



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 115

# Audit relief for proprietary companies

August 2016

### About this guide

This guide is for certain proprietary companies and their auditors.

It explains:

- the relief that we give to proprietary companies under ASIC Corporations (Audit Relief) Instrument 2016/XX from the requirement to have a financial report audited under the *Corporations Act 2001* (Corporations Act); and
- the individual relief that we may give to proprietary companies on a case-by-case basis under s340 of the Corporations Act.

### 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.

### Document history

This draft guide was issued in August 2016 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 115, issued August 2010
- Superseded Policy Statement 115, issued September 1998, reissued November 1998, April 2000, October 2001, February 2002 and May 2003, rebadged as a regulatory guide 5 July 2007

### Disclaimer

This guide 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.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview

### Key points

Certain proprietary companies and their auditors are eligible for audit relief, under ASIC Corporations (Audit Relief) Instrument 2016/XX, from the requirement to have their financial reports audited.

This guide only concerns relief from the requirement for proprietary companies to have an audit. It does not deal with relief from the obligation to lodge a financial report and a directors' report with ASIC.

### Reporting requirements for proprietary companies

- RG 115.1 A large proprietary company or a small proprietary company that is controlled by a foreign company must prepare and lodge with ASIC a financial report, a directors' report and an auditor's report within four months after the end of the company's financial year: s319(3)(b) of the *Corporations Act 2001* (Corporations Act). The financial report, directors' report and auditor's report must also be given to shareholders within these four months: s315(4).
- RG 115.2 The auditor must form an opinion in relation to the company's financial report for the financial year as well as the company's accounting records and other records relating to that financial report: s307. The auditor must also report to members in accordance with s308.
- RG 115.3 The distinction between large and small proprietary companies is based on consolidated revenue, consolidated assets and the number of employees: see s45A(2) and (3).

### Relief from the reporting requirements

#### Our approach to relief

- RG 115.4 We can grant relief from all or some of the requirements of Pt 2M.2 'Financial records', Pt 2M.3 'Financial reporting' or Pt 2M.4 'Appointment and removal of auditors' (other than Div 4) to:
- (a) a company, registered scheme or disclosing entity;
  - (b) its directors; and/or
  - (c) its auditor.

- RG 115.5 We can only grant relief if we are satisfied that the applying entity meets at least one of three statutory preconditions in s342(1) for relief—that is, that requiring the entity to comply with the Corporations Act would:
- (a) render the financial report or other reports misleading (s342(1)(a));
  - (b) be inappropriate in the circumstances (s342(1)(b)); or
  - (c) impose unreasonable burdens (s342(1)(c)).

- RG 115.6 This guide only deals with our policy for giving audit relief when compliance with the requirements of Ch 2M of the Corporations Act (audit requirements) imposes an unreasonable burden. Usually, we will only be satisfied that the audit requirements impose an unreasonable burden when the directors and shareholders of a company have agreed to dispense with an audit, and the company is well managed and in a sound financial condition: see Section B.

Note: This guide does not deal with relief from the financial reporting and audit requirements of the Corporations Act other than audit relief for proprietary companies. For guidance on relief from other financial reporting requirements of the Corporations Act, see [Regulatory Guide 43](#) *Financial reports and audit relief* (RG 43).

### ASIC audit relief

- RG 115.7 ASIC Corporations (Audit Relief) Instrument 2016/XX relieves certain proprietary companies from the obligation to:
- (a) have the company’s financial report audited (s301(1));
  - (b) provide an auditor’s report to shareholders (s314(1)(a)(iii) and 316(2)); and
  - (c) provide a statement by the auditor in relation to any concise financial report (s314(2)(c)).
- RG 115.8 The instrument also exempts the auditor of the company (if any) from the obligation to report on any discussion and analysis included in a concise financial report: s314(3).
- RG 115.9 The instrument does not relieve the company from the requirement to lodge its financial report with ASIC in accordance with s319(1) and (3)(b).
- RG 115.10 For a company to be eligible for relief under ASIC Corporations (Audit Relief) Instrument 2016/XX, the following conditions must be met:
- (a) the company’s directors and shareholders must have passed unanimous resolutions dispensing with an audit and, where applicable, notice of these resolutions must have been lodged with ASIC during the first year of reliance or following a year of non-reliance;

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- (b) the company must be well managed—having, at least, a system of quarterly management accounting in place—and must be in a sound financial condition;
- (c) the company’s financial reports must be prepared by a prescribed accountant;
- (d) the company’s financial reports and directors’ reports must be lodged on time; and
- (e) there must be no proposed modified auditor’s report or material disagreement with any auditor.

RG 115.11 Section C explains the conditions of our relief.

### Who our relief applies to

RG 115.12 ASIC Corporations (Audit Relief) Instrument 2016/XX gives relief from the audit requirements to proprietary companies that have not had their financial report audited for any financial year ending during 1993 or since, and are not:

- (a) ‘grandfathered’ large proprietary companies under s319(4) of the old Corporations Law (as taken to be included in the Corporations Act by s1408(2) of that Act);
- (b) disclosing entities (s111AC);
- (c) borrowers in relation to a debenture (s9);
- (d) the guarantors of such borrowers (s9); or
- (e) Australian financial services (AFS) licensees (s9).

RG 115.13 A proprietary company and its auditor will qualify for the relief set out in the instrument if it is not one of the companies described in RG 115.12(a)-(e), has not had its financial report audited for any financial year ending during 1993 or since, and if all of the conditions of relief are satisfied.

### Individual relief

RG 115.14 A company that does not meet all of the conditions of the instrument can apply to ASIC for individual audit relief. We may grant individual audit relief to companies that do not meet these requirements but that meet our policy in some other way: see Section D. It is unlikely that audit relief will be given unless the company applying for the relief generally meets the conditions of relief.

## B Our approach to audit relief

### Key points

This guide only deals with our policy for giving audit relief when compliance with the audit requirements imposes an unreasonable burden.

Usually, we will only be satisfied that the audit requirements impose an unreasonable burden when the directors and shareholders of a company have agreed to dispense with an audit, and the company is well managed and in a sound financial condition.

We may grant individual audit relief to companies that do not meet these requirements, but that meet our policy in some other way: see Section D.

### Compliance with the audit requirements imposes an ‘unreasonable burden’

RG 115.15 Before we give audit relief, we must be satisfied that compliance with the audit requirements would:

- (a) be misleading;
- (b) be inappropriate to the circumstances of the company; or
- (c) impose on the company, its officers or the auditor (if any) of the company, an unreasonable burden (s342(1)).

This guide sets out our policy on the unreasonable burden criterion.

RG 115.16 The objective of an audit of a financial report is to enable an auditor to express an opinion as to whether the financial report is prepared, in all material respects, according to an identified financial reporting framework: see Auditing Standard ASA 202 *Overall objectives of the independent auditor and the conduct of an audit in accordance with Australian auditing standards* (ASA 202).

RG 115.17 The people most likely to benefit from an audit include, but are not limited to, shareholders, directors, creditors and potential creditors. For these people an audit enhances the credibility and reliability of a company’s financial report.

RG 115.18 Compliance with the audit requirements imposes a burden on the company, its officers and its auditors. Depending on the expected costs and benefits that an audit provides, the burden may be unreasonable.

RG 115.19 For this purpose, a burden is unreasonable if it goes beyond what is based on reason or good sense and goes beyond what is equitable, or is excessive: see

*Mazda Australia Pty Ltd v ASC* (1992) 8 ACSR 613 and the discussion in RG 43.

## The matters we consider when determining ‘unreasonable burden’

- RG 115.20 The matters we consider when deciding whether the audit requirements impose an unreasonable burden on a proprietary company are set out in s342(2) and (3). These matters are:
- (a) the expected costs of complying with the audit requirements (s342(2)(a));
  - (b) the expected benefits of complying with the audit requirements (s342(2)(b))—taking into account:
    - (i) the number of creditors and potential creditors (s342(3)(a));
    - (ii) the position of creditors and potential creditors (in particular, their ability to independently obtain financial information about the company or companies) (s342(3)(b)); and
    - (iii) the nature and extent of the liabilities of the company or companies (s342(3)(c));
  - (c) any practical difficulties in complying effectively with these requirements (in particular, any difficulties that arise because a financial year is the first one for which the audit requirements apply or because the company or companies are likely to move frequently between the small and large categories from one financial year to another) (s342(2)(c));
  - (d) any unusual aspects of the operation of the company or companies during the financial year concerned (s342(2)(d)); and
  - (e) any other matters we consider relevant (s342(2)(e)).

### Expected costs of compliance: s342(2)(a)

RG 115.21 The expected costs of complying with the audit requirements are an unreasonable burden if these costs are out of all proportion to the expected benefits resulting from an audit. The legislative policy is that, in general, for large proprietary companies the expected costs of an audit are worth incurring for the expected benefits that it brings.

RG 115.22 This guide is principally about cases where the expected costs are out of all proportion to the expected benefits because the benefits are expected to be minimal. The additional costs and administrative burden of complying with the audit requirements do not alone give rise to unreasonable burdens.

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- RG 115.23 The fact that a company has had its financial report for a previous year audited may indicate that there are in existence persons already using the auditor's report, that the costs of compliance are not excessive, or both. Directors of a company who apply for audit relief should deal with these matters in an application for individual relief in addition to the requirements set out in Section C.

### **Expected benefits of compliance: s342(2)(b)**

- RG 115.24 When assessing the expected benefits of complying with the audit requirements, we will consider the position of people most likely to benefit from an audit. These include the company's shareholders, creditors and potential creditors.
- RG 115.25 When considering the position of these people, our objective is to minimise the potential for these people to be disadvantaged by audit relief. To achieve this objective, we will not generally give audit relief unless:
- (a) the shareholders and directors of the company agree that an audit of the company's financial report is not required (see RG 115.26–RG 115.27); and
  - (b) we are satisfied that the company is well managed and in a sound financial condition, in respects most directly relevant to the interests of creditors (see RG 115.28–RG 115.29).

### **Directors and shareholders agree to dispense with an audit**

- RG 115.26 Directors and shareholders of a company can make informed decisions as to whether or not it is in the interests of shareholders and other users of the financial report to dispense with the audit. We will, in general, require the unanimous agreement of directors and shareholders because any shareholder may be disadvantaged if an audit is dispensed with. Similarly, we will, in general, require the unanimous agreement of directors who should have regard to the information and assurance needs of the company's shareholders, creditors, potential creditors and other users of the financial report.
- RG 115.27 Obtaining unanimous agreement may only be practicable in circumstances when, for example, the number of shareholders and directors is small or when both groups have a fairly direct involvement with the company. However, it is outside these circumstances that the additional assurance provided by an audit may be most needed.

### **The interests of creditors**

- RG 115.28 We must also consider the interests of creditors and potential creditors: s342(3). In general, it will not be practicable to obtain the consent of a company's existing and prospective creditors to dispense with an audit.
- RG 115.29 In order that creditors and potential creditors are not disadvantaged if an audit is dispensed with, we will only give audit relief to companies which we are satisfied will be well managed and in sound financial condition, in respects most directly relevant to the interests of creditors. These requirements are not a direct substitute for an audit. However, those companies that meet them are the ones most able to give creditors and potential creditors the type and quality of financial information otherwise required by the financial reporting framework.

### **Practical difficulties: s342(2)(c)**

- RG 115.30 Practical difficulties in complying effectively with the audit requirements may arise in the first year for which an audit is required. This is because a proprietary company may not be able to determine that it will be 'large' until late in its financial year: see s45A. This prevents the timely appointment of an auditor. An appointment late in a financial year, or even after the financial year end, may cause practical difficulties because this may not give an auditor enough time to properly plan and carry out the audit. This may result in additional costs and the auditor's opinion being qualified.
- RG 115.31 We will not give audit relief simply because of the late appointment of the auditor, unless the expected additional costs arising from the late appointment of an auditor, or the expected diminished benefits arising from any resulting audit qualifications, make the burden of the audit requirements unreasonable. To the extent that the increase in burden is a result of unnecessary delay in the appointment of the auditor by the company, we will not take this increased burden into account when considering giving relief.

### **Unusual aspects: s342(2)(d)**

- RG 115.32 Audit relief may also be appropriate when a proprietary company that is usually 'small' (and is not controlled by a foreign company) becomes 'large' because of an unusual aspect in its operations during the relevant financial year. This may occur, for example, when a company disposes of a major asset and as a result becomes a large proprietary company for a year by reaching \$25 million consolidated gross operating revenue, and is not expected to be large for future financial years. In that situation, we might consider individual relief.

RG 115.33 We will consider giving audit relief when the circumstances that result in the proprietary company being classified as 'large' can reasonably be regarded as 'one off' or unlikely to recur or unusual.

RG 115.34 We will not generally give audit relief to a company that is expected to be a large proprietary company on a regularly recurring basis, even though it may be classified as a small proprietary company in other years.

**Other matters: s342(2)(e)**

RG 115.35 We will also consider any other matters that do not fall within any of the matters described in RG 115.20–RG 115.34 if they are relevant to giving audit relief.

## C ASIC audit relief

### Key points

For a company to be eligible for relief under ASIC Corporations (Audit Relief) Instrument 2016/XX, the following conditions must be met:

- the company's directors and shareholders must have passed unanimous resolutions dispensing with an audit and, where applicable, notice of these resolutions must have been lodged with ASIC;
- the company must be well managed—having, at least, a system of quarterly management accounting in place—and must be in a sound financial condition;
- the company's financial reports must be prepared by a prescribed accountant;
- the company's financial reports and directors' reports must be lodged on time; and
- there must be no proposed modified auditor's report or material disagreement with any auditor.

A company that does not meet all the conditions of the instrument can apply to ASIC for individual audit relief: see Section D.

### Relief from the reporting requirements

RG 115.36 ASIC Corporations (Audit Relief) Instrument 2016/XX relieves certain proprietary companies from the obligation to:

- (a) have the company's financial report audited (s301(1));
- (b) provide an auditor's report to shareholders (s314(1)(a)(iii) and 316(2)); and
- (c) provide a statement by the auditor in relation to any concise financial report (s314(2)(c)).

### Resolutions that an audit is not required

RG 115.37 To be eligible for relief:

- (a) the company's directors and shareholders must have passed unanimous resolutions dispensing with an audit; and
- (b) where applicable, notice of these resolutions must have been lodged with ASIC during the first year of reliance or following a year of non-reliance.

## Unanimous resolutions

- RG 115.38 Relief will be given only when the directors and shareholders (whether holding voting or non-voting shares) unanimously resolve that the company's financial report should not be audited for each financial year to which the relief applies. These resolutions must be made within the period commencing three months before the start of the financial year and ending four months after the end of the financial year.
- RG 115.39 It may sometimes be practically difficult to obtain the unanimous resolutions of shareholders and directors. Such difficulties may arise when, for example, directors or shareholders cannot be contacted for a prolonged period.
- RG 115.40 We will consider giving individual relief to dispense with this requirement where there is clear and documented evidence that:
- (a) reasonable attempts have been made to obtain the unanimous agreement of directors and shareholders;
  - (b) all remaining directors and shareholders agree to dispense with the audit; and
  - (c) those who have not been contacted represent a small minority of voting rights.
- RG 115.41 The agreement of directors and the agreement of shareholders are to be given by way of separate resolutions. The resolution of shareholders can be passed at a general meeting or by circulating the resolution for signing.
- RG 115.42 When the resolution of shareholders is sought at a general meeting, the shareholders must receive a notice of meeting. In the notice of meeting the directors must state whether, in their opinion, the expected costs of having the financial statements of the company audited outweigh the expected benefits of the audit. The reasons for the directors' opinion must also be included. When the resolution of shareholders is sought by way of a circulating resolution, this circulating resolution must be accompanied by the same information required for the notice of meeting.

## Lodgement of notice of resolutions with ASIC

- RG 115.43 A notice of the resolutions must be lodged with us, using [Form 382 Notification of resolutions for audit relief: Proprietary companies](#), after the resolutions of directors and shareholders are obtained for:
- (a) the first financial year relief under the instrument is to be applied; or
  - (b) the first financial year relief is to be applied following a financial year in which it did not apply (if any).

The notice must be lodged during the period commencing three months before the start and ending four months after the end of the first financial year in which relief is to be applied or reapplied.

- RG 115.44 If a company ceases to rely on our relief under ASIC Corporations (Audit Relief) Instrument 2016/XX, after having previously lodged a Form 382, a notice of cessation of relief should be lodged with us, using [Form 396 Notice of cessation of reliance on ASIC Corporations \(Audit Relief\) Instrument 2016/XX](#). The notice should be lodged during the period commencing three months before the start and ending four months after the end of the first financial year in which relief will cease to apply. A company that does not lodge Form 396 will not be able to reapply the relief for a future financial year.

### **Failure to make resolutions or lodge notice on time**

- RG 115.45 We are of the view that we cannot grant extensions of time to lodge Form 382 or to pass the annual resolutions of directors and shareholders referred to in RG 115.38. If a company fails to lodge Form 382 on time for the first financial year that it intends to apply or reapply relief under the instrument, or fails to obtain the resolutions of directors and shareholders for each financial year relief is intended to be applied, the company will not be able to apply the relief for the financial year in question.
- RG 115.46 As a result, the company will have a continuing obligation under the Corporations Act to prepare and lodge, and therefore should prepare and lodge, an audited financial report for the financial year in question. Further, once a company has lodged an audited financial report, it will be unable to rely on the relief for a subsequent financial year because of the condition at paragraph 6(d) of the instrument.
- RG 115.47 We will be very unlikely to grant individual relief to take away the continuing obligation to lodge an audited financial report. This is because, in such circumstances, we think the criteria in [Regulatory Guide 51 Applications for relief](#) (RG 51) are very unlikely to be met. We would also be concerned about the effect of such relief on the rights of third parties. We will also be unlikely to grant a formal no-action letter in circumstances where the outstanding audited financial report has not been lodged, because the criteria in [Regulatory Guide 108 No-action letters](#) (RG 108) are unlikely to be met.

Note: See [RG 51.67–RG 51.75](#) and [RG 108.29–RG 108.30](#) for further details.

### **Purpose of the condition**

- RG 115.48 The Corporations Act requires all proprietary companies that are required to prepare financial statements under Ch 2M to have those financial statements

audited. Audit relief is a privilege rather than a right. The requirements for relief under ASIC Corporations (Audit Relief) Instrument 2016/XX were developed as part of an extensive consultation process with creditor groups, companies, accountants and others. We will carefully consider the impact of any requested relief on these parties where these conditions are not met. It would be inappropriate to penalise creditors or others who deal with the company for a failure by the company.

- RG 115.49 The conditions in the instrument were each developed to meet specific objectives and the conditions are not interchangeable. It is not sufficient for the company to meet all but one of the conditions of the instrument to obtain relief. For example, the fact that a company meets the financial requirements for relief does not mean that the notice that the shareholders and directors have resolved to take advantage of audit relief (using Form 382) can be lodged late. Timely lodgement of the notice is intended to provide information to creditors and others who access the public records.
- RG 115.50 Many companies engage accountants, lawyers or other advisers to prepare draft resolutions and forms. In some cases, these advisers may fail to prepare draft resolutions or forms, or to lodge forms, within the times required by the instrument. The fact that a company has chosen to outsource certain functions rather than those functions being performed by the directors or an employee does not absolve the company of its responsibilities.
- RG 115.51 Timely completion of the resolutions and the evidencing of those resolutions by the lodgement of Form 382 serve other objectives, such as ensuring that shareholders and directors are not pressured to agree to audit relief at a point in the financial year when it is no longer possible to obtain an unqualified audit opinion. Where the obligations are not completed on time, this may cast doubt as to whether the company is well managed and is meeting the other requirements for audit relief on time (e.g. the requirements for quarterly management accounts).
- RG 115.52 Lodging a Form 382 or Form 396, and the processing of that form on the ASIC database, does not indicate that we have given any form of approval, nor does it alone enable a company to take advantage of relief under ASIC Corporations (Audit Relief) Instrument 2016/XX. A company will only have the benefit of relief if it meets all the conditions of the instrument.

### **Notice on the company to require an audit**

- RG 115.53 Even after the directors and shareholders have resolved to dispense with an audit, any director and any shareholder can, in certain circumstances, require the company's financial report to be audited. Similarly, holders of certain types of subordinated debt who have agreed that an audit is not required may request an audit.

- RG 115.54 This request can be made by any director at any time up until the date the directors' declaration is signed for the relevant year-end financial report. Any shareholder, or a group of shareholders, who individually or together control at least 5% of the voting rights can also make this request, at any time until one month before the end of the relevant financial year, or within such other time as approved, in writing, by an ASIC officer. The percentage of votes required by a shareholder or shareholders requesting the audit is calculated as at the close of business on the day before the notice is served on the company. The request must be in the form of a written notice served on the company: see s220 and 109Y.

## A well-managed company in a sound financial condition

- RG 115.55 Audit relief under ASIC Corporations (Audit Relief) Instrument 2016/XX will only be available to those proprietary companies that are well managed and in a sound financial condition. Paragraphs 6(k)–(q) of the instrument set out the requirements and procedures to be applied by a company in this regard.

### The company must be well managed

- RG 115.56 Directors must have appropriate internal management systems and procedures that allow them to assess the financial condition and the solvency of the company. The nature of these systems and the frequency of these procedures must be adequate for this purpose and appropriate to the company's business and financial circumstances.
- RG 115.57 As a minimum, however, the assessment by directors must include a quarterly assessment of a profit and loss statement, balance sheet and cash flow statement of the company prepared for management purposes. This assessment should not be taken to define or limit in any way the directors' duty to prevent the company from trading while insolvent under s588G.
- RG 115.58 When making this resolution, the directors must take into account material information (if any) about the company's affairs that has become available since the end of the quarter and/or financial year.
- RG 115.59 A copy of the management accounts used to make this resolution and a copy of the resolution itself must be given to a shareholder of the company or a person who is owed approved subordinated debt, if a request for these documents is received in writing.
- RG 115.60 The management accounts required by paragraph 6(k) of ASIC Corporations (Audit Relief) Instrument 2016/XX are not statutory accounts and the instrument does not require that they be prepared in compliance with the disclosure requirements of accounting standards. The onus is on directors to



satisfy themselves that management accounts prepared under paragraph 6(k) enable them to resolve that the company has satisfied the criteria in paragraphs 6(l)–(n) of the instrument.

### **The company must be in a sound financial condition**

- RG 115.61 To rely on ASIC Corporations (Audit Relief) Instrument 2016/XX, a company must:
- (a) have total liabilities not exceeding 70% of its total assets, excluding intangible assets (this ratio must be satisfied at the end of each quarter during the relevant financial year, at the end of the relevant financial year and at the time the resolution is made);
  - (b) make a profit after related income tax expense for either the relevant financial year or the immediately preceding financial year; and
  - (c) be able to pay all its debts as and when they become due and payable each quarter during the relevant financial year.

#### **Exclusion of intangible assets**

- RG 115.62 Intangible assets are excluded in the ratio in RG 115.61(a) because we will generally only give relief to companies that maintain a surplus of the type of assets that:
- (a) are less subjective in nature;
  - (b) can be recognised and traded separately;
  - (c) can be reliably measured; and
  - (d) can be realised quickly to enable timely payment of creditors.

- RG 115.63 If a company fails to meet the ratio in RG 115.61(a) but there are compensating factors, such as the existence of deeds of cross-guarantee with a financially sound holding entity (i.e. such that the combined ratio of liabilities to tangible assets of the companies is less than 70%), we may consider giving individual relief. Relief will only be given in very limited circumstances.

#### **Consolidated basis**

- RG 115.64 The financial conditions in RG 115.61(a)–RG 115.61(b) must be met on a consolidated basis for the company and its controlled entities where the company prepares consolidated financial information. At year end, at the date the directors' declaration is signed, the conditions must also be met on a consolidated basis for the company and its wholly owned entities where the companies are parties to deeds of cross-guarantee for the purposes of ASIC Corporations (Wholly-owned Companies) Instrument 2016/XX.

**Accounting standards**

RG 115.65 For the purposes of the financial conditions in RG 115.61 and RG 115.64, liabilities and assets must be determined in accordance with accounting standards (whether or not they are otherwise applicable to the company or its controlled entities), subject to any adjustments in relation to subordinated debt outlined in RG 115.66. In particular, companies should refer to the requirements of Accounting Standard AASB 132 *Financial instruments: Presentation* (AASB 132) for the classification of items such as redeemable preference shares as liabilities or equity.

**Inclusion of subordinated debt**

RG 115.66 For the purposes of the financial conditions in RG 115.61 and RG 115.64, subordinated debt must be included as a liability unless:

- (a) the subordination agreement is substantially in the form specified in Pro Forma 183 *Deed of subordination* (PF 183);
- (b) the subordination agreement has been executed and lodged with us before the commencement of the financial year and has been approved by us in writing; and
- (c) the debt is not provided by a controlled entity of the company and is not funded directly or indirectly by the company or one of its controlled entities.

RG 115.67 The condition that the subordinated debt is not funded directly or indirectly by the company or one of its controlled entities has broad application and, for example, applies:

- (a) even if the funding was already in place when the subordinated debt was provided to the company;
- (b) even if the funding has not been specifically designated as relating to the subordinated debt;
- (c) irrespective of the form of the funding (i.e. the funding may have been provided by way of equity, loans, a combination of equity and loans, trade payables, or by any other means); and
- (d) even if the funding is made to a third party that provides funding to a subordinated debt holder.

RG 115.68 A subordination agreement will not be approved by ASIC unless:

- (a) it is substantially in the form specified in PF 183. This pro forma requires ASIC to be a party to the agreement and prevents the company from repaying the debt without ASIC's prior written consent; and
- (b) before the commencement of the relevant financial year, three copies of the agreement have been provided to the ASIC office in the state or territory in which the company's registered office is located. All copies

must have already been executed by the company (under seal) and the relevant subordinated debt holder (under seal if it is a company) before they are lodged with ASIC.

- RG 115.69 If the agreement is acceptable to ASIC, we will execute the agreement and return two copies to the company. If a subordination agreement does not meet our requirements and is rejected, there may be insufficient time for the deed to be redrafted and re-executed before the commencement of the financial year. In these circumstances, relief will not be available to the company. Accordingly, companies are advised to lodge agreements with ASIC well before the commencement of the financial year.
- RG 115.70 If a subordination agreement is received by ASIC close to commencement of the financial year and is not approved by ASIC, it may not be possible for the company to provide an amended agreement before the commencement of the financial year. In such circumstances, the debt must be included as a liability for the purposes of the financial conditions of the instrument.

### **Profitability**

- RG 115.71 If a company makes a loss after tax for two years in a row, it must have an audit in the second year. The company must have made a profit after tax for either the financial year for which the company will rely on the instrument or the financial year immediately preceding that financial year.
- RG 115.72 For example, if a company intends to rely on the instrument for the 2016–17 financial year, but has made a loss after tax for the 2015–16 financial year, the directors should have a reasonable basis for believing that the company will make a profit after tax for the year that relief is sought. If a loss after tax is also made for the 2016–17 financial year, the company will not qualify for relief under the instrument and must have its financial report audited for that year.
- RG 115.73 If a company is required to prepare consolidated financial statements at year end under the Corporations Act or for the purposes of an ASIC instrument (e.g. as the holding entity in a closed group for the purposes of ASIC Corporations (Wholly-owned Companies) Instrument 2016/XX), this test must also be satisfied on a consolidated basis for the same financial year. If the company is a party to a deed of cross-guarantee for the purposes of relief for its wholly owned companies under ASIC Corporations (Wholly-owned Companies) Instrument 2016/XX it must also satisfy the test on a consolidated basis for the closed group (as defined in ASIC Corporations (Wholly-owned Companies) Instrument 2016/XX) and for the parties to the deed.
- RG 115.74 The compilation report (see RG 115.78) must be distributed to members with the financial report of the company and lodged with ASIC with the financial report.

**Unqualified solvency statement**

- RG 115.75 The ability of the company to pay its debts as and when they fall due should also be evidenced by the directors making an unqualified solvency statement in the directors' declaration (lodged with ASIC as part of the company's financial report).
- RG 115.76 A statement is not an unqualified solvency statement if the solvency of the company is expressed to be dependent on the financial support of a third party or is otherwise conditional or subject to provisos. For example, a statement that states that a company will be able to pay its debts as and when they become due and payable subject to the continuing financial support of the company's bankers or other entities is not an unqualified solvency statement.

**Other requirements**

- RG 115.77 Companies that take the benefit of this audit relief must also comply with paragraphs 6(t)–(v) and paragraph 7(3) of the instrument. These paragraphs deal with lodgements of reports, disclosure that the financial report has not been audited, proposed modifications to the auditor's report and making copies of the management accounts available to shareholders or subordinated debt providers.

**Financial report compiled by a prescribed accountant**

- RG 115.78 In order that professional competence and due care are used in compiling the year-end financial report, it must be:
- (a) compiled by a prescribed accountant (see RG 115.79 and the definition in section 4 of ASIC Corporations (Audit Relief) Instrument 2016/XX); and
  - (b) compiled in accordance with the Accounting Professional and Ethical Standard APES 315 *Compilation of financial information* (APES 315) (or some corresponding compilation rules or guidelines approved by ASIC).
- RG 115.79 A prescribed accountant is:
- (a) a member of CPA Australia (CPAA), who is entitled to use the post-nominals CPA or FCPA, and is subject to and reasonably believes that they comply with the CPAA's continuing professional development requirements; or
  - (b) a member of Chartered Accountants Australia and New Zealand (CA ANZ), who is entitled to use the post-nominals CA, ACA or

FACA, and is subject to and reasonably believes that they comply with CA ANZ's continuing professional education requirements; or

- (c) a member of the Institute of Public Accountants (IPA), who is entitled to use the post-nominals AIPA, MIPA or FIPA, and is subject to and reasonably believes that they comply with the IPA's continuing professional education requirements; or
- (d) another accountant approved by us for the purpose of compiling financial reports under this guide and who reasonably believes they comply with such requirements as may be specified by us.

A prescribed accountant may be an employee of the company. APES 315 also applies to employees engaged in compiling financial reports for their employers.

RG 115.80 When considering an application for another accountant to be approved under RG 115.79, we will consider all relevant matters, including:

- (a) the rules of ethical conduct of any relevant professional body;
- (b) the disciplinary procedures of that body with respect to its members;
- (c) the academic qualifications required to become a member of that body;
- (d) the type and amount of experience required to become a member of that body;
- (e) the continuing professional development/education requirements applied by that body to its members; and
- (f) whether members of that body are required to comply with APES 315 (or some equivalent rules or guidelines approved by us).

## Timely lodgement of financial report and directors' report

RG 115.81 Relief from the audit requirements is only available if a company lodges its financial report and directors' report for the relevant financial year and the immediately preceding financial year within the deadlines in the Corporations Act or within such additional time as is approved in writing by an ASIC officer. We regard timely lodgement of the company's unaudited financial report and its directors' report as an essential requirement for audit relief. Failure to lodge the financial report on time will mean that the company cannot rely on this relief in a subsequent financial year.

RG 115.82 If the company takes advantage of audit relief, its directors must state in the directors' report for the relevant financial year that they have:

- (a) relied on audit relief given by us; and
- (b) complied with all the requirements of this relief.

## No proposed modified auditor's report or material disagreement

- RG 115.83 To mitigate any risk directors and shareholders of a company might be pressured to take advantage of relief because a modified audit opinion is expected, relief from the audit requirements is only available if there:
- (a) is no proposed modified auditor's report; and
  - (b) there are no disagreements or unresolved issues with any auditor over accounting treatments or amounts in the company's financial report for the relevant financial year.

## Applying for an extension of time

- RG 115.84 Extensions of time may be approved in writing by an ASIC officer: see paragraphs 6(g), 6(k)–(l) and 7(3) of ASIC Corporations (Audit Relief) Instrument 2016/XX.
- RG 115.85 An applications for an extension of time must:
- (a) be made to the ASIC office in the state or territory in which the company's registered office is located, or by email to [applications@asic.gov.au](mailto:applications@asic.gov.au);
  - (b) confirm that the company and its directors have complied with all of the other conditions of ASIC Corporations (Audit Relief) Instrument 2016/XX within the required time; and
  - (c) be made in writing and be signed by a director or by the company secretary.

## D Individual relief

### Key points

A proprietary company that is not eligible for relief under ASIC Corporations (Audit Relief) Instrument 2016/XX may apply for individual relief in certain circumstances.

### Applying for individual relief

RG 115.86 A proprietary company that is not eligible for relief under ASIC Corporations (Audit Relief) Instrument 2016/XX may apply for individual relief with supporting documentation covering the matters set out in this guide. Applications should be made in writing in accordance with a resolution of directors and a statement of the reasons for seeking relief (see s340) and accompanied by ASIC's prescribed fee.

Note: A proprietary company may also propose further relief if there are a number of companies in a similar position.

RG 115.87 The requirements of ASIC Corporations (Audit Relief) Instrument 2016/XX indicate when relief may be given to a proprietary company. Any individual exemptions will generally contain most of the requirements set out in the instrument. When companies do not comply with the requirements of the instrument but meet our policy as set out in this guide in some other way, relief may be given on the basis of analogous requirements. Companies should state in their applications for individual relief the requirements of the instrument that they do not satisfy and the proposed analogous requirements.

RG 115.88 When making an application for individual relief, an applicant should ensure that there will be sufficient time for us to consider the application and serve notice of any order on the company before the s319(3) lodgement deadline for the financial year has expired. Section 340 applications should normally be lodged no later than one month before the end of the financial year for which the relief is being sought. Additional time should be allowed for applications that are novel or outside the scope of existing policy.

RG 115.89 In assessing applications, we may request additional information from the company. A company that does not comply with the requirements of the instrument (including paragraphs 6(e)–(f) and 6(k)–(n) of the instrument) pending a response from ASIC will not be eligible for relief even if we grant the application.

RG 115.90 In granting individual relief, we may impose conditions. For example, a company may have been unable to obtain relief under the instrument because

the required resolutions of shareholders and directors were not passed on time or the company did not lodge notification of those resolutions on time. We could require such a company to submit copies of management accounts for two quarters within one month of the end of the quarters to which they relate.

## Companies that had an audit during 1993 or a later year

- RG 115.91 Subject to the exemption provided in paragraph 6(d) of the instrument for certain small proprietary companies, relief under the instrument is only available to companies that have not had an audit in 1993 or a later year. This may include companies that have been registered or incorporated since 1993 and that have not had an audit since registration or incorporation.
- RG 115.92 A company that has been audited during 1993 or a later year may apply to ASIC for individual relief in relation to that year. An application to ASIC for such relief must have regard to [RG 43](#) and [RG 51](#) and must:
- (a) be signed by a director of the company;
  - (b) state that it is made in accordance with the authorisation of directors;
  - (c) be received by the ASIC office in the state or territory in which the company's registered office is located before the commencement of the financial year;
  - (d) confirm that the directors reasonably expect that all of the requirements of the instrument will be complied with for the financial year;
  - (e) state the reasons why the company did not obtain relief under the instrument (or a corresponding previous instrument or class order), where applicable;
  - (f) if the company had not met a requirement of the instrument (or a corresponding previous instrument or class order) in a previous year, state the reasons why it did not previously meet the requirement but is now expected to meet that requirement;
  - (g) state the reasons why the company believes that an audit would impose unreasonable burdens, having regard to s342;
  - (h) where applicable, explain why changes in the company's circumstances mean that an audit will impose unreasonable burdens in the financial year but did not impose unreasonable burdens in the year an audit was conducted;
  - (i) detail any other matters that the applicant believes may be relevant to our assessment of the application; and
  - (j) be accompanied by the prescribed fee.



## Key terms

Term	Meaning in this document
AASB	Australian Accounting Standards Board
accounting standards	Standards issued by the AASB under s334 of the Corporations Act
AFS licensee	A person who holds an Australian financial services (AFS) licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
APES	Accounting Professional and Ethical Standard
ASA	Auditing Standard
ASIC	Australian Securities and Investments Commission
ASIC officer	Officers of ASIC to whom ASIC's powers and functions under s340 have been delegated
audit relief	Relief from the audit requirements of Ch 2M of the Corporations Act
audit requirements	The audit obligations described in Ch 2M of the Corporations Act
auditing standards	Standards issued by the Auditing and Assurance Standards Board under s336 of the Corporations Act
CA ANZ	Chartered Accountants Australia and New Zealand
Ch 2M (for example)	A chapter of the Corporations Act (in this example numbered 2M), unless otherwise specified
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
CPAA	CPA Australia
Div 4 (for example)	A division of the Corporations Act (in this example numbered 4), unless otherwise specified
financial report	A full-year or half-year financial report required under Pt 2M.3 of the Corporations Act
IPA	Institute of Public Accountants

Term	Meaning in this document
large proprietary company	<p>A large proprietary company that is not:</p> <ul style="list-style-type: none"> <li>• a large 'grandfathered' proprietary company under s319(4) of the old Corporations Law (as taken to be included in the Corporations Act by s1408(2));</li> <li>• a disclosing entity;</li> <li>• a borrowing corporation;</li> <li>• a guarantor of a borrowing corporation; or</li> <li>• a licensed securities dealer or futures broker</li> </ul>
old Corporations Law	Has the meaning given in s1371 of the Corporations Act
paragraph 6 (for example)	A paragraph of ASIC Corporations (Audit Relief) Instrument 2016/XX (in this example numbered 6), unless otherwise specified
Pt 2M.2 (for example)	A part of the Corporations Act (in this example numbered 2M.2), unless otherwise specified
RG 43 (for example)	An ASIC regulatory guide (in this example numbered 43)
s340 (for example)	A section of the Corporations Act (in this example numbered 340), unless otherwise specified

## Related information

### Headnotes

audit relief, audit requirements, auditor's report, directors' report, financial report, individual relief, proprietary companies, relief from audit requirements, reporting requirements, solvency statement, subordinated debt, unreasonable burden

### Legislative instruments and pro formas

ASIC Corporations (Audit Relief) Instrument 2016/XX

ASIC Corporations (Wholly-owned Companies) Instrument 2016/XX

PF 183 *Deed of subordination*

### Regulatory guides

[RG 43](#) *Financial reports and audit relief*

[RG 51](#) *Applications for relief*

[RG 108](#) *No-action letters*

### Legislation

Corporations Act, s9, 45A, 45A(2), 45A(3), 109Y, 111AC, 220, 301(1), 307, 308, 314(1)(a)(iii), 314(2)(c), 314(3), 315(4), 316(2), 319(1), 319(3)(b), 340, 342(1), 342(2), 342(2)(a), 342(2)(b), 342(2)(c), 342(2)(d), 342(2)(e), 342(3), 342(3)(a), 342(3)(b), 342(3)(c), 588G, 1408(2)

Old Corporations Law, s319(4)

### Cases

*Mazda Australia Pty Ltd v ASC* (1992) 8 ACSR 613

### ASIC forms

[Form 382](#) *Notification of resolutions for audit relief: Proprietary companies*

[Form 396](#) *Notice of cessation of reliance on ASIC Corporations (Audit Relief) Instrument 2016/XX*

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## **Standards**

*AASB 132 Financial instruments: Presentation*

*APES 315 Compilation of financial information*

*ASA 202 Overall objectives of the independent auditor and the conduct of an audit in accordance with Australian auditing standards*

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