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Mr Kyle Wright
Corporations
Australian Securities and Investments Commission
Level 20, 240 Queen Street
Brisbane QLD 4000

20 October 2014

By email

Dear Kyle

KPMG Submission: Consultation Paper 223 Relief for externally administered companies and registered schemes being wound up – RG 174 update

Thank you for the opportunity to comment on ASIC's proposals in Consultation Paper 223 *Relief for externally administered companies and registered schemes being wound up – RG 174 update (CP223)*.

KPMG considers that the efficient protection of all stakeholders is dependent on appropriate policy on the financial reporting obligations for externally administered companies and registered managed investment schemes in liquidation, and the annual general meeting obligations applicable to externally administered public companies.

KPMG is generally supportive of ASIC's initiatives to reduce regulatory burden. KPMG believes that benefits in the form of a reduction to the drain on funds available for distribution to creditors and investors would be enhanced through the suitable modification of the class order relief.

The following comments set out KPMG's views on specific measures proposed. KPMG would be pleased to discuss these views should you wish.

KPMG comments on specific proposals

KPMG's comments on each of the questions in CP223 are set out in order below.

Options in the consultation paper

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

KPMG supports ASIC's Option 2. That is, KPMG sees value in:

- (i) expanding the scope of ASIC's current class order relief to:

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- (A) provide exemption from the financial reporting obligations to certain ‘insolvent’ registered schemes that are being wound up;
 - (B) provide exemption from the obligation to hold an annual general meeting for public companies that have a liquidator appointed;
 - (C) clarify that exemption for companies that have a liquidator appointed applies to providing outstanding financial reports as well as current obligations; and
 - (D) provide an extension of time for the reporting obligations of Australian financial services (AFS) licensees in Division 6 of Part 7.8, with relevant conditions;
- (ii) amending ASIC’s current class order provisions to:
- (A) remove the ASIC notification condition for extensions of time under class order financial reporting;
 - (B) to exclude AFS licensees from relying on the class order exemption for companies that have a liquidator appointed;
- (iii) replacing individual exemptions with individual deferrals where it is not clear whether the company will continue in business;
- (iv) providing 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) issuing an updated regulatory guide and new class order to explain and give effect to the above changes.

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).*

For most outcomes that may arise from an external administration, KPMG considers that the adoption of Option 2 will assist in relieving some of the burdens faced by externally administered companies. It will also be beneficial to the stakeholders of registered schemes being wound up.

KPMG considers that 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 individual relief from these obligations should be avoided where possible. In most practical scenarios KPMG considers that complying with the financial reporting and/or AGM obligations provides minimal benefits to stakeholders given other reporting requirements.

In the case of registered schemes and companies that have a liquidator appointed KPMG considers that the value of ongoing financial reporting and conducting annual general meetings is limited in protecting scheme members and creditors respectively and requires the use of funds that might otherwise be returned to them. Furthermore the additional cost associated with auditing these financial reports is wasteful as the practical value of the audit is minimal.

For AFS licensees KPMG generally agrees with the rationale put by ASIC that the deferral of six months for financial reporting gives the external administrator a more reasonable timeframe to address the most urgent post-appointment matters, become familiar with the affairs of the company, and to cause the financial reports required under Division 6 of Part 7.8 to be prepared, audited, and lodged with ASIC.

We also suggest arrangements be put in place to provide exemptions for companies that are in voluntary administration. Voluntary administration is intended to be an interim measure during which time the future of the company is determined. The potential outcomes and reporting consequences from a voluntary administration are:

- the company is placed in liquidation, in which case the liquidation reporting and AGM requirements should apply;
- control of the company is handed back to its directors in which case the normal Corporations Act requirements should apply; or
- the company enters into a deed of company arrangement (“DOCA”) in which case specific relief should be available from reporting and AGM requirements depending on the terms, structure and impact of the DOCA.

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

KPMG makes no other comment and raises no other issues in relation to the financial reporting obligations of externally administered companies and registered schemes that are being wound up that might be appropriate for ASIC to address in its regulatory guide.

Replacing the current class order

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

KPMG makes no further general comments and raises no concerns about ASIC’s proposed new class order.

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

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?*

KPMG considers that the circumstances outlined are an appropriate basis for ASIC to conclude that a registered scheme is insolvent, is being wound up and will ultimately be deregistered. That is, a class order exemption from the financial reporting obligations for registered schemes that are being wound up is appropriate, 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) ASIC has been formally notified of the commencement of the winding-up of the scheme.

We note the condition relating to the scheme’s net assets being less than \$5,000 does not appear to be relevant given by definition an insolvent scheme has negative net assets.

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’?*

KPMG believes that in the case of a solvent scheme being wound up that the reporting obligations should generally remain in place and that should individual relief be sought, then it should be considered by ASIC on its merits.

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?*

KPMG supports ASIC adopting 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.

Liquidator exemption

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

KPMG notes that relief in ASIC’s class order, CO 03/392 provides an exemption from the financial reporting obligations in Chapter 2M to companies that have a liquidator appointed, including the responsible entities (REs) of registered schemes whether or not the company is also an AFS licensee. Accordingly, KPMG agrees that class order exemption from the financial reporting obligations should apply to companies that have a liquidator appointed only if the company is not an AFS licensee, unless it is a RE.

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?*

KPMG agrees 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 and that ASIC should give relief allowing the AFS licence to continue in effect in a limited way. In such a case, KPMG considers that the class order exemption should extend to the outstanding financial reporting obligations and outstanding AFS licensee reporting obligations, except where a direction under s915H specifically requires compliance with the financial reporting obligations in Part 2M.3 or the AFS licensee reporting obligations in Division 6 of Part 7.8.

AGM exemption for public companies with a liquidator appointed

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?*

KPMG agrees that ASIC should 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 the class order.

Extension of time for AFS licensee reporting obligations

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?*

KPMG agrees that ASIC should amend its class order extension of time to the AFS licensee reporting obligations in Division 6 of Part 7.8, where ASIC has not cancelled or suspended an AFS licence subject to a specification under s915H that requires ongoing compliance with the financial reporting obligations in Part 2M.3 or the AFS licensee reporting obligations in Division 6 of Part 7.8.

Notifying ASIC and the market operator

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?*

KPMG agrees that ASIC should remove the requirement that a company notify ASIC that it is relying on the class order for an extension of time to report.

KPMG agrees that the requirement for a listed company should to notify the relevant market operator should remain in place. KPMG also agrees that failure by a listed company to do so should not prevent it from relying on the class order.

Advertising alternative distribution method

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

KPMG agrees that ASIC should remove the condition in class order CO 03/392 that a company give notice in a daily newspaper of the alternative distribution method for its financial report. KPMG agrees that instead an equivalent notice to be given on a website arranged by the external administrator would be adequate.

Changes to individual relief for externally administered companies

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?*

KPMG makes no comment concerning changes to individual relief for externally administered companies.

Individual deferrals for registered schemes being wound up

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?*

KPMG makes no comment concerning individual deferrals for registered schemes being wound up.

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

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.*

KPMG makes no comment concerning individual deferrals for registered schemes where the RE is under external administration.

Relief from obtaining a compliance plan audit report

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.*

KPMG considers that ASIC should consider providing class order 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 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.

In these circumstances KPMG considers that there is likely to be minimal value in the compliance plan audit for ASIC in its consideration of 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.

Furthermore KPMG recommends that ASIC consider increasing the net assets threshold. The current threshold of \$5,000 should either be raised or changed to some other meaningful basis.

Individual relief from AGM obligations for externally administered public companies

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

KPMG welcomes ASIC's proposal to update its guidance on individual AGM relief for externally administered public companies.

Regulatory and financial impact

KPMG makes no further comment on the regulatory and financial impact of the proposals.



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schemes being wound up – RG 174 update
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We would be pleased to discuss any of these points further; should you have any questions please contact me on _____ or Tom Seville, KPMG's Head of Regulatory & Compliance on _____

Yours faithfully

Damian Templeton
Partner
Restructuring Services