ASIC

Australian Securities & Investments Commission

REPORT 434

Response to submissions on CP 223 Relief for externally administered companies and registered schemes being wound up—RG 174 update

May 2015

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 223 *Relief for externally administered companies and registered schemes being wound up—RG 174 update* (CP 223) and details our responses in relation to those issues.

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)
- 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.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see Regulatory Guide 174 *Relief for externally administered companies and registered schemes being wound up* (RG 174).

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A Overview

1 In Consultation Paper 223 *Relief for externally administered companies and registered schemes being wound up—RG 174 update* (CP 223), we consulted on proposals to broaden the scope of our relief from the financial reporting provisions of the *Corporations Act 2001* (Corporations Act) that apply to externally administered companies and registered managed investment schemes (registered schemes) that are being wound up.

2 Specifically, we consulted on proposals to expand the scope of our relief to:

(a) provide an exemption from the financial reporting obligations to certain 'insolvent' registered schemes that are being wound up;

(b) provide an exemption from the obligation to hold an annual general meeting (AGM) for public companies that have a liquidator appointed;

(c) clarify that our 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 reporting obligations of Australian financial services (AFS) licensees in Subdiv C of Div 6 of Pt 7.8, subject to conditions.

3 In addition, we consulted on proposals to amend Class Order [CO 03/392] *Externally administered companies: Financial reporting relief*:

(a) to remove the ASIC notification condition for extensions of time under [CO 03/392]; and

(b) to exclude AFS licensees from relying on exemption relief under our new legislative instrument for companies that have a liquidator appointed.

4 We also consulted on proposals to:

(a) replace individual exemption relief with individual deferral relief where it is not clear whether the company will continue to carry on business;

(b) 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

(c) update Regulatory Guide 174 *Relief for externally administered companies and registered schemes being wound up* (RG 174) and issue a new legislative instrument to explain and give effect to the changes.

5 This report highlights the key issues that arose out of the submissions received on CP 223 and our responses to those issues.

6 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 223. We have limited this report to the key issues.

7 For a list of the non-confidential respondents to CP 223, see the appendix. Copies of the submissions are available on our website under CP 223.

Responses to consultation

8 We received six responses to CP 223 from insolvency firms and industry associations, and met with industry representatives to clarify issues. We are grateful to all the respondents for taking the time to send us their comments and we also extend our appreciation to those who discussed specific issues with us before and during the consultation process.

9 All respondents were supportive of our proposal to change our existing approach, expand our relief and provide guidance about a number of potential relief applications.

10 The main issues raised by respondents related to:

(a) the proposal to provide relief from the financial reporting obligations to certain 'insolvent' registered schemes that are being wound up under a new legislative instrument—in particular, the proposed requirement that the value of net assets of the scheme be no more than $5,000 throughout the relevant financial year;

(b) the proposal to replace individual exemption relief with individual deferral relief where it is not clear whether the company will continue to carry on business—in particular, the proposed individual deferral period of up to 12 months;

(c) the application of our ongoing economic interest test;

(d) relief for outstanding financial reports that were due to be lodged before the commencement of an external administration of a company or winding up of a scheme;

(e) the proposal to provide guidance about other potential relief applications, including relief for previously deferred financial reporting obligations and, for registered schemes, compliance plan audit relief—in particular, our proposal to generally not grant relief from the requirement in s601HG for a responsible entity to obtain a compliance plan audit report; and

(f) updating RG 174—in particular, guidance about the role of a controller or managing controller when directors have resigned or are uncooperative.

Note: In this report, references to chapters (Chs), parts (Pts), or sections (s) are to the Corporations Act, unless otherwise specified.

11 Some respondents suggested we needed to clarify our guidance on individual relief and other aspects of [CO 03/392] for externally administered companies and registered schemes being wound up. In response to the feedback received, we have amended our guidance in RG 174. See Sections B and C of this report for details of our amendments.

12 Other issues outside the scope of our proposed guidance were also raised. We have considered all of the issues raised in response to our consultation; however, we have limited our responses in this report to the issues raised which we considered closely relate to the scope of our policy review.

13 In CP 223, we proposed to make a number of technical amendments to [CO 03/392]. In this report, where we discuss the views of respondents to a particular proposal, we have only taken into consideration the views of those respondents that provided feedback on that proposal—and only in an abridged manner. We have not drawn any inferences on proposals where respondents did not specifically provide feedback.

B Changes to our exemption relief for externally administered companies and registered schemes

Key points

This section outlines the issues raised by respondents, and our response to those issues, in relation to the scope of our exemption relief from the financial reporting obligations for companies in external administration and registered schemes being wound up.

Financial reporting relief for 'insolvent' registered schemes being wound up

14 In CP 223 (Proposal B2), we proposed that our relief will provide an exemption from the financial reporting obligations for registered schemes 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.

15 The majority of respondents disagreed with some of our proposed general conditions for exemption relief for insolvent registered schemes. In particular, they questioned the requirement to determine whether the scheme had no more than $5,000 in net assets of the scheme throughout the relevant financial year. Respondents' comments included the following:

(a) the circumstances of a registered scheme can change significantly throughout the year, and it is not possible to determine the value of net assets at all times throughout the year;

(b) the requirement to determine net assets in accordance with Australian accounting standards is too high a standard;

(c) the condition relating to a scheme's net assets being less than $5,000 is not relevant to an insolvent scheme because, by definition, an insolvent scheme has negative net assets; and

(d) in the event a net assets requirement is adopted, it should either be raised or changed to a more meaningful basis, and there should be clarity as to the definition of 'net assets'.

16 We also received submissions identifying areas of our policy where, in the view of the respondents, there is scope for improvement. For example, it was suggested that:

(a) exemption relief may be appropriate where a liquidator is appointed to wind up a scheme and the scheme is solvent;

(b) exemption relief should extend to registered schemes where a court has appointed a receiver to property of the scheme on the presumption that the scheme is insolvent;

(c) exemption relief for outstanding reports of companies should also apply to our registered scheme exemption; and

(d) the word 'court' be removed from certain guidance (see draft RG 174 attached to CP 223 at RG 174.92–RG 174.93) because it is not necessary that a liquidator be appointed by the court.

ASIC's response

Taking into account the submissions received, we have decided not to proceed with the requirement that an insolvent registered scheme have no more than $5,000 in net assets throughout the relevant financial year.

We have amended our guidance to extend our exemption relief to registered schemes, where:

- the responsible entity has lodged a notice in the approved form (Form 5138 *Notification of commencement or completion of winding up of a registered scheme*) notifying ASIC that the winding-up of the scheme has commenced; or
- the person appointed by the court to take responsibility for winding up the scheme has notified ASIC of their appointment and the responsible entity or person appointed by the court to wind up the scheme has:
  - passed a resolution (a 'scheme insolvency resolution') to the effect that, for a period of at least 12 months, the scheme property has been insufficient to meet the debts of the responsible entity incurred in that capacity as and when they became due and payable; and
  - lodged a copy of the scheme insolvency resolution with ASIC.

The scheme insolvency resolution is required because a registered scheme cannot technically become insolvent. A registered scheme is not a separate legal entity that incurs debts in its own right. We consider 12 months to be sufficient to determine whether or not scheme property might become available to meet the debts of the responsible entity incurred in that capacity.

We have maintained our guidance that the responsible entity, or other person appointed by the court to wind up the scheme, is best placed to make a determination about the scheme's solvency to be eligible for exemption relief.

To provide accountability to members, our exemption relief will require the responsible entity or person appointed by the court to wind up the scheme to:

- have adequate arrangements in place to answer reasonable questions asked by members about the winding-up; and
- make important information about the progress of the winding-up available to members periodically and at completion of the winding-up, including information about actions taken and proposed to be taken in relation to the winding-up of the scheme, financial information about scheme receipts and payments and, in some cases, the value of scheme property and any potential return to members after payment of scheme debts.

We have taken this approach because members of registered schemes that are being wound up do not have access under Ch 5C to the same sort of information that members and creditors of externally administered companies have under Ch 5.

We have considered submissions about providing exemption relief where a liquidator is appointed to wind up a solvent scheme. We remain of the view that a solvent scheme being wound up should comply with its financial reporting obligations. This is because members of a solvent scheme continue to have an economic interest in the scheme and the outcome of the winding-up. They are also entitled to receive the information they are expecting to receive in accordance with the financial reporting obligations and the scheme's constitution.

We have also taken into account submissions that considered circumstances where a court has appointed a receiver to property of the scheme on the presumption that such a scheme would be insolvent. We have not expanded our relief because we consider that our proposed exemption or deferral relief should be sufficient to cover these circumstances.

We have maintained our policy that where a scheme is relying on our exemption relief, we will take no action against the responsible entity and its officers for failure to comply with any provisions in the scheme's constitution to arrange for an audit of the financial accounts to be undertaken. However, notification of the completion of the winding-up will still have to be provided to members.

We have expanded our relief to exempt a responsible entity of an insolvent scheme from the requirement in Form 5138 to provide a copy of the scheme's audited financial reports and auditor's report on completion of the winding-up. However, our relief will still require a final progress report on completion of the winding-up.

We have maintained our existing approach regarding the basis on which a responsible entity or other person appointed by the court may wind up a scheme (see draft RG 174 attached to CP 223 at RG 174.92–RG 174.93) because it is consistent with the requirements in Pt 5C.9.

Application of the liquidator exemption to AFS licensees

17 In CP 223 (Proposal B3), we proposed to clarify the scope of our exemption relief for companies that have a liquidator appointed, so that the exemption only applies to companies that are not AFS licensees, and relief is provided from any continuing obligations under Pt 2M.3 of the Corporations Act.

18 There was broad support for our proposal to limit the scope of our exemption relief for companies that are not AFS licensees. However, while most submissions agreed with our proposal, one respondent qualified their support by suggesting that responsible entities of registered schemes should have the benefit of exemption relief despite still holding an AFS licence.

ASIC's response

We have proceeded with our proposed exemption relief, from the obligations in Pt 2M.3, for companies where a liquidator is appointed and the company does not hold an AFS licence.

We consider that a responsible entity should not automatically be exempt from Pt 2M.3 where a liquidator is appointed. This is because a responsible entity is required under its AFS licence to have sufficient funds to carry on business.

We consider that in most cases a liquidator will only be appointed where the responsible entity is insolvent and does not have sufficient funds to carry on business. In those circumstances, we consider it appropriate to cancel the AFS licence and, if necessary, make a specification under s915H of the Corporations Act to enable the responsible entity to continue to perform certain functions, such as winding up schemes or transferring them to another responsible entity.

Alternative distribution method

19 In CP 223 (Proposal B7), we proposed to remove the condition 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.

20 Respondents generally agreed with our proposal to require notice to be given on a website maintained by the external administrator, however, one respondent submitted that the requirement for notice to be given on a website 'maintained by the external administrator' is too specific and suggested that notice be given by the external administrator on either the administrator's website or the company's website. Some respondents went further to suggest that if neither the administrator's or company's website is available, then notice should be given on the ASIC website.

21 One respondent also submitted that relief from the obligation to send annual reports to members may be appropriate where there are a high number of members but only a few inquiries made by those members. The respondent submitted that the 100 member limit in our proposed relief for alternative distribution was too high.

> *ASIC's response*
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> We have proceeded with our proposed relief for alternative distribution methods without a mandatory newspaper notice condition. Our new relief will provide for alternative distribution by:
>
> - sending copies of the reports to a member of the company free of charge if a member asks for the reports in writing; and
> - making the reports available for download on the company's website together with a hypertext link to the reports.
>
> The company must also arrange for a notice advising members of the alternative distribution method to be published:
>
> - in a prominent place on the company's website;
> - in a place that is readily accessible on a website maintained by the relevant external administrator or any external administrator appointed after the relevant external administrator; and
> - if the company is listed on a prescribed financial market, on a website maintained by the operator of the financial market.
>
> Based on the submissions, we have maintained our relief for alternative distribution of financial reports, but have dispensed with the 100 member limit. We have done this because it is not unusual for companies to provide their annual report to some members by making a copy of the report readily accessible on a website.

Replacing Class Order [CO 03/392] *Externally administered companies: Financial reporting relief*

22 In CP 223 (Proposal B1), we proposed to issue a new legislative instrument to replace Class Order [CO 03/392] *Externally administered companies: Financial reporting relief*. We encouraged general comments and concerns about our proposed relief, and respondents provided us with feedback.

23 While the majority of submissions generally supported our proposal to replace [CO 03/392], it was suggested by one respondent that we should extend our exemption relief to all externally administered companies or schemes being wound up where it has been determined that the members no longer have an ongoing economic interest in the company or scheme.

24 Another respondent recommended that we also provide exemption relief as an interim measure for companies that are in voluntary administration, until the outcome of the voluntary administration is known.

25 In relation to our proposed deferral relief, one respondent submitted that there should be an automatic deferral of any financial reports that are outstanding at the time of the appointment of the external administrator, and questioned the implications if we do not grant relief for outstanding financial reports that were required to be prepared and lodged with ASIC for previous years prior to the appointment of the external administrator.

ASIC's response

We have issued a new legislative instrument, ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251.

We have not adopted the suggestion to extend the scope of our exemption relief to cover all externally administered companies or schemes being wound up where it has been determined that the members no longer have an ongoing economic interest in the company or scheme. We do not think it is appropriate to provide such extensive relief.

We take the view that the individual deferral relief available to entities under external administration, together with the exemption relief available to entities in liquidation, provides sufficient relief for entities that need it. This approach ultimately preserves the requirement to prepare deferred reports, should the company be recapitalised or otherwise continue in business after the external administration.

We have maintained our deferral relief, extending the time for financial reporting by six months from the date of the first appointment of a voluntary administrator, managing controller or a provisional liquidator.

We have not extended our exemption relief from the obligations in Pt 2M.3 for companies in voluntary administration. This is because voluntary administration is an initial form of administration, after which the company will either cease being externally administered or be under another form of external administration. An exemption would mean that the relevant financial report would not be prepared and lodged even though a company may cease being externally administered and continue to carry on business.

Based on submissions, we have extended our deferral relief to automatically defer outstanding financial reporting obligations from previous years. This is because compliance with financial reporting obligations during the initial six-month period following the appointment of a relevant external administrator will generally impose unreasonable burdens. The same rationale applies to both outstanding financial reporting obligations from previous years and the financial reporting obligations that are due within the six-month period following the appointment of the relevant external administrator. However, our deferral of outstanding obligations will

only apply to any continuing obligations from the date of appointment of the relevant external administrator—it does not relieve the company or directors from any contravention of the financial reporting obligations prior to the date of appointment of the relevant external administrator.

We have clarified our guidance to make it clear that we may grant further individual deferral relief in relation to outstanding financial reports. The extent to which the outstanding financial reports would provide useful information to users of the reports will be a relevant factor in any decision we make on whether to grant individual deferral relief. We will consider this relief on a case-by-case basis if an application is made before a deferral relief expires. We will carefully consider if the outstanding financial reports may provide useful information to creditors and members for the reporting period prior to the external administration.

C Changes to our individual relief and AGM relief

Key points

This section outlines the issues raised by respondents, and our responses to those issues, in relation to:

- the scope of our individual relief from the financial reporting obligations for companies in external administration and registered schemes being wound up; and
- our relief from the AGM obligations for externally administered public companies.

Changes to individual relief for externally administered companies

26 In CP 223 (Proposal C1), we proposed to cease giving individual financial reporting exemptions for externally administered companies in certain circumstances and, instead, extend the circumstances in which we may grant individual deferral relief.

27 We considered that we could achieve the same policy objectives by granting individual deferral relief of all the financial reporting obligations, for consecutive periods of up to 12 months at a time, in appropriate cases, until it is determined that the company will either be wound up, deregistered or returned to the control of the directors.

Ceasing individual exemptions

28 While the majority of respondents generally supported our proposal to cease granting individual exemption relief and instead grant individual deferral relief, at least one respondent submitted that ASIC should continue granting individual exemption relief because, in their view, deferral relief creates too much uncertainty as to whether financial reports will have to be provided in the future.

29 One respondent submitted that it is not uncommon for a managing controller to be appointed where the members do not have an ongoing economic interest, but the company is not currently being wound up or may not be wound up. The respondent also suggested that in these circumstances, ASIC could grant a conditional exemption that would cease if members have an economic interest at a later date or if the company is returned to the control of the directors.

ASIC's response

We do not consider that individual deferral relief creates too much uncertainty as to whether financial reports will have to be

provided in the future. This is because the primary obligation, but for our relief, is for companies to report. In addition, the outcome of an external administration is inherently uncertain unless the external administration is to wind up the company or the company is under a deed of company arrangement (DOCA) and will cease following its completion.

We consider individual deferral relief may sometimes be appropriate until such time as a company is either wound up, ceases on completion of a DOCA, or is returned to the control of directors.

We are concerned that a test based on whether (or not) there is an ongoing economic interest is too subjective, and may change as the external administration progresses. The existence or non-existence of an ongoing economic interest of a member at a point-in-time is not necessarily determinative of whether there is any utility in the preparation and lodgement of financial reports relating to the period of the external administration, or whether there are users of those reports.

For example, members may cease to have an economic interest in the company because of a transfer of their shares under a DOCA or reconstruction—and the company may continue carrying on business with new members. Information relating to the performance of the company's business or business segments may be useful to the company's new members. While we have retained the concept of ongoing economic interest, it has become one factor to be considered in the wider test of whether the requirement to prepare financial reports imposes unreasonable burdens.

We do not propose to provide conditional exemptions which would cease upon a member having an economic interest or the company being returned to the control of the directors. Conditional exemption relief would mean that relevant financial reports falling under the exemption would not subsequently be prepared and lodged even though the company continues to carry on business.

Conditional exemption relief dependent on whether or not certain grounds continue to exist is problematic because satisfying the condition would ultimately be determined on the subjective views of the relevant external administrator (i.e. a self-assessment). In our experience, it would also be difficult to define appropriate conditions that would automatically trigger cessation in particular circumstances.

Amending our guidance on individual deferral relief

30 The majority of respondents generally agreed with our proposal to replace individual exemption relief with individual deferral relief, however, two respondents disagreed with the proposed 12-month deferral period. The respondents submitted that it was too short and suggested that an individual deferral should be for a period of up to 24 months. The respondents' reasons for their recommendations included the following:

(a) deferral relief of 12 months may not be sufficient where a managing controller has been appointed or a DOCA exists because some asset classes take longer than 12 months to dispose of in an orderly manner;

(b) there is little benefit to the administration to require applications to be made every 12 months at additional cost, ultimately born by creditors, if an external administrator is of the view that 24 months may be required; and

(c) the grounds for relief do not generally change significantly during a 12-month period and ASIC could, as an alternative, grant relief on the condition that the relevant grounds for relief continue to exist.

31 One respondent queried what circumstances would be considered 'exceptional' for the granting of deferral relief for longer than 12 months: see draft RG 174 attached to CP 223 at RG 174.73. Another respondent submitted that where a company is returned from administration to the control of its directors, the company should be given sufficient time to prepare any 'catch-up' accounts. The respondent suggested that a period of at least three to six months after the conclusion of the administration should be given, depending on the circumstances.

ASIC's response

We have amended our guidance to allow for the granting of individual deferral relief of all financial reporting obligations for up to 24 months, where we are satisfied that compliance will impose an unreasonable burden.

Our deferral relief will also apply to all financial reporting obligations falling due within the 24-month period: see RG 174.43 for an example of how a deferral will operate.

One respondent undertook an analysis of the time taken to finalise the external administrations that they had conducted. The analysis suggests that a greater percentage of external administrations will be finalised within 24 months after the commencement of the external administration than would be finalised within 12 months after the commencement of the external administration.

By extending the period to 24 months, the burden of having to re-apply for further individual deferral relief will be reduced. We also expect that external administrations that have not been completed within the first 24-month deferral period will have progressed considerably further than they would otherwise have progressed in a 12-month period—and that, as a consequence, the company's prospects will be able to be better understood at that time.

However, to balance the regulatory risk associated with extending our individual deferral relief period to 24 months, we may impose further conditions on our relief. For example, relief may cease automatically if the external administration ends during the 24-month period. We may also require the external administrator to notify us of any material changes in circumstances, such as the sale of significant assets.

This approach allows those who feel that they may be adversely affected by a further deferral an opportunity to take action to oppose a further deferral.

We do not consider the costs of applying for a further deferral likely to be unreasonably burdensome where the company's circumstances have not changed significantly since the previous application for deferral was made and its prospects are still being determined—and where they have the benefit of deferral relief for up to 24 months.

We have proceeded with our policy that a company must comply with any deferred financial reporting obligations in accordance with the Corporations Act before the deferral expires.

A company will have the benefit of our exemption relief under ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251 where a liquidator is appointed before deferral relief ends. A company will not be required to lodge deferred financial reports where the company ceases before the deferral period ends, for example, following completion of a DOCA and deregistration.

We have provided further guidance clarifying when our deferral relief will cease before the end of the deferral period. We have also provided guidance so that a company that has ceased being externally administered may apply for additional time to lodge 'catch-up reports'. We will consider this relief on a case-by-case basis if an application is made before a deferral expires.

We have clarified our guidance to make it clear that we may grant further individual deferral relief in relation to outstanding financial reports. The extent to which the outstanding financial reports would provide useful information to users of the reports will be a relevant factor in any decision we make on whether to grant individual deferral relief. We will consider this relief on a case-by-case basis if an application is made before a deferral expires. We will carefully consider if the outstanding financial reports may provide useful information to creditors and members for the reporting period prior to the external administration.

We have also clarified our guidance to make it clear that we may grant further individual deferral relief in relation to outstanding financial reports at the time when the company enters external administration. A relevant factor in our decision on whether to grant this deferral is the extent to which the outstanding financial reports would provide useful information to users of the reports. We will consider this relief on a case-by-case basis if an application is made before a deferral expires. We will carefully consider if the outstanding financial reports may provide useful information to creditors and members for the reporting period prior to the external administration

Controller appointments

32 Respondents generally agreed with our proposal that we should be able to grant consecutive deferrals of up to three months at a time where a controller

(not a managing controller) has been appointed to property of a company. Despite general agreement with the proposal, one respondent submitted that we should grant consecutive deferrals of up to six months at a time where a controller (not a managing controller) is appointed.

ASIC's response

We have amended our guidance to provide that we will generally grant individual deferral relief for three months and, in some cases, up to six months, where a controller is appointed (not a managing controller) to property of a company. We agree that there may be certain types of property or other circumstances which may justify deferral of up to six months.

Exemption relief from previously deferred financial reporting obligations

33 There was broad support for granting individual exemption relief from some or all of any previously deferred financial reporting obligations, where the deferral has been ongoing for a long period of time.

34 One respondent suggested that we should be less prescriptive with our policy on exemption relief for deferred financial reporting obligations where 'the deferral has been ongoing for a long period of time'. The respondent suggested that there may be other circumstances where preparing previously deferred financial reports may impose unreasonable burdens, for example, if the company had:

(a) been subject to a DOCA that had dramatically restructured the company; or

(b) sold the bulk of its previously consolidated subsidiaries during the external administration.

35 Another respondent submitted that we should grant this relief when members do not have an economic interest in the company. The respondent indicated that in their experience the factors that initially established the unreasonable burden of compliance did not generally improve over time. The respondent also indicated that they have had few (if any) inquiries from members after the initial appointment—and that this was indicative that members have little interest in financial reports.

36 Another respondent submitted that we should automatically grant exemption relief from previously deferred financial reporting obligations where the external administrator can demonstrate that the members do not have an ongoing economic interest at the time of cessation of the external administrator's appointment.

37 The respondent submitted that this would resolve the issue of directors or creditors not having taken action to wind up an insolvent company before the finalisation of a receivership.

> *ASIC's response*
>
> We have proceeded with our proposal to grant an exemption from some or all of the 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 financial reports from the commencement of the administration is disproportionate to the benefits.
>
> We have not extended the scope of our individual relief to provide an automatic exemption from previously deferred financial reporting obligations where the external administrator demonstrates that the members do not have an ongoing economic interest at the time of cessation of the external administrator's appointment. This is because there may still be utility in the financial reports for users of that information after a company has ceased to be externally administered. For example, there may be continuing business units or segments, and users of that information may not necessarily have been members before the external administration.
>
> We have provided further guidance to clarify what action directors may take where a receivership ends and a company has neither been wound up nor deregistered—and what relief may be available in those circumstances.

Relief from specific obligations

38 Respondents broadly supported our proposal to consider relief from specific obligations, rather than all of the financial reporting obligations, in certain circumstances.

39 One respondent submitted that there are some situations where it is appropriate to prepare and lodge financial reports, for example:

(a) when it is expected that the issued shares of a company will be sold rather than the assets; or

(b) when it is necessary to trade the business before sale and financial reports are required to be provided to interested parties.

40 The respondent submitted that in these situations it may not be possible to comply with some obligations.

41 Two other respondents submitted that there are situations where we should grant relief from specific obligations in Pt 2M.3, for example, for directors' reports.

ASIC's response

We have proceeded with our proposal to consider individual relief from specific obligations where compliance will impose unreasonable burdens.

Individual deferral relief for registered schemes being wound up

42 In CP 223 (Proposal C2), we proposed to update RG 174 to include guidance on when we will provide an individual deferral of the financial reporting obligations for registered schemes, where:

(a) the value of the net assets of the scheme, determined in accordance with Australian accounting standards, is unknown or is likely to be no more than $5,000 throughout the relevant financial year; and

(b) we have been formally notified of the commencement of the winding-up of the scheme.

43 While a number of respondents supported our proposal to provide individual deferral of the financial reporting obligations for registered schemes, one respondent submitted that our proposed criteria for deferral relief was unclear because we had proposed to use similar criteria for insolvent registered schemes in ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251. The respondent also submitted that where the solvency of a registered scheme is uncertain it is unlikely that a determination could be made and that the 'net assets' test is problematic.

44 Another respondent was concerned about the application of the $5,000 net assets test throughout the financial year because:

(a) the circumstances of a registered scheme could change significantly throughout a financial year;

(b) the scheme may not have sufficient books and records to determine the value of net assets at all times throughout the financial year; and

(c) the requirement for net assets to be determined in accordance with Australian accounting standards will be difficult because that information is usually only available at year-end.

45 Two respondents also submitted that we should grant individual exemption relief on the finalisation of the winding-up of the scheme where deferrals have previously been granted. The respondents also submitted that our guidance should cover circumstances where a receiver is appointed by the court to a registered scheme.

46 Two respondents submitted that a 12-month period is insufficient. One of these respondents also submitted that we should grant deferral for up to 24 months.

47 In CP 223, we also proposed that we would only consider a further deferral in rare and exceptional circumstances: see draft RG 174 attached to CP 223 at RG 174.99. Respondents queried what circumstances would be considered 'rare and exceptional'.

ASIC's response

Taking into account the submissions we received, we have not proceeded with the proposal to require a registered scheme to determine whether the value of net assets is likely to be no more than $5,000 throughout the relevant financial year.

We have amended our guidance to provide that we may grant individual deferral relief where:

- the responsible entity has lodged a notice in the approved form (Form 5138) notifying ASIC that the winding-up of the scheme has commenced; and
- in the reasonable opinion of the responsible entity or person appointed by the court, the scheme is likely to be insolvent.

Individual deferral relief is only intended to apply where it is likely that the scheme will be insolvent. We have adopted this approach because we recognise that in some cases the responsible entity or person appointed by the court will need additional time to progress the winding-up—and because our relief in ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251 for insolvent schemes will only apply where a scheme has been insolvent for at least 12 months. This approach will also allow the assets of the scheme to be preserved for the benefit of members and creditors during the period of deferral.

Individual deferral relief is available for scheme financial reporting obligations from the commencement of the winding-up of the scheme, subject to members being provided with information about the winding-up

To provide accountability to members, we will require the responsible entity or person appointed by the court to wind up the scheme to have adequate arrangements in place to answer reasonable questions asked by a member about the winding-up free of charge. In some cases, we will require the responsible entity or person appointed by the court to wind up the scheme to make important information about the progress of the winding-up available to members periodically and on completion of the winding-up. For example, we may require information to be periodically provided to members about actions taken and proposed to be taken in relation to the winding-up of the scheme, financial information about scheme receipts and payments and, in some cases, the value of scheme property and any potential return to members after payment of scheme debts.

Members of registered schemes being wound up do not have access under Ch 5C to the same sort of information that members and creditors of externally administered companies have under

Ch 5. We have adopted a deferral approach because we consider compliance with the financial reporting obligations imposes unreasonable burdens on a registered scheme when the scheme is being wound up and likely to be insolvent, or become insolvent, during a financial year. We consider that the responsible entity or other person appointed by the court to wind up the scheme is best placed to determine the likelihood of a scheme being insolvent at some point during the wind-up, if the scheme is not insolvent at the commencement of the winding-up.

We have clarified our guidance to make it clear that upon finalisation of the winding-up of an insolvent scheme, any deferred financial reporting obligations that have not been complied with will cease on deregistration of the scheme. We remain of the view that a solvent scheme being wound up should comply with its financial reporting obligations. This is because members of a solvent scheme continue to have an economic interest in the scheme and the outcome of the winding-up. They are also entitled to receive the information that they are expecting to receive in accordance with the financial reporting obligations and the scheme's constitution.

We have amended our guidance to grant deferral of all the financial reporting obligations for up to 24 months at a time. One respondent undertook an analysis of the time taken to finalise the external administrations that they had conducted. The analysis suggests that a greater percentage of external administrations will be finalised within 24 months after the commencement of the external administration than would be finalised within 12 months after the commencement of the external administration. The respondent considered 12 months insufficient for winding up a scheme.

By extending the period to 24 months, the burden of having to re-apply for relief during the period has been reduced. We also expect that winding ups which have not been completed within the first 24-month deferral period will have progressed considerably further than they would otherwise have progressed in a 12-month period—and that the status of the winding-up will be better understood at that time.

We will consider whether or not a further deferral should be granted having regard to the scheme's particular circumstances—and whether or not compliance would continue to impose unreasonable burdens. We consider it unlikely that the costs of applying for a deferral will be unreasonably burdensome if the scheme's circumstances have not changed significantly since the previous application for relief was made and its prospects are still being determined.

Our approach allows those that feel they may be adversely affected by a further deferral an opportunity to take action to oppose a further deferral. We have also removed the reference to 'rare and exceptional circumstances'. We have clarified that our approach does not prevent ASIC from granting a further deferral for previously deferred financial reporting obligations.

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

48 In CP 223 (Proposal C3), we proposed to update RG 174 to include 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.

49 Our proposed guidance also provided that a registered scheme that has been granted a deferral must comply with any deferred financial reporting obligations in accordance with the Corporations Act before the relief expires. Two respondents submitted that this guidance is too onerous and does not provide ASIC with discretion.

50 Our proposed guidance provided that, other than in exceptional circumstances, an individual deferral for a registered scheme will last no longer than 12 months. While the majority of respondents generally supported our proposal to provide individual deferral of the financial reporting obligations, two respondents submitted that a 12-month period is insufficient. One respondent suggested a deferral period of up to 24 months. Respondents also queried what sort of circumstances would be considered to be ‘exceptional’.

ASIC’s response

We have taken into account submissions about compliance with any deferred financial reporting obligations being too onerous. However, we consider that complete financial information about a scheme is useful after deferral comes to an end.

We have amended our guidance to grant individual deferral of all the financial reporting obligations for a registered scheme for up to 24 months at a time—where we are satisfied that compliance will impose unreasonable burdens—because some respondents were of the view that our proposed deferral of up to 12 months was too short.

One respondent undertook an analysis of the time taken to finalise the external administrations that they had conducted. The analysis suggests that a greater percentage of external administrations will be finalised within 24 months after the commencement of the external administration than would be finalised within 12 months after the commencement of the external administration.

By extending the period to 24 months, the burden of having to re-apply for relief during the period will be reduced. We also expect that external administrations that have not been completed within the first 24-month deferral period will have progressed considerably further than they would otherwise have progressed in a 12-month period—and that the status of the responsible entity will be better understood at that time.

We will consider whether or not a further deferral should be granted having regard to the scheme’s particular circumstances and

whether or not compliance would continue to impose unreasonable burdens. We do not consider the costs of applying for relief likely to be unreasonably burdensome where the scheme's circumstances have not changed significantly since the previous application for relief was made and its prospects are still being determined.

Our approach allows those that feel they may be adversely affected by a further deferral an opportunity to take action to oppose a further deferral.

We have also removed the reference to 'other than in exceptional circumstances' and clarified that this does not preclude ASIC from granting a further deferral in relation to previously deferred financial reporting obligations.

Relief from obtaining a compliance plan audit report

51 In CP 223 (Proposal C4), we proposed that where we have granted an individual deferral of the financial reporting obligations in Ch 2M for a registered scheme, we will generally not grant relief from the requirement in s601HG for a responsible entity to obtain a compliance plan audit report.

52 We also proposed that we would consider granting an individual exemption where:

(a) the responsible entity is in liquidation and does not hold an AFS licence;

(b) the value of net assets of the scheme (determined in accordance with Australian accounting standards) is unknown but, in the reasonable opinion of the responsible entity, is likely to be no more than $5,000 throughout the relevant financial year; and

(c) the responsible entity, or other person appointed by the court, has commenced winding up the scheme by lodging with ASIC a notice of commencement of winding up the scheme in the approved form (Form 5138).

53 We received mixed responses to this proposal. One respondent submitted that we should issue a new legislative instrument to grant relief from s601HG where the responsible entity is in liquidation and does not hold an AFS licence.

54 Another respondent submitted that the $5,000 net assets test is problematic and suggested that our guidance should be based on whether or not the registered scheme has been granted exemption relief under a legislative instrument or individual deferral relief, and the responsible entity is in external administration. The respondent also submitted that ASIC should have discretion to grant relief from s601HG where the responsible entity is in liquidation but the registered scheme is not yet being wound up—and further argued that compliance with s601HG is irrelevant in these circumstances.

55 One respondent submitted that there are likely to be difficulties in obtaining compliance plan audit reports—for example, because of reluctance on the part of an auditor or because a number of components may no longer be relevant.

ASIC's response

We have decided not to adopt the proposal to give individual exemption relief from s601HG where the responsible entity is in liquidation and does not hold an AFS licence. We consider that information about the responsible entity's compliance with the constitution and the Corporations Act in the period before insolvency is important for members and ASIC.

Taking into account submissions, we have granted individual exemption relief from s601HG in circumstances where the scheme rather than the responsible entity is being wound up. We have granted relief where:

- the responsible entity has lodged a notice in the approved form (Form 5138) notifying ASIC that the winding-up of the scheme has commenced; or
- the person appointed by the court to take responsibility for winding up the scheme has notified ASIC of their appointment, and the responsible entity or person appointed by the court to wind up the scheme has:
  - passed a scheme insolvency resolution to the effect that, for a period of at least 12 months, the scheme property has been insufficient to meet the debts of the responsible entity incurred in that capacity as and when they become due and payable; and
  - lodged a copy of the scheme insolvency resolution with ASIC.

We will not require a determination that the value of net assets of the scheme is unknown or is likely to be no more than $5,000 throughout the relevant financial year. However, to provide some accountability to members, we will require the responsible entity or person appointed by the court to wind up the scheme to have adequate arrangements in place to answer reasonable questions asked by members about the winding-up free of charge—and to make available to members information on the progress and status of the winding-up of the scheme, the receipts and payments during the period of the report and the value of any potential return to members.

We have also decided that where we have granted individual deferral from the financial reporting obligations in Pt 2M.3, we will generally defer compliance plan audit obligations for the same period. We consider compliance with the compliance plan audit obligations where we have granted individual deferral will impose a significant burden on the responsible entity or person appointed by the court to wind up the scheme.

Relief from AGM obligations for externally administered public companies

56 In CP 223 (Proposal C5), we proposed to update our guidance in RG 174 to clarify when we will:

(a) grant individual relief deferring the AGM obligations that apply to externally administered public companies; and

(b) exempt externally administered public companies from the AGM obligations.

57 All respondents were supportive of our proposal to clarify our guidance for both individual deferral and exemption relief from the AGM obligations for externally administered public companies.

58 However, one respondent suggested that ASIC provide an exemption from the AGM obligation on the finalisation of an external administration, where deferrals have been granted during the course of the external administration. The respondent submitted that this would address the situation where there has not been an application by a creditor to wind up a company and the directors of the company have not taken any action to place the company into liquidation. The respondent also commented that it is not the responsibility of a managing controller to meet the obligations of a company to hold an AGM and that these obligations sit with the directors.

ASIC's response

We do not generally propose to provide an exemption after relief deferring the holding of an AGM throughout a period of external administration has expired. However, we have provided an example in RG 174 of when we may grant an exemption from previously extended AGM obligations.

We have included guidance about the role of a controller in seeking AGM relief on behalf of a company—because a controller is not able to formally apply for AGM relief on behalf of a company. We have clarified what steps we consider a managing controller may take where a company has no directors or where directors are unable or unwilling to resolve to apply for AGM relief.

We have also clarified our guidance on no-action letters where a public company has ceased to be under external administration with outstanding AGM obligations from previous extensions. We have done this because we only have power to grant an exemption from the AGM obligations where a liquidator, voluntary administrator or deed administrator is appointed.

Appendix: List of non-confidential respondents

- Australian Restructuring and Insolvency and Turnaround Association (ARITA)
- Australian Shareholders' Association (ASA)
- KordaMentha
- KPMG
- Law Council of Australia
- Property Council of Australia