



**ASIC**

Australian Securities & Investments Commission

CONSULTATION PAPER 223

# Relief for externally administered companies and registered schemes being wound up—RG 174 update

August 2014

## About this paper

This consultation paper sets out ASIC's proposals for updating our guidance in Regulatory Guide 174 *Externally administered companies: Financial reporting obligations and AGMs* (RG 174) and revising our class order relief currently in Class Order [CO 03/392] *Externally administered companies: Financial reporting relief*.

This paper attaches a draft updated version of RG 174, which describes when we will give financial reporting relief to externally administered companies and registered managed investment schemes being wound up, and when we will give AGM relief to externally administered public companies. We are seeking feedback on our proposed guidance.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the *Corporations Act 2001* (Corporations Act))
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This paper was issued on 25 August 2014 and is based on the Corporations Act as at the date of issue.

### Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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## The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other matters you consider important.

Your comments will help us develop our policy on the financial reporting obligations that apply to externally administered companies and registered managed investment schemes (registered schemes) that are being wound up, and the annual general meeting (AGM) obligations that apply to externally administered public companies. In particular, any information about compliance costs, impacts on competition and other impacts, and costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section D, 'Regulatory and financial impact'.

### Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 20 October 2014 to:

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### What will happen next?

<b>Stage 1</b>	25 August 2014	Release of ASIC consultation paper and draft updated RG 174
<b>Stage 2</b>	20 October 2014	Comments due on the consultation paper
<b>Stage 3</b>	February 2015	Updated regulatory guide and class order released

## A Background to the proposals

### Key points

Regulatory Guide 174 *Externally administered companies: Financial reporting and AGMs* (RG 174) gives guidance on our relief for externally administered companies from the obligations in the *Corporations Act 2001* (Corporations Act) relating to:

- financial reporting; and
- for public companies—the requirement to hold an annual general meeting (AGM).

We are consulting on whether we should change our approach to this relief.

We propose to retain many of the current regulatory settings in RG 174. However, we have identified some additional areas about which we might usefully provide guidance, and where improvements could be made in the administration of our policy.

To address these matters, we are considering several different options. Under our preferred option (Option 2), we propose to make certain revisions to our guidance and to the relief currently provided in Class Order [CO 03/392] *Externally administered companies: Financial reporting relief*. We are consulting on the various options, and ask for your feedback on our approach and on the draft updated RG 174, which is attached to this paper.

Note: See the attached draft updated RG 174 for a list of the ‘Key terms’ that are also relevant to this consultation paper.

## Background

- 1 Regulatory Guide 174 *Externally administered companies: Financial reporting and AGMs* (RG 174) sets out our guidance on how we exercise our discretionary powers under the *Corporations Act 2001* (Corporations Act) to:
  - (a) give class order and individual relief to externally administered companies from some or all of the financial reporting obligations; and
  - (b) extend the time in which an externally administered public company must hold an AGM.
- 2 Since RG 174 was published in June 2003, we have provided financial reporting relief to many externally administered companies and registered managed investment schemes (registered schemes) that are being wound up, as well as relief from the AGM obligations to externally administered public companies.
- 3 Since June 2003, there have been a number of legislative amendments to the Corporations Act, including as a result of the *Corporations Amendment (Insolvency) Act 2007*. These amendments include giving ASIC the power to make an order exempting a specified public company or specified class of

public companies from the obligation to hold an AGM, where these companies are being wound up, are under voluntary administration or are subject to a deed of company arrangement (DOCA).

- 4 We are consulting on whether we should update and modify our guidance and relief in light of our experience in administering the current policy and the legislative changes that have occurred.

## Our current relief

- 5 Our current relief is provided in Class Order [CO 03/392] *Externally administered companies: Financial reporting relief*, or by individual relief. Table 1 provides a summary of our current relief and our proposed changes.

- 6 We provide two broad types of relief:

- (a) exemptions—where financial reporting obligations are cancelled; and
- (b) deferrals—where financial reporting obligations are deferred and so must be complied with at a later date.

- 7 [CO 03/392] provides an exemption from all financial reporting obligations to companies that have a liquidator appointed. This relief is based on the view that complying with the financial reporting obligations in these circumstances would make the financial or other reports misleading, would be inappropriate in the circumstances, and would impose an unreasonable burden: s342(1).

- 8 [CO 03/392] also provides more limited conditional deferral relief to companies under voluntary administration, companies where a managing controller has been appointed, or companies in provisional liquidation. This conditional relief extends the time for reporting by six months from the date that the first external administrator is appointed. The basis for this relief is that compliance with the financial reporting obligations during the period following the appointment of a voluntary administrator, managing controller or provisional liquidator would impose an unreasonable burden: s342(1)(c).

- 9 Under our current policy, in addition to our class order relief, we may grant individual relief to either exempt an externally administered company from some or all of the financial reporting obligations, or defer some or all of the financial reporting obligations, subject to certain conditions. The existing RG 174 also describes our no-action position in relation to the financial reporting obligations and the relief we provide in relation to AGMs.

- 10 We do not give relief from the obligation to keep financial records: s286. An externally administered company, registered scheme or disclosing entity must always keep written financial records that:

- (a) correctly record and explain its transactions, financial position and performance; and
- (b) would enable true and fair financial statements to be prepared and audited.

## Review of RG 174 and [CO 03/392]

- 11 We have recently undertaken a project to review RG 174 and [CO 03/392] and have identified some additional areas about which we might usefully provide guidance, and where improvements could be made in the administration of our policy.
- 12 We have identified that our policy does not cover a range of topics that we could give guidance on. These include:
- (a) companies that are Australian financial services (AFS) licensees;
  - (b) registered schemes that are being wound up;
  - (c) ASIC's power to provide AGM relief to public companies; and
  - (d) the outstanding financial reporting obligations for companies that have a liquidator appointed.
- 13 We have also identified some areas where improvements could be made in the administration of our policy. For example, our review identified instances of:
- (a) non-compliance with the continuing obligations to prepare and lodge outstanding financial reports (either before or after the commencement of the external administration) for which no relief has been given;
  - (b) externally administered companies being ineligible to rely on [CO 03/392], despite intending to, because they have failed to give notice to ASIC and/or the relevant market operator;
  - (c) applications for individual exemptions incorrectly applying the concept of 'ongoing economic interest'; and
  - (d) externally administered companies contravening the Corporations Act and then applying retrospectively to ASIC for individual relief.
- 14 We also note that [CO 03/392] will 'sunset'—that is, expire—unless it is remade before 1 April 2017. ASIC is therefore required to reissue our class order relief for it to continue to apply.
- 15 We have considered these matters in formulating our proposals for a new class order—Class Order [CO 14/xxx] *Externally administered companies and registered schemes being wound up: Relief from financial reporting and AGM obligations*—to replace [CO 03/392], and our proposed updated guidance: see the draft updated RG 174 attached to this paper.



## Options considered in this consultation paper

- 16 To address the matters that we have identified in our review process, we are considering the following options:
- (a) *Option 1: Not recommended*—Maintain our existing approach;
  - (b) *Option 2: Recommended*—Change our existing approach:
    - (i) to expand the scope of our class order relief:
      - (A) to provide a class order exemption from the financial reporting obligations to certain ‘insolvent’ registered schemes that are being wound up;
      - (B) to provide a class order exemption from the obligation to hold an AGM to public companies that have a liquidator appointed;
      - (C) to clarify that our class order exemption for companies that have a liquidator appointed applies to providing outstanding financial reports as well as current obligations; and
      - (D) to provide a class order extension of time for the reporting obligations of AFS licensees in Div 6 of Pt 7.8, subject to conditions;
    - (ii) to amend the current provisions of our class order:
      - (A) to remove the ASIC notification condition for extensions of time under our class order financial reporting relief; and
      - (B) to exclude AFS licensees from relying on our class order exemption for companies that have a liquidator appointed;
    - (iii) to replace individual exemptions with individual deferrals where it is not clear whether the company will continue in business;
    - (iv) to provide guidance about a number of other potential relief applications, including relief for previously deferred financial reporting obligations and, for registered schemes, compliance plan audit relief; and
    - (v) to issue an updated regulatory guide and new class order to explain and give effect to the above changes;
  - (c) *Option 3: Not recommended*—Tighten our approach so that externally administered companies and registered schemes being wound up comply with their financial reporting obligations when they fall due. For example, ASIC’s approach could require externally administered companies to lodge financial reports covering the financial year in which they went into external administration to provide greater transparency to the market, and then consider providing relief for any subsequent financial years in which the company is still under external administration; and
  - (d) *Option 4: Not recommended*—Change our approach so that externally administered companies and registered schemes being wound up have more extensive class order or individual relief.

## Proposal

**A1** We propose to consult on our approach to relief from the financial reporting and AGM obligations that apply to externally administered companies and registered schemes that are being wound up, and our proposed updates to RG 174.

We are considering the four options set out in paragraph 16.

We recommend Option 2, and are therefore consulting in detail on this option.

### *Your feedback*

**A1Q1** Which of these four options do you support and why?

- (a) If you support Option 3, please explain which areas of our policy, in particular, should be tightened.
- (b) If you support Option 4, please describe the additional relief you think we should consider providing and why.

**A1Q2** We want to understand the burdens faced by externally administered companies and registered schemes being wound up, including the costs that the company, scheme or others may bear in complying with the financial reporting and/or AGM obligations, and the costs associated with seeking relief from these obligations. We also want to understand the benefits of complying with the financial reporting and/or AGM obligations. How do you consider that these burdens and benefits may be affected by adopting Options 1, 2, 3 or 4? Please be as specific as possible, and include any estimates about the costs and resources required (e.g. time, personnel, external resources and expertise).

## Rationale for not recommending Options 1, 3 and 4

- 17 Option 1 is not recommended because:
- (a) it does not address the legislative changes that have been made;
  - (b) it would mean that our policy is not extended to cover registered schemes that are being wound up; and
  - (c) it does not address the areas that we have identified where improvements could be made in the administration of our policy.
- 18 Option 3 is not recommended because:
- (a) we consider that it would impose a greater burden on externally administered companies and registered schemes that are being wound up, where the company or scheme may have scarce resources, and we therefore think it likely that these costs would be borne by creditors; or
  - (b) the economic interests of members and creditors may suffer because of the company's or scheme's available funds or because the costs of compliance for members and creditors are disproportionate to the benefits of compliance.

- 19 Option 4 is not recommended because there are certain fundamental investor and creditor protection measures that need to be retained because the outcomes of an external administration or winding-up of a registered scheme may be uncertain. These measures may be lost or compromised if ASIC were to broaden the scope of its relief.

## Rationale for recommending Option 2

- 20 We consider that Option 2 provides an appropriate balance—within the limits of our discretions—between the interests of members and creditors, and the statutory objectives of the financial reporting and external administration provisions.
- 21 In general, we consider that the financial reporting obligations are likely to impose an unreasonable burden on ‘insolvent’ registered schemes that are being wound up and externally administered companies that are insolvent and will cease carrying on a business and ultimately be deregistered. We think that a deferral of financial reporting obligations provides an appropriate balance in circumstances where an externally administered company or registered scheme being wound up may later carry on business as a going concern. We describe the basis for each of the proposals under Option 2 in Sections B and C of this paper.
- 22 We have prepared and attached to this paper a draft updated version of our regulatory guide, RG 174. This is intended to facilitate comments on the appropriateness of our approach, as part of the consultation process, and to enable us to review whether to change that approach or specific parts of that approach.
- 23 Table 1 (next page) contains a summary of our relief currently available and the proposed changes under Option 2.

## Other current and emerging issues

- 24 As part of our process of updating our guidance and relief, we welcome your views on other significant issues that you think we should consider.

### Issue

- A2** We want to hear your views on other issues in relation to the financial reporting obligations of externally administered companies and registered schemes that are being wound up.

#### *Your feedback*

- A2Q1 Are there any other policy considerations that may be appropriate for us to address in our regulatory guide? Please be specific.

**Table 1: Our current relief and the proposed changes**

Relief currently available	Type of external administration	Exemption/extension period	Proposed changes
<b>Class order relief under [CO 03/392]</b>			
<p><i>Exemption</i> from all the financial reporting obligations</p>	<p>Relief applies to companies in liquidation, including companies where a controller is concurrently appointed to the property of the company, but excluding companies under voluntary administration or subject to a DOCA.</p> <p>Note: This exemption currently applies whether or not the company is an AFS licensee, including responsible entities of registered schemes.</p>	<p>Until:</p> <ul style="list-style-type: none"> <li>the company is de-registered;</li> <li>the winding-up is stayed; or</li> <li>a voluntary administrator or deed administrator is appointed.</li> </ul>	<p>Extend the relief to 'insolvent' registered schemes that are being wound up, where:</p> <ul style="list-style-type: none"> <li>the person that has responsibility for winding up the scheme has made a determination that the scheme is insolvent and has net assets of no more than \$5,000 for the relevant financial year; and</li> <li>notice of the winding-up is given to ASIC: see proposal B2.</li> </ul> <p>Clarify that the financial reporting exemption:</p> <ul style="list-style-type: none"> <li>does not apply to companies that are AFS licensees; and</li> <li>applies to any continuing obligations to prepare, lodge and distribute outstanding financial reports (including any outstanding reports under Div 6 of Pt 7.8 where an AFS licence has been cancelled): see proposal B3.</li> </ul> <p>Extend the relief to the future and continuing AGM obligations of public companies where a liquidator is appointed and the company is eligible for a financial reporting exemption under our class order relief: see proposal B4.</p>
<p><i>Extension of time</i> to report under Ch 2M, where an external administrator is appointed no earlier than three months before the balance date and no later than the due date for lodging the report.</p> <p>This is subject to the conditions that:</p> <ul style="list-style-type: none"> <li>the company must notify ASIC and, if listed, the relevant market operator that it is relying on the class order; and</li> <li>the company must have in place arrangements to answer reasonable inquiries.</li> </ul>	<p>Relief applies to:</p> <ul style="list-style-type: none"> <li>companies where a voluntary administrator has been appointed;</li> <li>companies where a managing controller has been appointed to the whole or substantially the whole of the company's property; or</li> <li>companies in provisional liquidation.</li> </ul> <p>Note: This extension of time applies whether or not the company is an AFS licensee, including responsible entities of registered schemes.</p>	<p>Six months from the initial appointment.</p> <p>Note: The six-month period will continue despite the appointment of a deed administrator.</p>	<p>Remove the condition that the company must notify ASIC: see proposal B6.</p> <p>Extend this relief to the reporting obligations in Div 6 of Pt 7.8 for AFS licensees, subject to conditions: see proposal B5.</p>

Relief currently available	Type of external administration	Exemption/extension period	Proposed changes
<b>Individual relief</b>			
<p><i>Exemption</i> from all of the financial reporting obligations in Ch 2M where:</p> <ul style="list-style-type: none"> <li>the external administrator exercises all or most of the management functions and powers;</li> <li>the voluntary administrator declares that, in their reasonable opinion, members have no ongoing economic interest; and</li> <li>if the company is subject to a DOCA, or a managing controller is 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 to the extent necessary to enable an orderly disposal of the whole or substantially the whole of the company's business and property.</li> </ul>	<p>Relief applies to:</p> <ul style="list-style-type: none"> <li>companies where a voluntary administrator or deed administrator has been appointed;</li> <li>companies where a managing controller has been appointed to the whole or substantially the whole of the company's property; or</li> <li>companies in provisional liquidation.</li> </ul>	<p>For companies under voluntary administration or in provisional liquidation—until the end of the external administration or when the external administrator forms the opinion that members have an ongoing economic interest in the company.</p> <p>For companies subject to a DOCA or where a managing controller has been appointed—until the earlier of the end of two years, or the termination of the DOCA or appointment of the managing controller.</p>	<p>Cease giving the individual exemption and provide an extension of time, as described below: see proposal C1.</p>
<p><i>Extension of time</i> to comply with all of the financial reporting obligations in Ch 2M (including any previously deferred obligations) where:</p> <ul style="list-style-type: none"> <li>the external administrator exercises all or most of the management functions and powers but is unable to make a declaration that members have no ongoing economic interest; or</li> <li>if the company is subject to a DOCA, it does not meet all the requirements for an individual exemption but we are satisfied that the company should have additional time.</li> </ul>	<p>Relief applies to:</p> <ul style="list-style-type: none"> <li>companies where a voluntary administrator or deed administrator has been appointed;</li> <li>companies where a managing controller has been appointed to the whole or substantially the whole of the company's property; or</li> <li>companies in provisional liquidation.</li> </ul>	<p>Up to six months at a time.</p>	<p>Expand relief to include circumstances where we would previously have granted an individual exemption: see proposal C1.</p> <p>Allow for a deferral of up to 12 months at a time: see proposal C1(a).</p> <p>Extend this relief to the reporting obligations in Div 6 of Pt 7.8 for AFS licensees, subject to conditions: see proposal C1(d).</p> <p>Expand relief to registered schemes that are being wound up, subject to conditions: see proposal C2.</p> <p>Expand relief in some circumstances to registered schemes not being wound up, but with an externally administered responsible entity, subject to conditions: see proposal C3.</p>

## B Changes to our class order relief

### Key points

Our relief in [CO 03/392] provides an exemption from the financial reporting obligations to all companies that have a liquidator appointed. [CO 03/392] also provides:

- an extension of time to report, subject to notice conditions, for companies that have a voluntary administrator, managing controller or provisional liquidator appointed; and
- relief to use an alternative distribution method for financial reports, where an externally administered company has more than 100 members.

In our new class order, we propose to retain the relief in [CO 03/392] and:

- provide class order financial reporting relief to ‘insolvent’ registered schemes that are being wound up;
- clarify that our class order financial reporting exemption for companies that have a liquidator appointed extends to providing all outstanding financial reports as well as financial reports that become due;
- exclude AFS licensees from relying on our class order exemption for companies that have a liquidator appointed;
- provide a class order exemption from the obligation to hold an AGM to public companies that have a liquidator appointed;
- extend our class order extension of time to the reporting obligations of AFS licensees in Div 6 of Pt 7.8, subject to conditions;
- remove the notification condition for extensions of time for companies to report under our class order financial reporting relief; and
- remove the condition that a company give notice in a daily newspaper of any alternative distribution method for its financial report, but require notice to be given on a website maintained by the external administrator.

### Replacing our current class order

25 Our current class order—[CO 03/392]—provides an exemption from the financial reporting obligations to all companies that have a liquidator appointed, including a responsible entity of a registered scheme.

26 It also extends the time for reporting by six months from the date of the first appointment of a voluntary administrator, managing controller to the whole or substantially the whole of the property of the company, or provisional liquidator, and gives relief from the obligation to report to members, provided that certain conditions are met.

Note: The extension of time is not affected by the company subsequently entering into a DOCA during the extended period.

27 Table 1 in Section A contains an overview of our relief in [CO 03/392].

### Proposal

**B1** We propose to issue a new class order to replace [CO 03/392]. Our proposed new class order—Class Order [CO 14/xxx] *Externally administered companies and registered schemes being wound up: Relief from financial reporting and AGM obligations*—will provide the same relief as [CO 03/392], with the additional modifications proposed at B2–B7.

#### Your feedback

**B1Q1** Do you have any general comments and concerns about our proposed new class order? Please provide reasons supporting your comments.

### Rationale

28 Our reasons for issuing a new class order, and the basis for each of our proposed changes to the class order, are explained below. In addition, [CO 03/392] will expire, unless remade, on 1 April 2017.

## Financial reporting relief for ‘insolvent’ registered schemes being wound up

### Proposal

**B2** We propose to provide a class order exemption from the financial reporting obligations for registered schemes that are being wound up, where:

- (a) the scheme is ‘insolvent’ (i.e. the scheme property is insufficient to meet the scheme liabilities to scheme creditors as they fall due);
- (b) the value of net assets of the scheme, determined in accordance with Australian accounting standards, is no more than \$5,000 throughout the relevant financial year; and
- (c) ASIC has been formally notified of the commencement of the winding-up of the scheme.

We propose that, in these circumstances, we will also adopt a no-action position in relation to the responsible entity and its officers, or other person appointed by the court to wind up the registered scheme, for failure to comply with any provisions in the constitution of the scheme to arrange for a final audit of the financial statements to be undertaken.

#### Your feedback

**B2Q1** Do you agree that the circumstances outlined above are an appropriate basis for ASIC to conclude that a registered scheme is insolvent, is being wound up and will ultimately be deregistered?



B2Q2 Do you think we should give class order relief to registered schemes in the circumstances outlined above? If not, are there any particular aspects of the proposal that should be amended?

B2Q3 Do you agree that we should not give class order relief to registered schemes that are being wound up where the scheme is 'solvent'?

B2Q4 Do you agree that we should take a no-action position in relation to the responsible entity and its officers, or other person appointed by the court to wind up the registered scheme, for failure to comply with any provisions in the constitution of the scheme to arrange for a final audit to be undertaken?

## Rationale

29 [CO 03/392] does not apply to registered schemes. We propose to extend our new class order to registered schemes in certain circumstances.

30 We propose to explain, in updated RG 174, that a registered scheme cannot technically become insolvent because a scheme is not a separate legal entity that incurs debts in its own right. The responsible entity is the legal entity that holds the scheme property and incurs debts to scheme creditors on behalf of the scheme.

31 However, based on the courts' consideration of the concept of an insolvent scheme, we consider that a scheme may generally be described as 'insolvent' when scheme property is insufficient to meet the scheme liabilities to scheme creditors as they fall due, whether or not the responsible entity, as a separate legal entity, is itself insolvent or under some form of external administration.

32 For example, in *Capelli v Shepard & Ors* [2010] VSCA 2 at [93], the court observed that:

a scheme may colloquially be characterised as insolvent in the sense that ... the liabilities referable to it cannot be satisfied as they fall due from its income or readily realisable assets.

33 We do not provide guidance in the current RG 174 about when we consider that compliance would impose an unreasonable burden on a registered scheme that is being wound up, and when we consider that relief from some or all of the financial reporting obligations may be appropriate.

34 We propose to grant relief in [CO 14/xxx] from the financial reporting obligations in Ch 2M for registered schemes when the responsible entity, or other person appointed by the court to wind up the scheme, has:

- (a) if they are the responsible entity, resolved that the scheme property is insufficient to meet the debts of the responsible entity in that capacity as and when they become due and payable (i.e. the scheme is insolvent);



or, if they are a person appointed by the court to wind up the scheme, they have made a determination that the scheme is insolvent;

- (b) made a determination that the value of the net assets of the scheme, determined in accordance with Australian accounting standards, is no more than \$5,000 throughout the relevant financial year; and
- (c) formally notified ASIC of the commencement of the winding-up of the scheme.

Note: We consider that formal notification of the winding-up of a scheme occurs when a Form 5138 is lodged with ASIC.

35 We consider that formal notification of the commencement of the winding-up of a registered scheme is a sufficient and reasonable basis to conclude that there are no prospects that the scheme will carry on a business in the future—other than to effect an orderly disposal of the whole or substantially the whole of the scheme’s assets—and that the scheme will be deregistered.

36 We consider that the proposed relief from the financial reporting obligations in Ch 2M, in these circumstances, provides for a fair and equitable distribution of the scheme’s assets and property among members and creditors. Generally, in such circumstances, the burden of compliance with the financial reporting obligations by the registered scheme would ultimately be borne by its creditors.

37 A scheme constitution will generally contain a provision requiring an independent audit of the financial statements to be prepared and lodged with ASIC on the winding-up of the scheme. If we provide financial reporting relief under our class order, we propose that we will also adopt a no-action position in relation to the responsible entity and its officers for failure to comply with any provisions in its constitution to arrange for a final audit of the financial statements to be undertaken.

## Clarifying the liquidator exemption

### Proposal

- B3** We propose to clarify the scope of our class order financial reporting exemption for companies that have a liquidator appointed, so that:
- (a) the exemption applies only to companies that are not AFS licensees; and
  - (b) relief is provided from any continuing obligations to prepare, lodge and distribute outstanding financial reports.

*Your feedback*

B3Q1 Do you agree that our class order exemption for companies that have a liquidator appointed should not apply to AFS licensees?

B3Q2 Do you agree that our class order exemption for companies that have a liquidator appointed should extend to the outstanding financial reporting obligations and outstanding AFS licensee reporting obligations if the company has had its AFS licence cancelled?

**Rationale****AFS licensees**

38 The class order relief in [CO 03/392]—which provides an exemption from the financial reporting obligations in Ch 2M to companies that have a liquidator appointed, including the responsible entities of registered schemes—applies whether or not the company is also an AFS licensee.

39 We propose to clarify that our class order exemption from the financial reporting obligations will apply to companies that have a liquidator appointed only if the company is not an AFS licensee.

40 An AFS licensee is required to meet minimum financial requirements at all times, including being able to pay all debts as they become due and payable, and having total assets that exceed total liabilities (in the most recent balance sheet lodged with ASIC). Because of this, we consider that it is anomalous to grant relief from the financial reporting obligations in Pt 2M.3 while the company holds an AFS licence.

Note: For more information on the financial requirements that apply to AFS licensees, see Regulatory Guide 166 *Licensing: Financial requirements* (RG 166).

41 We propose to amend RG 174 to make it clear that a company that holds an AFS licence, and that also has a liquidator appointed, should apply for the cancellation of its AFS licence under s915B. We will give relief even if a s915H direction applies to the company, unless this specifically requires that the company comply with some or all of the financial reporting obligations in Pt 2M.3 or the reporting obligations for AFS licensees in Div 6 of Pt 7.8 (AFS licensee reporting obligations).

Note: We may immediately suspend or cancel an AFS licence under s915B by giving written notice to a body corporate if the body becomes externally administered. Under s915H, we may allow the AFS licence to continue in effect in a limited way. This can preserve the operation of the AFS licence for the purposes of specified provisions of the Corporations Act in relation to specified matters, or for a specified period, or both. A direction under s915H may require compliance with the financial reporting obligations in Pt 2M.3 or the AFS licensee reporting obligations in Div 6 of Pt 7.8. However, such a requirement would generally not be imposed.

### Continuing obligations

- 42 It is currently unclear whether the exemption given to an externally administered company that has a liquidator appointed applies to any continuing obligations that the company may have to prepare, lodge and distribute outstanding financial reports—for example, a report that should have been prepared and lodged before the liquidator was appointed or a report that has been deferred during an external administration.
- 43 Under the Corporations Act, a company that has failed to prepare and lodge a financial report in contravention of its financial reporting obligations has a continuing obligation to lodge the financial report. Our proposed class order makes it clear that the exemption will apply to the company’s continuing obligations while a liquidator is appointed. Our relief does not affect any contraventions by the directors of the company if they fail to take all reasonable steps to comply with, or to secure compliance with, the financial reporting obligations.
- 44 We propose to adopt this approach because there is arguably no need for financial reports to be prepared, lodged with ASIC or distributed to members by a company in liquidation, if there are no prospects of the company continuing in business. Members and creditors have the protections and access to information relating to the winding-up of the company. We think the same rationale applies to any outstanding AFS licensee reports where a company’s AFS licence has been cancelled. AFS licensee reports lodged under Div 6 of Pt 7.8 are not public documents. This relief will not apply if a company’s AFS licence has been cancelled subject to a specification under s915H that requires the company to continue to comply with the financial reporting obligations in Pt 2M.3 or the AFS licensee reporting obligations in Div 6 of Pt 7.8.

## AGM exemption for public companies with a liquidator appointed

### Proposal

- B4** We propose to provide a class order exemption from the obligation to hold an AGM to public companies that have a liquidator appointed where the company is also eligible for financial reporting relief under our class order.

#### *Your feedback*

- B4Q1** Do you agree that we should give a class order exemption from the obligation to hold an AGM to public companies that have a liquidator appointed?

## Rationale

- 45 A public company must hold an AGM each calendar year and within five months after the end of its financial year. There is no need for a company that has a liquidator appointed to carry out the business of an AGM if it is clear that there are no prospects of the company continuing in business.
- 46 ASIC did not have the power to grant an exemption from the AGM obligation when [CO 03/392] was issued. We now have this power and propose to provide class order relief from the obligation to hold an AGM to public companies that have a liquidator appointed where the company is also eligible for financial reporting relief under our class order.

## Extension of time for AFS licensee reporting obligations

### Proposal

- B5** We propose to extend our class order extension of time to the AFS licensee reporting obligations in Div 6 of Pt 7.8, subject to conditions.

Relief from the requirements in Div 6 of Pt 7.8 will not be available if ASIC has cancelled or suspended an AFS licence subject to a specification under s915H that requires ongoing compliance with the financial reporting obligations in Pt 2M.3 or the AFS licensee reporting obligations in Div 6 of Pt 7.8.

#### *Your feedback*

- B5Q1 Do you agree that we should extend our class order extension of time to the AFS licensee reporting obligations in Div 6 of Pt 7.8, subject to conditions?

## Rationale

- 47 We have granted class order relief which provides a six-month deferral of the financial reporting obligations for externally administered companies from the date of the first appointment of a voluntary administrator, controller or provisional liquidator. Our class order relief does not currently extend to the AFS licensee reporting obligations in Div 6 of Pt 7.8.
- 48 Compliance with the financial reporting obligations during the six-month period following the appointment of an external administrator will generally impose an unreasonable burden. The burden arises from the combination of time constraints, and financial and human resource constraints, imposed on the company and the external administrator in these forms of external administration.
- 49 We think that the requirements in Div 6 of Pt 7.8 will impose a similar burden on an externally administered company to the burden imposed under

Pt 2M.3. Financial statements lodged under Div 6 of Pt 7.8 are not public documents.

50 The deferral of six months gives the external administrator time to attend to the most urgent post-appointment matters, become familiar with the affairs of the company, and to cause the annual profit and loss statement and balance sheet required under Div 6 of Pt 7.8 to be prepared, audited, and lodged with ASIC.

51 AFS licensees must have available adequate financial resources to provide the financial services covered by the AFS licence and to carry out supervisory arrangements: see RG 174.34–RG 174.35. Any granting of a deferral of the AFS licensee reporting obligations in Div 6 of Pt 7.8 does not relieve the AFS licensee from the obligation to have adequate financial resources. We will not grant a deferral if a company’s AFS licence has been cancelled or suspended subject to a specification under s915H that requires ongoing compliance with the financial reporting obligations in Pt 2M.3 or the AFS licensee reporting obligations in Div 6 of Pt 7.8, or if we have extended the time for lodgement under s989D(3).

## Notifying ASIC and the market operator

### Proposal

**B6** We propose to remove the requirement that a company notify ASIC that it is relying on the class order for an extension of time to report.

#### *Your feedback*

**B6Q1** Do you agree that we should remove the ASIC notification conditions for companies that rely on the class order for an extension of time to report?

### Rationale

52 A company that wants to rely on the extension of time under [CO 03/392] must notify ASIC. Some externally administered companies have failed to comply with this condition and have been unable to rely on the class order relief—in some cases, contravening the Corporations Act.

53 The condition to give ASIC notice was intended to prevent a company being sent a penalty notice for failing to lodge financial reports on time or at all. We no longer require notification for this purpose.

54 Our proposed relief does not affect any reporting obligations that a listed company may have under applicable listing rules. We propose to amend our class order relief so that a listed company is still required to notify the

relevant market operator but failure to do so will not preclude the listed company from relying on the class order.

## Advertising alternative distribution method

### Proposal

**B7** We propose to remove the condition in [CO 03/392] that a company give notice in a daily newspaper of the alternative distribution method for its financial report, and instead require notice to be given on a website maintained by the external administrator.

#### *Your feedback*

**B7Q1** Do you agree that we should remove the newspaper advertising condition for the alternative distribution of financial reports?

### Rationale

- 55 Under [CO 03/392], an externally administered company that has more than 100 members does not have to distribute its financial report to members after the six-month extension period, provided that the company places an advertisement in a daily newspaper, stating that:
- (a) the annual report has been lodged with ASIC;
  - (b) the annual report will be sent free of charge to a member of the company if the member asks for it in writing; and
  - (c) if the company or the relevant external administrator's firm has a website—the annual report is available on the relevant website at a specified internet address.
- 56 We consider that the requirement to advertise in a daily newspaper is unnecessary because most investors are now accustomed to obtaining company information using the internet. We propose that an externally administered company should now only have to give prominent notice of the alternative distribution method on the external administrator's website.

## C Changes to our individual relief

### Key points

We propose to modify the circumstances in which we may give individual relief by:

- no longer providing individual financial reporting exemptions for externally administered companies, but instead extending the circumstances in which we may grant an individual deferral;
- extending our individual deferral relief to the AFS licensee reporting obligations in Div 6 of Pt 7.8, subject to conditions;
- providing guidance on the circumstances in which we may grant individual financial reporting relief to registered schemes that are being wound up, or registered schemes where the responsible entity is being externally administered; and
- updating our guidance on individual relief from the obligation to hold an AGM for externally administered public companies.

### Changes to individual relief for externally administered companies

#### Proposal

- c1 We propose to cease giving individual financial reporting exemptions for externally administered companies, and to update our guidance in RG 174 on individual deferrals to make it clear that:
- (a) we are generally likely to grant a deferral of all the financial reporting obligations (in addition to any previously deferred financial reporting obligations under our proposed class order relief or previous individual relief) for up to 12 months, where:
    - (i) the external administrator exercises all or most of the management functions and powers;
    - (ii) it is uncertain whether members have an ongoing economic interest in the company; and
    - (iii) if the company is subject to a DOCA and does not meet the above requirements—we are satisfied that the company should have additional time for other reasons;
  - (b) we may grant consecutive deferrals of up to three months each where a controller (i.e. not a managing controller) has been appointed;
  - (c) depending on the company's circumstances, we may also grant relief from some or all of any previously deferred financial reporting obligations, where the deferral has been ongoing for a long period of time and we are satisfied that the burden of preparing and lodging financial reports from the commencement of the external administration is disproportionate to the benefits; and

- (d) we are generally likely to grant a deferral of the reporting obligations in Div 6 of Pt 7.8 if the company is an AFS licensee.

*Your feedback*

- C1Q1 Do you agree that we should no longer provide individual exemptions for externally administered companies, and instead grant a deferral until it is clear whether a company will be wound up or deregistered? If not, why not?
- C1Q2 Do you agree that a deferral should be for up to 12 months?
- C1Q3 Do you agree that we should be able to grant consecutive deferrals of up to three months at a time where a controller has been appointed?
- C1Q4 Do you agree that we should consider granting relief from some or all of any previously deferred financial reporting obligations, where the deferral has been ongoing for a long period of time? In your experience, what sort of circumstances should we take into account when considering whether to grant this relief?
- C1Q5 Do you think that there are situations where we should grant relief from specific obligations, rather than all of the financial reporting obligations, where an externally administered company is required to prepare and lodge a financial report? In your experience, what sort of circumstances should we take into account when considering whether to grant this relief?

## Rationale

### Ceasing individual exemptions

- 57 At present, we are generally likely to grant an exemption from all of the financial reporting obligations (including any previously deferred financial reporting obligations under [CO 03/392] or our individual relief), where:
- (a) the external administrator exercises all or most of the management functions and powers;
  - (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
  - (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 to the extent necessary to enable an orderly disposal of the whole or substantially the whole of the company's business and property.



58 We currently grant an exemption where the above requirements are satisfied because:

- (a) it appears that the company has no prospects of continuing in business;
- (b) the cost of compliance would ultimately diminish any returns to members and creditors; and
- (c) there is no value in preparing and lodging financial reports where there are no users of the information who will be making investment decisions in relation to the company.

59 However, our review of relief applications indicates that:

- (a) there have been instances where external administrators have provided declarations that, in their reasonable opinion, members have no ongoing economic interest, and these declarations have been misconceived or the external administrator has formed the view that members will have an economic interest at a later date;
- (b) there have been instances where deed administrators have carried on the company's business and effected an orderly disposal of the whole or substantially the whole of the company's assets, and the company has then ceased being externally administered and continued in business under the control of the directors; and
- (c) a financial reporting gap will occur where an externally administered company has been exempt during a reporting period and then, for example, the exemption has ceased because the external administration has ended.

60 We think we can address the above issues by ceasing to provide individual exemptions, and achieve the same policy objectives by granting individual deferrals in appropriate cases until it is determined that the company will either be wound up or deregistered.

#### **Amending our guidance on individual deferrals**

61 The purpose of our granting an individual deferral is:

- (a) to give the external administrator additional time to determine the company's prospects; and
- (b) to preserve the company's resources during this period of time.

62 Under our current policy, we provide an individual deferral of all the financial reporting obligations for up to six months from the date on which it is granted, where:

- (a) the external administrator exercises all or most of the management functions and powers but is unable to make a declaration that members have no ongoing interest in the company; or

- (b) a company is subject to a DOCA and does not meet all the requirements for an exemption but we are satisfied that the company should have additional time to prepare, lodge and distribute reports that were deferred during the preceding Pt 5.3A administration (because of [CO 03/392] and/or individual relief), as well as the financial reports next due.

Note: This relief is additional to the extension of time to report provided under our class order.

63 Given that we propose to provide relief in the form of a deferral rather than an exemption, we propose to extend the timeframe for deferrals. Currently, our guidance provides that deferrals will be for six months at a time.

64 Under our proposed guidance, we may grant consecutive deferrals of up to 12 months at a time (i.e. to defer any forthcoming and previously deferred financial reporting obligations), where:

- (a) the external administrator exercises all or most of the management functions and powers;
- (b) it is uncertain whether members have an ongoing economic interest in the company.

65 We also propose to provide guidance that we may grant consecutive deferrals of up to 12 months at a time for companies that are subject to a DOCA, if we are satisfied that the company should have additional time for reasons other than those described in paragraph 64.

#### *AFS licensee's financial reporting obligations*

66 We also propose to provide guidance that we may grant a deferral of the obligations in Div 6 of Pt 7.8 that require AFS licensees to prepare and lodge audited financial statements with ASIC. We think that the requirements in Div 6 of Pt 7.8 will impose a similar burden on an externally administered company to the burden imposed under Ch 2M. Financial statements lodged under Div 6 of Pt 7.8 are not public documents.

67 Under our proposed policy, where we have granted an individual deferral of the financial reporting obligations of a company, we will generally grant relief from the requirement for the company to comply with the reporting obligations in Div 6 of Pt 7.8 if it is an AFS licensee.

68 If the company is unable to comply with these requirements, an application should be made to ASIC by the company or the external administrator for a cancellation of the company's AFS licence.

*Controller appointments*

- 69 It is currently unclear that we may grant consecutive individual deferrals of all the financial reporting obligations of up to three months each, where:
- (a) a controller has been appointed to property of the company;
  - (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.
- 70 We propose to amend RG 174 to make it clear that we may grant consecutive individual deferrals of up to three months each, where a controller has been appointed and we are satisfied that the financial reporting obligations impose an unreasonable burden at the time that the obligations arise.

*Exemption from previously deferred financial reporting obligations*

- 71 We think there may be some situations where compliance with previously deferred financial obligations over a long period of time might impose an unreasonable burden. Our proposed updates to RG 174 will make it clear that we will consider relief in these circumstances, but that we think these situations are likely to be rare and exceptional.

**Individual deferrals for registered schemes being wound up****Proposal**

- c2 We propose to include, in our updated RG 174, guidance on when we will provide an individual deferral of the financial reporting obligations of registered schemes, where:
- (a) the value of the net assets of the scheme, determined in accordance with Australian accounting standards, is unknown but is likely to be no more than \$5,000 throughout the relevant financial year; and
  - (b) ASIC has been formally notified of the commencement of the winding-up of the scheme.

We propose that, other than in exceptional circumstances, an individual deferral will last no longer than 12 months.

*Your feedback*

- c2Q1 Do you agree with our proposal? Please describe and quantify the benefits and costs of our proposal.

C2Q2 Are there any situations that are not covered by our proposed guidance? If so, please give details.

C2Q3 Do you agree with our proposal that relief will be provided for up to 12 months?

## Rationale

- 72 We currently allow externally administered companies, but not registered schemes, to defer their financial reporting obligations for six months following the first appointment of a voluntary administrator, managing controller or provisional liquidator.
- 73 Under our proposed policy, we will consider granting an individual deferral of a registered scheme’s financial reporting obligations for up to 12 months. A deferral of the financial reporting obligations may preserve the assets of the scheme for the benefit of members, creditors and other parties while an assessment is made of the distribution to members and the obligations owed to third parties.
- 74 Unlike our class order relief, our individual relief for registered schemes being wound up is intended to apply to schemes that are being wound up where the scheme’s solvency is uncertain or unknown.
- 75 When we assess an application for an individual deferral, we will consider the following factors:
- (a) whether a deferral of the financial reporting obligations may preserve the assets of the registered scheme for the benefit of members, creditors and other parties while an assessment is made of the return to members and creditors and other obligations owed to third parties;
  - (b) the expected costs of compliance with the financial reporting obligations, who will bear the costs of compliance and the extent to which these costs may affect the outcome of the winding-up of the registered scheme; and
  - (c) the expected benefits of compliance with the financial reporting obligations, taking into account:
    - (i) who would be the relevant users of the Pt 2M.3 reports that would result from compliance, and what is the likely extent and nature of their use; and
    - (ii) the ability and efficiency of creditors, potential creditors, members and other relevant users to independently obtain, in a timely manner, audited or other reliable financial information about the registered scheme from the directors or other persons appointed by the court to wind up the scheme.

- 76 A registered scheme that has been granted an individual deferral must comply with any deferred financial reporting obligations in accordance with the Corporations Act before the relief expires.

## Individual deferrals for registered schemes where the responsible entity is under external administration

### Proposal

- c3 We propose to include, in our updated RG 174, guidance on when we will provide an individual deferral of the financial reporting obligations in Ch 2M for a registered scheme that has an externally administered responsible entity. Our proposed updates will clarify that:
- (a) we will not grant relief from the financial reporting obligations of a registered scheme merely because its responsible entity is being externally administered; and
  - (b) we may grant an individual deferral of some or all of the financial reporting obligations of a registered scheme where the appointment of an external administrator to the responsible entity has created circumstances where compliance with the obligations would impose an unreasonable burden.

#### *Your feedback*

- C3Q1 Do you agree with our proposal? Please describe and quantify the benefits and costs of our proposal.
- C3Q2 Are there any situations that are not covered by our proposed guidance? If so, please give details.

### Rationale

- 77 Where an external administrator is appointed to the responsible entity, we will consider granting an individual deferral of all the financial reporting obligations in Ch 2M of a registered scheme. The responsible entity will need to demonstrate that the appointment of the external administrator to the responsible entity has significantly disrupted the management and financial routine of the scheme, and created practical difficulties for the scheme to comply with the financial reporting obligations in Ch 2M. It will also need to show that the external administrator exercises most of the functions and powers of the responsible entity.
- 78 In such circumstances, compliance with the financial reporting obligations may impose an unreasonable burden.
- 79 We will not grant relief from the financial reporting obligations of a registered scheme merely because a responsible entity is itself being externally administered.

## Relief from obtaining a compliance plan audit report

### Proposal

- c4 Where we have granted an individual deferral of the financial reporting obligations in Ch 2M of a registered scheme, we propose that we will generally not grant relief from the requirement in s601HG for a responsible entity to obtain a compliance plan audit report.

#### *Your feedback*

- C4Q1 Do you agree with our proposal? Please describe and quantify the benefits and costs of our proposal.
- C4Q2 Are there any situations that are not covered by our proposal? If so, please give details.

### Rationale

- 80 Under our proposed policy, where we have granted an individual deferral of the financial reporting obligations of a registered scheme, we will generally not grant relief from the requirement in s601HG to obtain a compliance plan audit report, which is to be lodged with ASIC within three months after the end of the financial year of the scheme.
- 81 We monitor the lodgement of these reports on an ongoing basis to consider whether the responsible entity has designed measures that adequately address the risks of not complying with its obligations under the scheme constitution and the Corporations Act, and has adequate arrangements for monitoring, reviewing and auditing the outcomes of its compliance activities.
- 82 Under our proposed policy, we will consider granting an individual exemption from the obligation to obtain a compliance plan audit report, where:
- (a) the responsible entity is in liquidation and does not hold an AFS licence;
  - (b) the responsible entity, or other person appointed by the court, has lodged with ASIC a notice of commencement of winding up the scheme; and
  - (c) the value of net assets of the scheme, determined in accordance with Australian accounting standards, is no more than \$5,000 throughout the relevant financial year.
- 83 Under our proposed policy, we will also take into consideration the factors outlined in Regulatory Guide 136 *Managed investments: Discretionary powers and closely related schemes* (RG 136) at RG 136.12.

## Individual relief from AGM obligations for externally administered public companies

### Proposal

c5 We propose to update our guidance on individual AGM relief for externally administered public companies.

#### *Your feedback*

C5Q1 Do you agree with our proposed guidance on individual AGM relief for externally administered public companies?

### Rationale

- 84 We may exempt a public company from the obligation to hold an AGM if the company is:
- (a) being wound up;
  - (b) under Pt 5.3A administration; or
  - (c) subject to a DOCA.
- 85 Our update to RG 174 will make it clear that our policy for granting an extension of time to hold an AGM has not changed—that is, we will grant relief deferring an AGM while there is a deferral of reporting obligations. If an externally administered company is going to cease being externally administered and will carry on in business, it should hold any previously extended AGMs and present any deferred financial reports to members at the appropriate time.
- Note: Deferred AGMs may be convened on the same date, if required.
- 86 At present, our guidance does not discuss our powers to give individual exemptions from the AGM obligations to externally administered public companies. Our update to RG 174 will make it clear that we will only exempt an externally administered public company that does not have a liquidator appointed from the AGM obligations where the deferral of financial reporting obligations and AGM extensions have been ongoing for a long period of time.

## D Regulatory and financial impact

87 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:

- (a) the interests of members and creditors; and
- (b) the statutory objectives of the financial reporting and external administration provisions.

88 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
- (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

89 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

90 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process', p 4.



## List of proposals and questions

Proposal	Your feedback
<p>A1 We propose to consult on our approach to relief from the financial reporting and AGM obligations that apply to externally administered companies and registered schemes that are being wound up, and our proposed updates to RG 174.</p> <p>We are considering the four options set out in paragraph 16.</p> <p>We recommend Option 2, and are therefore consulting in detail on this option.</p>	<p>A1Q1 Which of these four options do you support and why?</p> <p>(a) If you support Option 3, please explain which areas of our policy, in particular, should be tightened.</p> <p>(b) If you support Option 4, please describe the additional relief you think we should consider providing and why.</p> <p>A1Q2 We want to understand the burdens faced by externally administered companies and registered schemes being wound up, including the costs that the company, scheme or others may bear in complying with the financial reporting and/or AGM obligations, and the costs associated with seeking relief from these obligations. We also want to understand the benefits of complying with the financial reporting and/or AGM obligations. How do you consider that these burdens and benefits may be affected by adopting Options 1, 2, 3 or 4? Please be as specific as possible, and include any estimates about the costs and resources required (e.g. time, personnel, external resources and expertise).</p>
<p>A2 We want to hear your views on other issues in relation to the financial reporting obligations of externally administered companies and registered schemes that are being wound up.</p>	<p>A2Q1 Are there any other policy considerations that may be appropriate for us to address in our regulatory guide? Please be specific.</p>
<p>B1 We propose to issue a new class order to replace [CO 03/392]. Our proposed new class order—Class Order [CO 14/xxx] Externally administered companies and registered schemes being wound up: Relief from financial reporting and AGM obligations—will provide the same relief as [CO 03/392], with the additional modifications proposed at B2–B7.</p>	<p>B1Q1 Do you have any general comments and concerns about our proposed new class order? Please provide reasons supporting your comments.</p>

Proposal	Your feedback
<p>B2 We propose to provide a class order exemption from the financial reporting obligations for registered schemes that are being wound up, where:</p> <ul style="list-style-type: none"> <li>(a) the scheme is 'insolvent' (i.e. the scheme property is insufficient to meet the scheme liabilities to scheme creditors as they fall due);</li> <li>(b) the value of net assets of the scheme, determined in accordance with Australian accounting standards, is no more than \$5,000 throughout the relevant financial year; and</li> <li>(c) ASIC has been formally notified of the commencement of the winding-up of the scheme.</li> </ul> <p>We propose that, in these circumstances, we will also adopt a no-action position in relation to the responsible entity and its officers, or other person appointed by the court to wind up the registered scheme, for failure to comply with any provisions in the constitution of the scheme to arrange for a final audit of the financial statements to be undertaken.</p>	<p>B2Q1 Do you agree that the circumstances outlined above are an appropriate basis for ASIC to conclude that a registered scheme is insolvent, is being wound up and will ultimately be deregistered?</p> <p>B2Q2 Do you think we should give class order relief to registered schemes in the circumstances outlined above? If not, are there any particular aspects of the proposal that should be amended?</p> <p>B2Q3 Do you agree that we should not give class order relief to registered schemes that are being wound up where the scheme is 'solvent'?</p> <p>B2Q4 Do you agree that we should take a no-action position in relation to the responsible entity and its officers, or other person appointed by the court to wind up the registered scheme, for failure to comply with any provisions in the constitution of the scheme to arrange for a final audit to be undertaken?</p>
<p>B3 We propose to clarify the scope of our class order financial reporting exemption for companies that have a liquidator appointed, so that:</p> <ul style="list-style-type: none"> <li>(a) the exemption applies only to companies that are not AFS licensees; and</li> <li>(b) relief is provided from any continuing obligations to prepare, lodge and distribute outstanding financial reports.</li> </ul>	<p>B3Q1 Do you agree that our class order exemption for companies that have a liquidator appointed should not apply to AFS licensees?</p> <p>B3Q2 Do you agree that our class order exemption for companies that have a liquidator appointed should extend to the outstanding financial reporting obligations and outstanding AFS licensee reporting obligations if the company has had its AFS licence cancelled?</p>
<p>B4 We propose to provide a class order exemption from the obligation to hold an AGM to public companies that have a liquidator appointed where the company is also eligible for financial reporting relief under our class order.</p>	<p>B4Q1 Do you agree that we should give a class order exemption from the obligation to hold an AGM to public companies that have a liquidator appointed?</p>

Proposal	Your feedback
<p>B5 We propose to extend our class order extension of time to the AFS licensee reporting obligations in Div 6 of Pt 7.8, subject to conditions.</p> <p>Relief from the requirements in Div 6 of Pt 7.8 will not be available if ASIC has cancelled or suspended an AFS licence subject to a specification under s915H that requires ongoing compliance with the financial reporting obligations in Pt 2M.3 or the AFS licensee reporting obligations in Div 6 of Pt 7.8.</p>	<p>B5Q1 Do you agree that we should extend our class order extension of time to the AFS licensee reporting obligations in Div 6 of Pt 7.8, subject to conditions?</p>
<p>B6 We propose to remove the requirement that a company notify ASIC that it is relying on the class order for an extension of time to report.</p>	<p>B6Q1 Do you agree that we should remove the ASIC notification conditions for companies that rely on the class order for an extension of time to report?</p>
<p>B7 We propose to remove the condition in [CO 03/392] that a company give notice in a daily newspaper of the alternative distribution method for its financial report, and instead require notice to be given on a website maintained by the external administrator.</p>	<p>B7Q1 Do you agree that we should remove the newspaper advertising condition for the alternative distribution of financial reports?</p>

Proposal	Your feedback
<p>C1 We propose to cease giving individual financial reporting exemptions for externally administered companies, and to update our guidance in RG 174 on individual deferrals to make it clear that:</p> <p>(a) we are generally likely to grant a deferral of all the financial reporting obligations (in addition to any previously deferred financial reporting obligations under our proposed class order relief or previous individual relief) for up to 12 months, where:</p> <p>(i) the external administrator exercises all or most of the management functions and powers;</p> <p>(ii) it is uncertain whether members have an ongoing economic interest in the company; and</p> <p>(iii) if the company is subject to a DOCA and does not meet the above requirements—we are satisfied that the company should have additional time for other reasons;</p> <p>(b) we may grant consecutive deferrals of up to three months each where a controller (i.e. not a managing controller) has been appointed;</p> <p>(c) depending on the company's circumstances, we may also grant relief from some or all of any previously deferred financial reporting obligations, where the deferral has been ongoing for a long period of time and we are satisfied that the burden of preparing and lodging financial reports from the commencement of the external administration is disproportionate to the benefits; and</p> <p>(d) we are generally likely to grant a deferral of the reporting obligations in Div 6 of Pt 7.8 if the company is an AFS licensee.</p>	<p>C1Q1 Do you agree that we should no longer provide individual exemptions for externally administered companies, and instead grant a deferral until it is clear whether a company will be wound up or deregistered? If not, why not?</p> <p>C1Q2 Do you agree that a deferral should be for up to 12 months?</p> <p>C1Q3 Do you agree that we should be able to grant consecutive deferrals of up to three months at a time where a controller has been appointed?</p> <p>C1Q4 Do you agree that we should consider granting relief from some or all of any previously deferred financial reporting obligations, where the deferral has been ongoing for a long period of time? In your experience, what sort of circumstances should we take into account when considering whether to grant this relief?</p> <p>C1Q5 Do you think that there are situations where we should grant relief from specific obligations, rather than all of the financial reporting obligations, where an externally administered company is required to prepare and lodge a financial report? In your experience, what sort of circumstances should we take into account when considering whether to grant this relief?</p>

Proposal	Your feedback
<p>C2 We propose to include, in our updated RG 174, guidance on when we will provide an individual deferral of the financial reporting obligations of registered schemes, where:</p> <ul style="list-style-type: none"> <li>(a) the value of the net assets of the scheme, determined in accordance with Australian accounting standards, is unknown but is likely to be no more than \$5,000 throughout the relevant financial year; and</li> <li>(b) ASIC has been formally notified of the commencement of the winding-up of the scheme.</li> </ul> <p>We propose that, other than in exceptional circumstances, an individual deferral will last no longer than 12 months.</p>	<p>C2Q1 Do you agree with our proposal? Please describe and quantify the benefits and costs of our proposal.</p> <p>C2Q2 Are there any situations that are not covered by our proposed guidance? If so, please give details.</p> <p>C2Q3 Do you agree with our proposal that relief will be provided for up to 12 months?</p>
<p>C3 We propose to include, in our updated RG 174, guidance on when we will provide an individual deferral of the financial reporting obligations in Ch 2M for a registered scheme that has an externally administered responsible entity. Our proposed updates will clarify that:</p> <ul style="list-style-type: none"> <li>(a) we will not grant relief from the financial reporting obligations of a registered scheme merely because its responsible entity is being externally administered; and</li> <li>(b) we may grant an individual deferral of some or all of the financial reporting obligations of a registered scheme where the appointment of an external administrator to the responsible entity has created circumstances where compliance with the obligations would impose an unreasonable burden.</li> </ul>	<p>C3Q1 Do you agree with our proposal? Please describe and quantify the benefits and costs of our proposal.</p> <p>C3Q2 Are there any situations that are not covered by our proposed guidance? If so, please give details.</p>
<p>C4 Where we have granted an individual deferral of the financial reporting obligations in Ch 2M of a registered scheme, we propose that we will generally not grant relief from the requirement in s601HG for a responsible entity to obtain a compliance plan audit report.</p>	<p>C4Q1 Do you agree with our proposal? Please describe and quantify the benefits and costs of our proposal.</p> <p>C4Q2 Are there any situations that are not covered by our proposal? If so, please give details.</p>
<p>C5 We propose to update our guidance on individual AGM relief for externally administered public companies.</p>	<p>C5Q1 Do you agree with our proposed guidance on individual AGM relief for externally administered public companies?</p>