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RG 16 Consultation Feedback
Companies and Small Business
Australian Securities and Investments Commission
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6 June 2024

KPMG submission: Consultation Paper 377 Guidance for reporting by external administrators and controllers: Updates to RG 16

Thank you for the opportunity to comment on ASIC’s proposals in Consultation Paper 377 *Consultation Paper 377 Guidance for reporting by external administrators and controllers: Updates to RG 16 (CP377)*.

KPMG recognises the challenges for ASIC in processing the large volume of initial statutory reports lodged by external administrators and escalating those matters deserving a regulatory response in the public interest.

KPMG’s national Turnaround & Restructuring team includes a number of registered liquidators, and we are cognisant also of their compliance obligations, and the associated time and costs, in lodging reports of this nature, often including unfunded work.

KPMG is supportive of ASIC’s initiative to update its guidance in RG16 and generally supports the content of the draft regulatory guide. KPMG’s views on the specific proposals and feedback questions are set out in the attached document.

Should you wish to discuss these issues or proposals further, please do not hesitate to contact us.

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List of proposals and questions

Set out below are KPMG's views on the specific proposals and feedback questions.

B1 General updates to RG16

B1Q1 *Is any further guidance required in RG16 to assist external administrators to meet their reporting obligations? If so, what additional guidance should we provide?*

KPMG Response

The guidance is useful. KPMG considers that a clear summary checklist, possibly as an appendix, could also be included, that sets out a summary of the key considerations and steps necessary to meet reporting obligations in relation to initial and supplementary reports.

B2 Guidance on preparing the initial statutory report

B2Q1 *Is the proposed guidance in Section B of draft updated RG 16 helpful? If not, explain how we could improve the guidance.*

KPMG Response

The guidance in section B is sufficient.

We note, in relation to RG16.12, an inconsistency in the reference to “*after it appears that*”, which differs to the wording in section 533(1) of the Corporations Act which states “*If it appears to the liquidator...*” We recommend the wording be aligned with the obligations of liquidators under the Act to remove the ambiguity around to whom “it appears”.

At RG16.9, ASIC “*encourage the controller, provisional liquidator or administrator to lodge an initial statutory report with ASIC, when possible offences or misconduct are identified.*”

RG16.42 notes these appointees do not have the qualified privilege available to an external administrator or controller. This is problematic and should be addressed and clarified so that controller, provisional liquidators or administrators are comfortable reporting.

RG16.42 also makes a distinction in relation to a controller who is neither a receiver nor a managing controller. However, the definition of a controller in Section 9 of the Act, at (b), refers to “*anyone else who (whether or not as agent for the corporation) is in possession, or has control, of that property for the purpose of enforcing a security interest.*” This should be clarified.

RG16 does not include guidance in situations where an external administrator disagrees with an ASIC response to the initial statutory report, for example where no further, or only limited, action is proposed when the external administrator considers the circumstances of misconduct are egregious and the matter, for various reasons, justifies a robust response.

In these situations, an external administrator is faced with explaining an unexpected regulatory outcome to aggrieved creditors without the benefit of feedback from ASIC which contributes to a commonly held impression among creditors, supported by the statistics, that most instances of significant misconduct do not result in a regulatory response. We recommend that external administrators be provided with a means to raise concerns with ASIC and that ASIC consider providing some further details, that could be communicated to creditors, as to why a matter would not proceed further.

Whilst RG 16.24 notes “*We anticipate that the ASIC form will take, on average, approximately one hour to complete once an external administrator or controller has undertaken their inquiries and prepared records of their findings*”, it is worth noting that preparation of the initial report, including review by the registered liquidator, typically takes considerably longer than this because the electronic format of the report is quite detailed, and cumbersome to enter data, move around the form, to print and review. We recommend that the form should be reviewed for opportunities to eliminate manual input of data that can be pulled in from ASIC databases, to shorten the report and to improve navigation and review.

B2Q2 *Is any further guidance required to assist the preparation of the initial statutory report? If so, what further guidance should we provide?*

KPMG Response

We do not suggest any further guidance. In relation to RG16.22, whilst we understand the inclusion of note 2, referring to the *AAF Allegations of possible misconduct – Substantiation guide*, we consider that the wording of this note suggests a higher bar in reaching a genuine view than set out in section 533 and in the judgement of *Murdaca v Australian Securities and Investments Commission [2009]*. Perhaps note 2 could be clarified to address this.

B3 Inclusion of commentary

B3Q1 *Is the proposed guidance on relevant case law in Section B of the draft updated RG 16 helpful? If not, explain how we could improve the guidance.*

KPMG Response

The guidance on case law is sufficient.

B4 Guidance on preparing the supplementary statutory report

B4Q1 *Is the proposed guidance in Section C of draft updated RG 16 helpful? If not, explain how we could improve the guidance.*

KPMG Response

The supplementary report guidance is useful.

CP377 notes cases where external administrators are preparing a supplementary statutory report in circumstances where ASIC does not consider this further work is required and ASIC is unable to take further action based on the information in the report.

We note however, that section 533 (and similar wording in sections for other administrations) stipulates “*The liquidator may also, if he or she thinks fit, lodge further reports specifying any other matter that, in his or her opinion, it is desirable to bring to the notice of ASIC.*”

In our experience, there are situations where an external administrator will consider they are obliged, out of consideration to the creditors of a company or in the wider public interest, to provide a supplementary report regardless of how they expect ASIC will respond. In some cases, this occurs with strong encouragement from creditors who feel aggrieved by some misconduct by officers of a company. We consider that RG16 could better reflect the challenge facing external administrators.

B4Q2 *Is any further guidance required to assist the preparation of the supplementary statutory report? If so, what further guidance should we provide?*

KPMG Response

The supplementary report guidance is sufficient.

B5 Timing for lodgement

B5Q1 *Is the proposed guidance in Section D of draft updated RG 16 helpful? If not, explain how we could improve the guidance.*

KPMG Response

The guidance on timing is useful.

B5Q2 *Do you think the four-month timeframe for lodgement of the initial statutory report is appropriate? If not, what alternative timeframe do you think should be adopted and why?*

KPMG Response

We consider the guidance timing is appropriate whilst noting the statutory time frames are broader.

B5Q3 *Do you think the three-month timeframe for lodgement of the supplementary statutory report is appropriate? If not, what alternative timeframe do you think should be adopted and why?*

KPMG Response

We consider the guidance timing is appropriate whilst noting there is no statutory timeframe. We also note there are often, usually larger more complex, cases where investigations occur over many months or even years that may lead to a need to report at a later date. For example, this may be the case in matters involving public examinations and / or litigation funding.