Deregistration

RG 64.5 If an annual return has not been lodged for four months after the issue of the penalty notice, we will take this into account when deciding whether a company is carrying on business. Once the requirements of s601AB(1) are satisfied (see RG 64.13), we will deregister the company.

Reinstatement

RG 64.6 Our policy on reinstatement of a company under s601AH and previous corresponding provisions is explained in Policy Statement 83 RG 83 *Reinstatement of companies*.

Six-monthly returns from external administrator

RG 64.7 When an administrator fails to lodge a six-monthly return, we will send a warning notice to the administrator. We may refer continuing defaulters to the Companies Auditors and Liquidators Disciplinary Board.

Foreign company accounts

RG 64.8 When a foreign company fails to lodge financial statements, we will issue a warning notice to the company's registered office address in Australia. If, after one month, the financial statements have not been lodged, we will send a further notice to the company's local agent and will initiate strike-off action. The registration of the foreign company will be cancelled after a further three months if the financial statements have not been lodged. We take continued failure to lodge to indicate that the company is not operating in Australia.

Further action

RG 64.9 We may apply to the court under s1274 for an order directing a company or its officers to lodge outstanding documents.

Underlying principles

RG 64.10 This policy encourages the lodgment of certain company documents required by the Law so that we can meet the needs of the community for information about companies and ensure the accuracy of the data supplied.

Explanations

RG 64.11 When companies fail to lodge documents, we will pursue those companies which, on the face of information known to us, are still active and therefore can reasonably be expected to comply. We will also pursue officeholders in those companies. Where a company appears not to be operating and compliance is therefore unlikely, we will proceed to cancel registration of the company.

RG 64.12 In considering our response to a company's failure to lodge documents, we will take into account individual circumstances and the type of document.

Deregistration

RG 64.13 Changes to the Law under the Corporate Law Reform Act 1998 allow us to initiate deregistration procedures under s601AB(1) based on three criteria:

- (a) the company's annual return is at least six months late;
- (b) the company has not lodged any other document under the Law in the last 18 months; and
- (c) ASIC has no reason to believe that the company is carrying on business.

B When we will withdraw proceedings against a company secretary

Our policy

Annual returns

RG 64.14 We may withdraw proceedings against a company secretary for a breach of s345 (annual returns) if compassionate grounds or personal hardship, not being solely based on financial considerations, are demonstrated. In such cases, if a company is insolvent, withdrawal of proceedings and penalty notices will be conditional upon the company taking all necessary steps to seek the cancellation of its registration as a company.

RG 64.15 We will also consider applications for the withdrawal of proceedings against a company secretary for a breach of s345 if all of the following conditions have been satisfied no later than seven working days before the hearing of the proceedings:

- (a) the annual return to which the proceeding relates has been lodged and all lodging and late fees arising from the late lodgment of the annual return have been paid in full;
- (b) the \$125 penalty payable under the penalty notice has been paid in full; and
- (c) the amount of any disbursements and legal costs incurred by us in the preparation, issuing and service of the proceedings are paid in full.

RG 64.16 We will not entertain an application for the withdrawal of a proceeding against a company secretary for a breach of s345 of the Law from a person who has previously successfully sought the withdrawal of such a proceeding in respect of an outstanding annual return for a previous year or who has a prior conviction for this offence.

How to apply for withdrawal of proceedings

Applications for withdrawal of court proceedings must be:

- in writing
- received NO LATER THAN 7 working days before the court hearing date
- addressed to the Prosecutions Clerk at the ASIC Business Centre listed in the information sheet attached to the court summons *or*

Prosecutions Clerk
Information Processing Centre
Australian Securities and Investments Commission
PO Box 4000
Gippsland Mail Centre VIC 3841

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

Related information

RG 64.17

Regulatory guides

RG 83 *Reinstatement of companies*

Legislation

s142, 145, 232, 240, 242, 319, 345, 601AB(1) , 601AH, 1274, Form 203, Form 304, Form 316

Information sheets

Checklist for registered companies and their officers
Commonly lodged forms

Information releases

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