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REGULATORY GUIDE 68

New financial reporting and procedural requirements

Chapter 2G — Meetings
Chapter 2H — Shares
Chapter 2M — Financial reports and audit
Chapter 2N — Annual returns and lodgments with ASIC

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From 5 July 2007, this document may be referred to as Regulatory Guide 68 (RG 68) or Practice Note 68 (PN 68). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 68.1) or their practice note number (e.g. PN 68.1).

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Purpose

RG 68.1 The purpose of this guide is to clarify some of the accounting-related requirements introduced into the Corporations Law ("the Law") by the *Company Law Review Act 1998* ("CLRA") and the *Managed Investments Act 1998* ("MIA"). The matters discussed in this guide relate to the following areas of the Law:

(a) the financial reporting and audit requirements;

(b) the share capital requirements for companies;

(c) the meeting requirements for public companies; and

(d) the annual return requirements.

RG 68.2 In this guide, the term "old" is used to describe provisions of the Law prior to CLRA and MIA. The term "new" describes provisions of the Law after CLRA and MIA. All section references are to sections of the Law unless otherwise stated.

Commencement

RG 68.3 Most of the new requirements introduced by CLRA apply from 1 July 1998, including the amendments made by Schedule 5 of CLRA concerning the nominal value of shares and share capital reductions.

RG 68.4 Under s2 of CLRA, Schedules 1 to 4 of CLRA could commence on a day fixed by proclamation, while Schedule 5 commenced immediately after the *Taxation Laws Amendment (Company Law Review) Act 1998*. In both cases, the relevant date was 1 July 1998. Section 3 of the *Acts Interpretation Act 1901* causes CLRA to come into operation immediately on the expiration of the 30 June 1998.

RG 68.5 However, special transitional provisions apply in relation to the new financial reporting and audit requirements contained in Chapter 2M of the Law. In particular, s1431 applies these requirements for financial years and half-years ending after 30 June 1998. ASIC Class Order [CO 98/95] also allows entities to apply the old financial reporting requirements for financial years and half-years ending 1 July 1998 to 7 July 1998. (For simplicity, the effect of Class Order [CO 98/95] is generally not taken into account in the remainder of this guide.)

Changing balance dates

Old requirements concerning financial years

RG 68.6 Under the old s70A, the directors of a company could resolve to make any financial year of the company a period of up to 18 months. In the case of a prescribed interest undertaking the financial year was required to be a period of 12 months ending on 30 June each year (or such other date instead of 30 June specified in a deed relating to the prescribed interests).

RG 68.7 The old s290 also required the financial year of an entity to be synchronised with that of any company which controlled it.

New requirements concerning financial years

RG 68.8 The new s323D requires each company, registered scheme and disclosing entity ("the entity") to have a financial year of 12 months (plus or minus 7 days) except:

(a) in the first financial year after it is registered or incorporated, when the financial year may be a period of up to 18 months determined by the directors; or

(b) to synchronise the financial year with that of a company, registered scheme or disclosing entity which controls the entity.

RG 68.9 In certain circumstances, ASIC Class Order [CO 98/96] also allows synchronisation with a foreign parent. Requirements for applications to ASIC for individual relief under the new s340 to synchronise with a foreign parent are outlined in ASIC Regulatory Guide 58 *Reporting requirements — Registered foreign companies and Australian companies with foreign company shareholders* (RG 58).

Effect of changes in requirements for financial years

RG 68.10 Application of the old and new requirements concerning financial years during the transition from the old to the new financial reporting requirements will vary depending upon the circumstances. The possible scenarios for companies and disclosing entities which are bodies corporate are discussed below (this discussion is not relevant to prescribed interest undertakings).

Between balance dates prior to 1 July 1998

RG 68.11 Since the old financial reporting requirements apply for all financial years which ended on or before 30 June 1998, the directors of a company can apply the provisions of the old s70A to change the company's financial year between two balance dates which both end on or before 30 June 1998 provided that the resolution was made prior to 1 July 1998.

RG 68.12 The transitional provisions in s1431 apply the financial reporting requirements in the old Part 3.6 and the provisions of the old s70A to both financial years. The old s70A is repealed by Part 4 of Schedule 2 to CLRA and is therefore specifically subject to the transitional provisions in s1431.

RG 68.13 The balance date must not be changed if this would result in desynchronisation with the financial year of a controlling entity (old s290(3)) and cannot be changed if the deadline for reporting in relation to the proposed new balance date has passed.

From balance date on or before 30 June 1998 to balance date after 30 June 1998

RG 68.14 A resolution made by the directors of a company prior to 1 July 1998 to extend the company's financial year from the 12 months ended 30 June 1998 to a longer period (not exceeding 18 months) ending after 30 June 1998 remains effective. The directors are able to apply the old s 70A in such circumstances.

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Between balance dates after 30 June 1998 where financial year commenced before 1 July 1998

RG 68.15 A resolution by the directors of a company under the old s70A to change the company's balance date from a date after 30 June 1998 to another date after 30 June 1998 remains effective provided that resolution was made before 1 July 1998. It is considered that the financial year has been determined under the old Law and that s1431 then specifies that the new Chapter 2M applies to the company in respect of that financial year. That is, the new s323D will only have effect for subsequent financial years.

RG 68.16 All of the other new financial reporting and audit requirements of the Law apply given that the reporting obligation crystallises at a time (ie the new balance date) when the new Chapter 2M applies pursuant to s1431.

Between balance dates after 30 June 1998 where financial year commenced 1 July 1998 or later

RG 68.17 It is inappropriate to apply the old s70A in respect of financial years which commenced after 30 June 1998. Any resolution made under the old s70A is ineffective even if it was made prior to 1 July 1998.

RG 68.18 Accordingly, a company can only change its balance date in the circumstances permitted by the new s323D or in accordance with a relief order made by ASIC.

Individual applications to change financial year

RG 68.19 As mentioned earlier, ASIC published its policy concerning synchronisation of an entity's financial year with that of a foreign parent in RG 58.

RG 68.20 Entities may also be able to obtain individual relief from ASIC under the new s340 from the requirement to have a financial year of other than 12 months (plus or minus 7 days) where they can demonstrate to ASIC's satisfaction that the new s323D imposes unreasonable burdens. Applicants should have regard to RG 58 at RG 58.48–RG 58.51, even if the entity is not seeking to synchronise with a foreign parent. Where the entity is controlled by another entity but not by a foreign entity, subparas (a) and (f) of RG 58.48 should be read as if the references to "foreign parent" were references to "parent". In the case of public companies, applications should also have regard to the requirements of s250N concerning the holding of AGMs.

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RG 68.21 ASIC may consider case by case relief for an entity to synchronise its financial year with that of newly acquired controlled entities which:

(a) represent the largest part of an economic entity;

(b) have a seasonal business which necessitates a particular financial year; or

(c) are foreign companies which are not able to change their financial years in their place of origin.

Financial reporting requirements for prescribed interest undertakings

Old financial reporting requirements

RG 68.22 Prescribed interest undertakings which were disclosing entities were required to prepare accounts in accordance with Division 11 of the old Part 3.6.

RG 68.23 A prescribed interest undertaking with an approved deed which was not a disclosing entity was required to prepare an audited statement of accounts for each financial year in accordance with the old s1069(1)(f). This statement of accounts was not required to comply with the old Part 3.6.

Financial reporting requirements for registered schemes

RG 68.24 Registered schemes are subject to the new financial reporting requirements contained in Chapter 2M in respect of any financial year ending on or after their registration. There were no registered schemes prior to 1 July 1998.

Application of new requirements for prescribed interest undertakings

RG 68.25 Until such time as a prescribed interest undertaking registers as a registered scheme, it remains subject to a requirement to prepare a financial report, accounts or statement of accounts under the Law if it is either of the following:

(a) ”managed investment scheme” as defined in s9 (see s1452); and/or

(b) a disclosing entity.

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RG 68.26 A prescribed interest undertaking which does not fall into either of these categories is no longer required to prepare a financial report/accounts/statement of accounts under Law. However, it may still be required to do so pursuant to a covenant which was included in the deed relating to that undertaking made previously in accordance with the old s1069(1)(f).

"Old Law"

RG 68.27 An understanding of the term "old Law" is essential to determining the reporting requirements which apply to prescribed interest undertakings which are managed investment schemes ("MIS undertakings").

RG 68.28 Under s1454, the "old Law" applies to such undertakings for 2 years starting immediately after the expiration of 30 June 1998, unless they become a registered scheme. Under certain circumstances, ASIC may extend this period of 2 years if the undertaking is to be wound up at a fixed time after the 2 years: s1451(2).

RG 68.29 The "old Law" is defined in s1451 as the Corporations Law in force immediately before the commencement of Chapter 5C.

New requirements for MIS undertakings which are not disclosing entities

RG 68.30 The old s1069 is a part of the "old Law" because it was repealed by MIA at the same time as Chapter 5C commenced. Therefore, MIS undertakings which are not disclosing entities are required to comply with the statement of accounts requirements under the old s1069(1)(f).

RG 68.31 While the annual return requirement in the old s1071 was repealed by CLRA, item 47.1 in the Corporations Regulations (Amendment) 1998, No 186 requires MIS undertakings which are not disclosing entities to lodge an annual return in accordance with the old s1071. (Note: Item 47 has not been inserted into the Corporations Regulations and will only be found in the Corporations Regulations (Amendment) 1998, No 186 Corporations Regulations (Amendment) SR 186 of 1998.)

New requirements for MIS undertakings which are disclosing entities

RG 68.32 The financial reporting requirements which apply to MIS undertakings which are disclosing entities are also dependent on

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the meaning of "old Law". Pursuant to s 2 of MIA, Chapter 5C commenced immediately after Schedules 1 to 4 of CLRA commenced. That is, the transitional provisions in s1431 apply to MIS undertakings which are disclosing entities. The old Part 3.6 applies for years ended on or before 30 June 1998 and the new Chapter 2M applies for years ending on or after 1 July 1998.

RG 68.33 In applying the new Chapter 2M to MIS undertakings, item 47.4 of Corporations Regulations (Amendment) 1998, No 186 Corporations Regulations (Amendment) SR 186 of 1998 states that:

(a) the trustee is responsible for the performance of obligations in respect of the undertaking;

(b) the trustee is taken to be the directors and officers of the undertaking; and

(c) debts incurred in operating the undertaking are taken to be the debts of the undertaking.

Note: Item 47 has not been inserted into the Corporations Regulations and will only be found in Corporations Regulations (Amendment) 1998, No 186 Corporations Regulations (Amendment) SR 186 of 1998.

RG 68.34 There are no annual return requirements for MIS undertakings which are disclosing entities. The new Chapter 2N contains annual return requirements for registered schemes but not for MIS undertakings. The annual return requirements for prescribed interest undertakings under the old s1071 were repealed by CLRA.

RG 68.35 MIS undertakings which are disclosing entities are encouraged to complete and lodge an annual return which complies with the new s349. No fees are payable on the lodgment of such annual returns from 1 July 1998. However, a fee applies on lodgment of the financial report for a financial year ending on or after 1 July 1998: see Item 9A of the Corporations (Fees) Regulations and Information Sheet 30 *Fees for commonly lodged documents* (INFO 30) at www.asic.gov.au/fees.

RG 68.36 The new Chapter 2M removes any uncertainty which may have existed under Division 11 of the old Part 3.6 concerning the ability of the Australian Accounting Standards Board ("AASB") to make an accounting standard requiring an MIS undertaking to prepare consolidated financial statements as well as single entity financial statements.

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Prescribed interest undertakings which register as registered schemes

Prescribed interest undertakings which register after balance date

RG 68.37 A prescribed interest undertaking may be registered as a registered scheme after the end of a financial year but before completing its financial reporting obligations for that year. The reporting obligations of an entity under the Law are taken to be crystallised at the end of the financial year. An MIS undertaking which is not a disclosing entity will need to complete its financial statements and reports in compliance with the old s1069(1)(f). An MIS undertaking which is a disclosing entity will remain subject to the requirements of the new Chapter 2M.

RG 68.38 In such cases, the responsible entity must complete all of the outstanding reporting obligations in respect of the scheme previously imposed on the trustee and/or manager in respect of the year that ended immediately prior to registration (consistent with the requirements of s601FS as modified by s1462).

Registration does not create a new financial year

RG 68.39 The new s323D(1) requires the first financial year of a registered scheme to commence on the date of registration. However, this does not apply if a prescribed interest undertaking which is required by the Law to prepare accounts or a financial report registers as a registered scheme. That is, s323D(1) does not have the effect of creating a new financial year on the date of registration.

RG 68.40 Registration does not create a new scheme. The prescribed interest undertaking has already commenced (and, in most cases, completed) a "first financial year" prior to registration. Hence, the last financial year of the undertaking which had commenced prior to the date of registration continues.

Application of Chapter 2M to disclosing entities

RG 68.41 The new s111AO states that:

> "A disclosing entity has to prepare financial statements and reports for half-years as well as full financial years. These requirements are set out in Chapter 2M."

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RG 68.42 However, the new s 285(2) (which is included in Chapter 2M) states:

> "This Chapter covers all disclosing entities incorporated or formed in this jurisdiction (whether or not they are companies or registered schemes)."

RG 68.43 There are two apparent inconsistencies in these requirements:

(a) Foreign companies

The new s 111AO suggests that disclosing entities which are foreign companies must prepare their financial statements and reports in accordance with Chapter 2M and this appears to be an addition to the requirement of the new s285(2). However, note 1 to s302 (which is included in Chapter 2M) states "This Chapter only applies to disclosing entities incorporated or formed in Australia (see subsection 285(2))".

(b) Other non-company bodies corporate

The new s111AO does not require disclosing entities to comply with all of the requirements of Chapter 2M (eg the audit requirements are excluded).

RG 68.44 ASIC believes that s111AO is merely a signpost to the new Chapter 2M and is not intended to expand or limit the application of the new Chapter 2M in relation to disclosing entities. In determining the application of the new Chapter 2M to disclosing entities, reference should be made to s285(2).

RG 68.45 Hence, foreign companies which are disclosing entities are not subject to Chapter 2M but registered foreign companies must comply with the reporting requirements under s601CK.

RG 68.46 Bodies corporate which are not companies but are disclosing entities and were incorporated or formed in Australia should comply with all of the relevant requirements of Chapter 2M. That is, they are not required to comply with Part 2M.4 (which only applies to companies and registered schemes) unless they are made subject to Part 2M.4 by virtue of the requirements of legislation other than the Law.

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Entities which cease to be disclosing entities before their deadline

Financial years and half-years ended on or before 30 June 1998

RG 68.47 For years ended on or before 30 June 1998, non-company disclosing entities which cease to be disclosing entities after balance date but before the deadline for the financial year are not subject to the reporting requirements of the old Part 3.6: see old s58C. Similarly, all disclosing entities (whether companies or not) are only required to prepare half-year accounts if they are disclosing entities at both the end of the half-year and at the deadline for the half-year.

RG 68.48 However, a company disclosing entity which ceases to be a disclosing entity after the end of a financial year ended on or before 30 June 1998, but before the deadline for that financial year, may still be subject to the reporting requirements under the old Part 3.6. This is because public companies, large proprietary companies, many small proprietary companies controlled by foreign companies and some other small proprietary companies (those subject to a shareholder or ASIC request to prepare accounts) are subject to the reporting requirements of the old Part 3.6 even if they are not disclosing entities.

Financial years and half-years ended on or after 1 July 1998

RG 68.49 For financial years ending on or after 1 July 1998, the new Chapter 2M requires entities which are disclosing entities at balance date to report even if they cease to become disclosing entities before completing their reporting obligations. However, for half-years ending on or after 1 July 1998, the new s 302 does not require an entity to report for the half-year if it ceases to be a disclosing entity before the lodgment deadline.

RG 68.50 ASIC Class Order [CO 98/2016] dated 30 October 1998 applies to an entity which ceases to be a disclosing entity after the end of a financial year and before the earlier of:

(a) the end of the 3 months after the end of that year; and

(b) if the entity is required to have an AGM, 21 days before the date of the next AGM after the end of that year.

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The order provides relief from the full year financial reporting requirements under the new Chapter 2M, except to the extent that Chapter 2M would have applied to the entity if it had not been a disclosing entity. Relief is not available unless the directors have no reason to believe that the entity may become a disclosing entity again before the lodgment deadline for the next financial year.

Emoluments of directors and five named officers

[*Historical note:* RG 68.51–RG 68.69 deleted 29/7/2005. The paragraphs formerly read:

'Background

RG 68.51 For years ending on or after 1 July 1998, the new s300A(1) requires listed Australian companies to include in their directors' report in respect of years ending on or after 1 July 1998:

"(a) discussion of broad policy for determining the nature and amount of emoluments of board members and senior executives of the company; and

(b) discussion of the relationship between that policy and the company's performance; and

(c) details of the nature and amount of each element of the emolument of each director and each of the 5 named officers of the company receiving the highest emolument".

RG 68.52 The requirements of s 300A have been referred to the Parliamentary Joint Committee on Corporations and Securities for review. The Committee has not yet reported and any report is still to be considered by the Government. The guidance provided in this practice note recognises that s300A is law at the date of this practice note.

RG 68.53 The following comments are intended to provide some interim guidance on the application of these requirements.

Application of new s300A

RG 68.54 ASIC believes that the requirements of the new s 300A(1)(c) should be applied in accordance with the overall objectives of that paragraph, in particular to enable a comparison of the remuneration of directors and executive officers with the reported performance of the company and economic entity. In some cases application of the wording used in the new s300A(1)(c) and the supporting definitions of "emoluments" and "officers" in s9 and 82A of the Law may give results which would not appear to be completely consistent with the purpose of the new s300A. Hence, listed companies, their directors and auditors should not focus too closely on these words. In particular, the information disclosed should not be false or misleading nor should the information be misleading by omission.

RG 68.55 While ASIC does not intend to detail in this practice note all of the principles which should be applied in order to comply with the overall objectives of s300A(1)(c), ASIC expects companies to comply with the following interim guidelines:

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(i) Period

Remuneration should be disclosed for the period of the financial year to which the directors' report relates and not on the basis of the arrangements in place as at the date of the directors' report.

Disclosure of remuneration for the financial year is consistent with the purpose of the disclosures because it enables the remuneration of directors and officers to be compared to the reported performance of the company for the year. The disclosure of performance criteria in accordance with s300A(1)(b) implies that shareholders should be provided with the information necessary to make such a comparison.

Disclosure of information in respect of the financial year just ended would be consistent with the basis for disclosing remuneration under accounting standards AASB 1017 "Related Party Disclosures" and AASB 1034 "Information to be Disclosed in Financial Reports". It also avoids any loss of information because remuneration arrangements were changed one or more times during or since the financial year, or because directors or officers held office for only part of the year.

(ii) Single entity and consolidated bases

The disclosures should be applied both in relation to the listed company (ie in respect of directors of the listed company and the five named officers of the listed company receiving the highest emoluments) and on a consolidated basis (ie for directors of the listed company and the five named officers of the economic entity receiving the highest emoluments).

In many cases it will be misleading in terms of the purpose of s300A(1)(c) not to disclose information on a consolidated basis. This may occur where the listed company is a holding company and the main operating activities of the group are conducted through controlled entities. Shareholders of the listed holding company should be provided with information on the remuneration of officers of companies in the economic entity (comprising the holding company and its controlled entities) irrespective of the legal entity for which they are officers.

Despite (iv) below, on a consolidated basis, the information should include directors of controlled entities who are not directors of the holding company if they are amongst the five most highly remunerated officers of the economic entity.

(iii) Cost to the company

Remuneration should be determined on the basis of the cost (including any opportunity cost) to the company rather than the benefit to the director or officer.

However, directors need to be aware of their general obligations under the Law concerning false and misleading statements and may need to provide additional information. It may be necessary to disclose additional information concerning certain components of remuneration on the basis of the benefit received by directors and officers where disclosure on the basis of cost to the company would be misleading or misleading by omission.

ASIC believes that disclosure of the cost to the company is generally more meaningful to shareholders than the benefit to the officer concerned and that it is also a more objective and easily quantifiable measure.

(iv) Non-director officers

Remuneration should be disclosed for each director and should also be disclosed in respect of the five additional officers who receive the highest remuneration of those

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officers who are not directors. That is, even if the five most highly remunerated officers of the listed company are directors, the remuneration of five officers who are not directors of the listed company should also be disclosed (unless, of course, there are less than five officers who are not directors of the listed company, in which case the remuneration of all officers who are not directors should be disclosed). Each of these persons should be named.

ASIC believes that this is in accordance with the intent of s 300A(1)(c).

These comments are subject to the exclusion of non-executive officers who are not directors (see (v) below).

(v) Executive officers

Remuneration should be disclosed in respect of the five most highly remunerated executive officers.

Non-executive officers should be disregarded even if:

- they are amongst the five most highly remunerated officers; and/or
- there are less than five executive officers.

The overall objectives of s 300A(1)(c) should be applied rather than the strict definition of the term “executive officer” in s9 of the Law. Executive officers should be regarded as officers who are involved in, concerned in or take part in the management of the affairs of the company and/or a related body corporate (regardless of the person’s designation). As noted in (iv) above, directors of the listed company are excluded for the purposes of determining the five most highly remunerated executive officers.

An officer may be an executive officer in the context of an economic entity even though that officer is not an executive officer of the listed parent.

Highly paid technical specialists or operational staff employed by a company may not be executive officers for the purposes of s300A(1)(c) where those specialists or staff are not involved in the management of the affairs of the company. This might be the case where, for example, a foreign exchange dealer in a large bank is not in a managerial position and does not set limits or overall strategy. However, in a small mining company with two or three staff, it may be that a specialist geologist is also involved in management of the affairs of the company.

However, the remuneration of the executive officers to be disclosed should not be limited to amounts paid in connection with the management of the affairs of the company or any related body corporate.

ASIC believes that this approach is consistent with the intent of s300A(1)(c). It is also consistent with s300A(1)(a) which refers to executive officers and is similar to para 12 of AASB 1034 which only requires disclosures for officers who are executive officers.

(vi) Paid directly or indirectly

The remuneration to be disclosed should be any remuneration paid, payable or otherwise made available directly or indirectly by the company and its controlled entities. This would necessitate including amounts paid, payable or otherwise made available indirectly by the company or a controlled entity via payments to an associate or other related party.

(vii) UIG Abstract 14

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The attachment to UIG Abstract 14 "Directors' Remuneration" may provide guidance on items which should be included as remuneration. For example, remuneration should include (but not be limited to) superannuation contributions and golden handshakes.

The discussion in paras 13 and 14 of UIG Abstract 14 concerning the use of the accrual basis and the inclusion of fringe benefits tax is relevant for the purposes of s 300A(1)(c).

However, the discussion in paras 15 to 17 of UIG Abstract 14 concerning the exclusion of remuneration for the period when a person was an employee but not a director will not be relevant if the director was also one of the five officers receiving the highest emoluments. The remuneration of such a person may need to be disclosed separately as a director and as an officer who is not a director.

The inclusion of emoluments for the period for which a person has been a director will be consistent with the disclosures required by the new s300(1)(c). The new s300(1)(c) applies in relation to each person who has been a director at any time during or since the financial year and requires the directors' report to include the period for which each such person has been a director.

RG 68.56 The items listed in RG 68.55 are guidance only and the overall objective of the legislation is the overriding consideration. This may necessitate disclosing amounts or information which might not appear to be required to be disclosed on reading the items listed in RG 68.55. Directors must have regard to their general duties under the Law to ensure that the information provided is not misleading by omission.

RG 68.57 The term "remuneration" has been used in RG 68.54 and RG 68.55 to avoid any implication that the definition of "emoluments" in s9 of the Law should be applied in following the overall objectives of the legislation. However, the use of this term should not be taken to infer that the definition of "remuneration" in the Law or in any accounting standard is to be applied. In particular, there are no exclusions for directors or executives who are not residents of Australia.

Elements of emoluments

RG 68.58 The new s 300A(1)(c) requires disclosure of "details of the nature and amount of each element of the emolument" of each director and relevant officer.

RG 68.59 The elements disclosed should have regard to the information required to be disclosed under the new s300A(1)(a) and 300A(1)(b) and should include elements which:

(a) are consistent with the overriding principle that the disclosures conform to the overall objectives of the legislation (see RG 68.54);

(b) correspond to the broad policy for determining remuneration; and

(c) enable users of the directors' report to make a proper assessment concerning the relationship between emoluments and company performance.

RG 68.60 Elements of emoluments to be disclosed would normally include salary and fees, non-cash benefits, bonuses (possibly separate categories of bonus where the bonuses are based on different performance criteria), profit share, superannuation contributions, other payments in connection with retirement from office, the value of shares issued, and the value of options granted.

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RG 68.61 The foregoing discussion is intended to assist directors. There may be other elements of emoluments which are significant because of their nature or amount or given the particular circumstances. It remains the responsibility directors of each company to determine which elements of emoluments are relevant in the circumstances of the company and which would need to be disclosed in order to ensure that members of the company are properly informed within the spirit of the new s300A.

Comparative information

RG 68.62 Section 300A does not require the disclosure of comparative information.

Names

RG 68.63 As noted in para (iv) of RG 68.55, s 300A(1)(c) requires the remuneration to be disclosed in respect of each individual director and officer, and for each of those individuals to be identified by name. The elements of emoluments are also to be shown for each of these named individuals.

Companies reporting prior to release of this practice note

RG 68.64 ASIC will not take action against a listed Australian company which has not followed RG 68.54–RG 68.61 in respect of a financial report for a year ended on or after 1 July 1998 where either:

(a) the directors' report was signed prior to the release of this practice note; or

(b) the directors' report was signed so soon after the release of this practice note that it was genuinely impractical to follow those paragraphs,

provided that the company and its directors have made their best efforts to comply with the requirements of s300A and the disclosures made are not misleading or misleading by omission.

ASIC will not provide relief from s 300A in its entirety

RG 68.65 Some companies have enquired whether ASIC will provide relief from the new s300A in its entirety. ASIC does not consider that such relief is appropriate given that the new s300A is a requirement enacted by Parliament. It is also noted that there are requirements concerning disclosure of the remuneration of named directors and officers in the US and UK.

Inconsistencies between requirements

RG 68.66 The requirements relating to disclosure of the emoluments of named directors and officers under the new s300A are inconsistent with the requirements of:

(a) the new s 300(1)(d) — which requires disclosure of information on options in relation to each director and each of the five most highly remunerated officers;

(b) accounting standard AASB 1017 "Related Party Disclosures" — which requires disclosure of directors' remuneration; and

(c) accounting standard AASB 1034 "Information to be Disclosed in Financial Reports" — which requires disclosure of the remuneration of executive officers.

RG 68.67 Each of the four requirements uses different criteria for determining the remuneration/emoluments of each director/officer. The result is that:

(a) three different remuneration figures could be required to be disclosed in an annual report in respect of the one executive director under 300A, AASB

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1017 and AASB 1034 (although the figures under the two accounting standards are shown in $10,000 bands only); and

(b) different individuals may be required to be shown as the five most highly remunerated officers under s300(1)(d) and s300A.

RG 68.68 The table attached to this practice note summarises the main differences between the requirements of the new s 300A(1)(c), the new s300(1)(d), paras 4.2 to 4.6 of AASB 1017 and paras 12.1 to 12.3 of AASB 1034. The table is included for general information purposes only and reference should be made to the relevant requirements of accounting standards, the Law and this practice note.

RG 68.69 ASIC does not consider it appropriate at this time to give relief under s340 or 341 to address the inconsistencies and other problems noted above. Reasons include:

(a) Such relief would pre-empt processes to deal with the matter at the Parliamentary Joint Committee on Corporations and Securities and AASB. AASB 1017 and AASB 1034 are due to be revised and reissued in the next 12 months. A class order could result in two changes in the reporting requirements (ie there would be a change from last year's requirements to the class order requirements and a change from the class order requirements to the revised requirements of the accounting standards).

(b) Some companies may choose not to apply any class order and this would create inconsistencies between companies.]

Transfer to notes to the financial statements

RG 68.70 [deleted]

[*Historical note:* RG 68.70 deleted 24/12/1998. The paragraph formerly read: "RG 68.70 ASIC does not believe that relief allowing the disclosures required by the new s300A to be made in the notes to the financial statements would meet the pre-conditions for relief in the new s342 at this time. While such relief would allow the information to be located closer to that disclosed in accordance with AASB 1017 and AASB 1034, the information could not be integrated with that required by AASB 1017 and AASB 1034 so as to reduce duplication. If the information were permitted to be included in the notes to the financial statements, it would become subject to audit."]

Short form reports

RG 68.71 Under s314, the full directors' report will be required to be included in a concise report.

[*Historical note:* RG 68.71 amended 1/4/1999 by deleting the first sentence which read: "Under ASIC Class Order [CO 98/102], the information required to be disclosed in the directors' report (specifically including information required by the new s300A) must be disclosed in any short form report."]

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Environmental reporting

RG 68.72 Pursuant to the new s299(1)(f), the directors' report of a company, registered scheme or disclosing entity for financial years ending on or after 1 July 1998 must give:

> "if the entity's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory — details of the entity's performance in relation to environmental regulation".

RG 68.73 The requirements of s299(1)(f) have been referred to the Parliamentary Joint Committee on Corporations and Securities for review. The Committee has not yet reported and any report is still to be considered by the Government. The guidance provided in this guide recognises that s299(1)(f) is law at the date of this guide.

RG 68.74 The following general guidelines are relevant in relation to the environmental reporting requirements:

(a) Prima facie, the requirements would normally apply where an entity is licensed or otherwise subject to conditions for the purposes of environmental legislation or regulation.

(b) The requirements are not related specifically to financial disclosures (eg contingent liabilities and capital commitments) but relate to performance in relation to environmental regulation. Hence, accounting concepts of materiality in financial statements are not applicable.

(c) The information provided in the directors' report cannot be reduced or eliminated because information has been provided to a regulatory authority for the purposes of any environmental legislation.

(d) The information provided in the directors' report would normally be more general and less technical than information which an entity is required to provide in any compliance reports to an environmental regulator.

RG 68.75 The circumstances of each entity will be different and many entities affected by the new s299(1)(f) are still to come to terms with these new reporting requirements. ASIC is conscious that reporting practices in relation to environmental matters will evolve, particularly during the coming 12 months. ASIC will be monitoring reports to assess whether further guidance is necessary. ASIC expects full compliance with the spirit as well as the terms of the law.

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Transfer of information from directors' report

RG 68.76 ASIC Class Order [CO 98/2395] allows certain information otherwise required to be included in the directors' report to be transferred to a document bound together with the financial report and directors' report.

[*Historical note:* RG 68.76 replaced 24/12/1998. The paragraph formerly read: "ASIC Class Order [CO 98/2015] dated 30 October 1998 allows information on directors' qualifications and experience to be included in a document bound together with the financial report and directors' report. In the absence of this relief, the new s300 of the Law would require the information to be contained in the directors' report or in the financial report. The relief provides entities with greater flexibility in the presentation of their annual reports and reference should be made to the order for the conditions for relief."

RG 68.76 amended 29/7/2005 by deleting the words 'dated 24 December 1998' which appeared after '[CO 98/2395]' and by replacing 'any information' with 'certain information'.]

RG 68.76A The relief can be applied to any of the requirements as to the content of annual directors' reports contained in s298(1)(c) (auditor's independence declaration), s298(1A) (statements concerning information included in the financial report to give a true and fair view), s299 (general requirements), s299A (discussion and analysis) and 300 (specific requirements) (other than s300(11B) and (11C)) of the Act. The directors will be able to choose which items, if any, are transferred from the directors' report. The relief can also be applied to the requirements of s306 concerning half-year directors' reports

[*Historical note:* RG 68.76A inserted 24/12/1998.

RG 68.76A replaced 29/7/2005. The paragraph formerly read:
'RG 68.76A The relief can be applied to any of the requirements as to the content of annual directors' reports contained in new s299 (general requirements), 300 (specific requirements) and 300A (directors' and officers' emoluments) of the Law. The directors will be able to choose which items, if any, are transferred from the directors' report. The relief can also be applied to the requirements of s306 concerning half-year directors' reports.']

RG 68.76B In the absence of this relief, the s300 of the Act would allow the information required by that section to be contained in the directors' report or in the financial report. The relief provides entities with greater flexibility in the presentation of their annual reports and reference should be made to the order for the conditions for relief.

[*Historical note:* RG 68.76B inserted 24/12/1998. Text of this paragraph was formerly second sentence of RG 68.76.

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RG 68.76B further amended 29/7/2005 by replacing the first sentence. The first sentence formerly read:
'In the absence of this relief, the new s300 of the Law would require the information to be contained in the directors' report or in the financial report.']

RG 68.77 The relief referred to in RG 68.76 recognises the practice of many companies under the old financial reporting requirements of the Act

[*Historical note:* RG 68.77 amended 24/12/1998 by deleting the second sentence which formerly read:
'For the purposes of provisions of the Law concerning offences for false and misleading statements, s1308(7) has the effect of deeming a document attached to the directors' report to be a part of the directors' report.']

RG 68.77A The Act contains specific provisions which make false or misleading statements (including information which is misleading by omission) an offence. Under s1308(7) of the Act all information attached to a directors' report is treated as if it is part of the report for the purpose of these provisions.

[*Historical note:* RG 68.77A inserted 24/12/1998.]

RG 68.77B Class Order [CO 98/2395] no longer applies to the director and executive remuneration information required to be disclosed in the directors' reports of listed companies under s300A. Regulation 2M.36.04 now allows the director and executive remuneration disclosures required by accounting standard AASB 1046 'Director and Executive Disclosures by Disclosing Entities' to be transferred into the directors' report, subject to certain conditions. Information required by s299 (eg review of operations), s299A is not permitted to be transferred to the financial report.

[*Historical note:* RG 68.77B inserted 24/12/1998.

RG 68.77B replaced 29/7/2005. The paragraph formerly read:
'Class Order [CO 98/2395] allows listed Australian companies to transfer the information on directors' and officers' emoluments required by the new s300A to the notes to the financial report rather than include it in the directors' report. This allows the information to be located closer to the information disclosed in accordance with AASB 1017 and AASB 1034. However, it does not enable the information to be integrated with that required by AASB 1017 and AASB 1034 because of inconsistencies in the information required. Information required by the new 299 (eg review of operations) is not permitted to be transferred to the financial report.']

RG 68.77C Further information on the operation of the order can be found in the editorial note to the order. In particular, where the information is transferred to the financial report, it will be subject to audit pursuant to s307 308 to 309 of the Act.

[*Historical note:* RG 68.77C inserted 24/12/1998.]

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Statement of compliance with accounting standards in directors' declaration

[*Historical note:* RG 68.78–RG 68.79 deleted 29/7/2005. The paragraphs formerly read: 'RG 68.78 For years ending on or after 1 July 1998, the new s295(1) requires the financial report of a company, registered scheme or disclosing entity to include a directors' declaration. The new s295(4) states:

"The directors' declaration is a declaration by the directors:

(a) that the financial statements, and the notes referred to in para (3)(b) (ie notes required by accounting standards), comply with the accounting standards; and

(b) that the financial statements and notes give a true and fair view (see section 297); and

(c) ...

(d) whether, in the directors' opinion, the financial statement (sic) and notes are in accordance with this law, including:

(i) section 296 (compliance with accounting standards); and

(ii) section 297 (true and fair view)."

RG 68.79 There is no need to make duplicate declarations to comply with the requirements of both s295(4)(d) and s295(4)(a) and 295(4)(b). As there are no differences of substance between these requirements, it is sufficient for the directors' declaration to contain a single declaration concerning these matters.'.]

Statement of cash flows

All entities preparing financial reports under Chapter 2M to prepare statement of cash flows

RG 68.80 For years ending on or after 1 July 1998, all companies, registered schemes and disclosing entities which are required to prepare a financial report in accordance with the new Chapter 2M are required to prepare a statement of cash flows: see new s295(2)(c). This requirement applies irrespective of whether an entity is a reporting entity or not.

Application of AASB 1026 "Statement of Cash Flows"

RG 68.81 For years ended on or before 30 June 1998 and commencing before 1 January 2005, entities which were reporting entities were required to prepare a statement of cash flows in

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accordance with AASB 1026 “Statement of Cash Flows”. However, non-reporting entities were not required to comply with AASB 1026.

[*Historical note:* RG 68.81 amended 29/7/2005 by inserting the text ‘and commencing before 1 January 2005’.]

RG 68.82 In specifying that all entities preparing a financial report in accordance with the new Chapter 2M prepare a statement of cash flows, the Act intended these statements to be of consistent quality and reliable. The best guidance available to all entities is that contained in AASB 1026 “Statements of Cash Flows”. AASB 1026 does not state that it applies to non-reporting entities, however, ASIC expects non-reporting entities to prepare a cash flow statement in accordance with most of the requirements of accounting standard AASB 1026. Those requirements of AASB 1026 which it may not be necessary for a non-reporting entity to comply with in *some* instances are:

(a) the requirements of para 11.1 concerning non-cash transactions; and

(b) the requirements of para 12.2 concerning standby credit arrangements and used and unused loan facilities; and

(c) if consolidated financial statements are not prepared, the requirements of para 9 concerning acquisitions and disposals of entities.

The other disclosure requirements of AASB 1026 are considered essential to an understanding of the statement of cash flows and should be followed in the financial statements of all non-reporting entities.

RG 68.82A For years commencing on or after 1 January 2005, accounting standard AASB 107 “Cash Flow Statements” specifically applies in full to all entities required to prepare financial reports in accordance with Part 2M.3 of the Act.

[*Historical note:* RG 68.82A inserted 29/7/2005.]

Comparative information in the first year for non-reporting entities

RG 68.83 For years commencing before 1 January 2005, the application of RG 68.82 above does not require a non-reporting entity to include comparative information in its statement of cash flows for the first financial year ending on or after 1 July 1998 if the entity did not prepare a statement of cash flows for the immediately preceding financial year.

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[*Historical note:* RG 68.81 amended 29/7/2005 by inserting the text ‘For years commencing before 1 January 2005,’.]

Registered foreign companies

RG 68.84 The old s349 has been relocated to s601CK and amended. The major change is that a registered foreign company which is required to lodge a financial report with ASIC must include a statement of cash flows. In most instances, a statement prepared in accordance with a requirement of the law in the place of origin of a registered foreign company will satisfy the requirement of s601CK. However, in some instances s601CK requires a registered foreign company to lodge a financial report prepared as if it were an Australian public company.

Concise financial reports

[*Historical note:* RG 68.85–RG 68.90 deleted 24/12/1998. The paragraphs formerly read:
“RG 68.85 The new s314 allows a company, registered scheme or disclosing entity to distribute a concise report to those of its members who do not request to be sent a full financial report or to be sent no report. However, there is currently no accounting standard dealing with the content of concise financial reports and it is not possible to produce a concise report which satisfies the requirements of the new s314(2).

RG 68.86 In these circumstances, entities are precluded by the Law from issuing concise financial reports. However, ASIC will consider applications for relief under the new s340 to send concise reports to shareholders instead of the full annual report. Conditions for individual relief include:

(a) ED 94 “Concise Financial Reports” be applied and the report contain such other information as the directors consider an ordinary investor would require.

(b) Requirements as to the availability of the full annual report, including establishment of a 1 800 (free call) telephone request service number, Internet access, and timely delivery of the full financial report.

(c) The concise report is to be sent to members at least 7 days before the deadline otherwise required by the Law.

RG 68.87 Companies which obtain relief will be required to comply with all of the requirements of ED 94 as it was the accounting standard made for the purposes of the new s314(2), including the requirement that each financial statement be accompanied by discussion and analysis: see para 5.3 of ED 94. Under the new s314(2)(c), the auditor must make a statement:

(a) that the full financial report has been audited; and

(b) whether, in the auditor’s opinion, the concise financial report complies with the accounting standard (ie ED 94).

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In order to form the opinion referred to in (b) above, it would be necessary for the auditor to audit the discussion and analysis.

RG 68.88 Because ED 94 is not an accounting standard, the concise financial report of companies obtaining relief will also be required to include all information which the directors believe an ordinary investor would require. Where this information is additional to that required by ED 94, it may be included in a separate section of the concise financial report (eg separate pages). This section would be part of the concise financial report but would not be required to be audited (eg it could be excluded from page numbers referred to in the statement by the auditor required by the new s314(2)(c)).

RG 68.89 In determining whether to apply for individual relief, directors should take into account any additional audit costs which may relate to the concise financial report (including any costs relating to the discussion and analysis).

RG 68.90 For years ended on or before 30 June 1998, Class Order [CO 97/1009] continues to allow the public companies to issue short form reports to members who request a short form report instead of the full financial report. For years ending on or after 1 July 1998, ASIC Class Order [CO 98/102] allows entities to issue short form reports to members who request a short form report instead of the full financial report. Both class orders contain conditions for relief, including requirements as to the content of short form reports. Class Order [CO 98/102] will be revoked when an accounting standard dealing with concise financial reports becomes operative.”]

Accounting impact of share capital requirements

Treatment of share premium account

RG 68.91 CLRA repealed the old s191 of the Law dealing with the establishment and maintenance of share premium accounts. The new s1446 requires the balance of the share premium account to be transferred to share capital at the start of 1 July 1998 (ie irrespective of the financial year end of the company).

RG 68.92 The new s1447 allows the balance of the former share premium account to be applied for certain purposes and companies should continue to maintain records of the balance of the former share premium account.

RG 68.93 Accounts for years ended on or before 30 June 1998 should continue to disclose the share premium account on the balance sheet. However, it may be appropriate to note any material transfer as a subsequent event.

RG 68.94 Financial reports for years ending on or after 1 July 1998 should reflect the transfer of the balance of the share premium account into share capital on 1 July 1998. However, ASIC encourages

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disclosure of the balance of the former share premium account in the notes to the financial statements if the information is material. In some cases, such disclosure may be necessary to provide relevant and reliable information.

RG 68.95 The balance of the share premium account or former share premium account (or part thereof) may be required to be classified as liabilities in accordance with AASB 1033 "Presentation and Disclosure of Financial Instruments" (eg where it relates to redeemable preference shares issued prior to 1 July 1998).

Redemption of preference shares

RG 68.96 Section 1446 requires the balance of the capital redemption reserve to be transferred to share capital at the start of 1 July 1998.

RG 68.97 From 1 July 1998, the new s254K(b) only allows preference shares to be redeemed "out of profits or the proceeds of a new issue of shares made for the purpose of the redemption". However, it may also be possible under s1447 to meet the premium payable on the redemption of preference shares issued before 1 July 1998 from the former share premium account.

RG 68.98 As the balance of the Capital Redemption Reserve created on redemptions of preference shares prior to 1 July 1998 was required to be transferred into share capital, it is inappropriate to create a new capital reserve on redemptions on or after 1 July 1998. It is also inappropriate to reduce share capital in respect of any redemption given that the nominal amount of any redemptions prior to 1 July 1998 have not resulted in any reduction in share capital (after taking into account the transfer of the balance of the Capital Redemption Reserve into share capital).

RG 68.99 Redeemable preference shares would normally be classified as a liability in accordance with accounting standard AASB 1033 "Presentation and Disclosure of Financial Instruments" or accounting standard AASB 132 "Financial Instruments: Presentation and Disclosure". Where s254K(b) applies and the redemption is out of the proceeds of a fresh issue of shares, the entries would be as follows (assuming the fresh issue of shares and redemption are satisfied by cash):

DR Cash
CR Share capital (equity/liability)

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DR Share capital — redeemable preference shares (liability)
CR Cash

[*Historical note:* RG 68.99 amended 29/7/2005 by inserting the text 'or accounting standard AASB 132 "Financial Instruments: Presentation and Disclosure"'.]

RG 68.100 Where s254K(b) applies and the redemption is "out of profits", the amount of the redemption should be recorded in the appropriations section of the profit and loss account rather than as an expense. The redemption is met "out of profits" rather than being a component of profits. The requirement of s254K(b) would take precedence over the requirements of accounting standards or any Statement of Accounting Concepts.

RG 68.101 Redeemable preference shares are normally a liability in substance and the repayment of a liability would not normally give rise to an expense. Where all or part of the redemption is met out of profits, s254K(b) requires an additional entry in the nature of a transfer from retained profits in order to preserve the capital of the company and protect creditors. The entries required would be as follows (assuming the redemption is satisfied by cash):

DR Profit and loss appropriation
CR Share capital (equity)

DR Share capital — redeemable preference shares (liability)
CR Cash

These two entries are consistent with the entries required where there is a fresh issue of shares: see RG 68.99. While the first entry would not be required on the repayment of a liability which was not required to be classified as share capital for the purposes of the Law, preference shares are share capital under the Law and their redemption must be made in accordance with the requirements of the Law. For example, it would be inappropriate to transfer the amount out of profits to a reserve account which would not be subject to a restriction under the Law on the payment of dividends out of those profits.

RG 68.102 ASIC has been made aware that the treatment required by the Law on the redemption of preference shares out of profits (as outlined in RG 68.101) may have taxation consequences which might not exist if the Law did not require a redemption "out of profits of the proceeds of a new issue of shares made for the purpose of the redemption". Some may seek to argue that the outcome detailed in RG 68.101 is an unintended consequence, however, ASIC believes it is in accordance with the requirements of the Law.

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RG 68.103 As stated in RG 68.97, redeemable preference shares issued prior to 1 July 1998 may still be redeemed out of the former balance of a share premium account (refer s1447 of the Law). It is also now possible to buy-back redeemable preference shares (refer note 2 to new s257A of the Law).

Lodgment of company annual returns and financial reports

Lodgment requirements to 30 June 1998

RG 68.104 Until 30 June 1998, the old s335(1) required public companies to lodge their annual return (under old reg 3.8.02) (accompanied by their accounts and reports if they were not disclosing entities) within:

(a) 1 month after their annual general meeting ("AGM") for a financial year; or

(b) if no AGM was held within the period required, 6 months after the end of the financial year.

RG 68.105 Under the old s335(1A), proprietary companies were required to lodge an annual return for each calendar year by 31 January in the next calendar year. Those proprietary companies required to lodge accounts and reports were generally required to do so within 4 months after the end of their financial year unless they were disclosing entities: see old s317B and old s283D.

RG 68.106 For financial years ended on or before 30 June 1998, companies which were disclosing entities were required to lodge their accounts and reports within 90 days after the end of the financial year: see old s317A, old s283D(2) and old s58C(4)(a).

Annual return lodgment requirements from 1 July 1998

RG 68.107 From 1 July 1998 (irrespective of the financial year of the company), the new s 345 requires all companies to lodge their annual returns by 31 January each year unless ASIC and the company agree a different deadline in writing. This requirement is not linked to a particular financial year or calendar year. The new s1436(1) requires public companies to lodge their next annual return by 31 January 1999.

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RG 68.108 The requirements of s1436(2) have caused confusion for some. Subsection 1436(2) is redundant and would have only applied if CLRA had commenced within 6 months before a 31 January. CLRA commenced on 1 July 1998 which is more than 6 months before 31 January 1999.

RG 68.109 From 1 July 1998, public companies which are not disclosing entities can no longer lodge their accounts and reports with their annual return, irrespective of the financial year end.

RG 68.110 Section 1432 requires public companies which are not disclosing entities to lodge accounts and reports for the last financial year ended on or before 30 June 1998 within one month after:

(a) the first AGM after 30 June 1998 (this AGM must be held within 5 months after the end of the financial year and there must be an AGM each calendar year); or

(b) the last day on which the company should have held its first AGM after 30 June 1998.

RG 68.111 For financial years ending on or after 1 July 1998, non-disclosing entities which are proprietary companies required to lodge financial reports or public companies must lodge their financial reports and reports within 4 months of the end of the financial year: see new s319(3)(b).

RG 68.112 Companies which are disclosing entities must lodge their accounts and reports within 90 days after the end of the financial year for years ended on or before 30 June 1998 (see RG 68.106) and within 3 months after the end of the financial year for years ended on or after 1 July 1998: see s319(3)(a).

Newly registered companies

RG 68.113 As noted in RG 68.107, from 1 July 1998 the new s345 requires all companies to lodge their annual returns by 31 January each year unless ASIC and the company agree a different deadline in writing. It is no longer possible for ASIC to issue a class instrument extending the deadline for particular kinds of companies.

RG 68.114 Under the old s335(1B), ASIC had issued class instruments extending the period of time for proprietary companies incorporated in the period from 1 October to 31 December to the immediately following 30 April (instead of 31 January as required by the old s335(1A)). An annual return lodged immediately after incorporation could be a burden on companies and normally did not provide much useful information. Many companies are formed as

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shelf companies and later lodgment of the annual return provided information such as the names of any new directors of the company.

RG 68.115 The annual return for companies required by the new s348 is much simpler and shorter than that previously required. Hence, the burden for newly registered companies in lodging an annual return soon after registration is reduced.

RG 68.116 However, ASIC will make individual agreements with companies registered between 1 October and 31 December to lodge their first annual returns by the immediately following 30 April. This will be achieved through the pre-printed annual returns which are normally sent to companies registered between 1 October and 31 December in March of the following year. The pre-printed annual return will include a pre-printed line (which the company may elect to strike out) to the effect that the company accepts an offer made by ASIC to lodge the return late. If they prefer, companies registered between 1 October and 31 December may still lodge an annual return before the immediately following 31 January.

RG 68.117 Companies registered in January are not required to lodge an annual return until 31 January of the following year (ie about 12 months after registration). This is consistent with the provisions of the Law prior to CLRA. While the lodgment date for annual returns of proprietary companies is no longer related to a calendar year under the new s345, the Law is unclear as to the situation for newly registered companies. It is ASIC's view that the removal of the relationship to a calendar year was not intended to result in companies registered in January being required to lodge an annual return by the end of the month of registration.

RG 68.118 An extended deadline for lodging the first annual return may be useful for newly registered proprietary companies which are likely to be sold soon after registration (eg shelf companies). However, such companies may still need to lodge notice within 3 months of registration for the purposes of relief under one of the following class orders:

(a) Class Order [CO 98/98] — Relief from preparation and lodgment of audited financial reports for small proprietary companies which are controlled by foreign companies but which are not part of a "large group"; and

(b) Class Order [CO 98/1417] — Audit relief for proprietary companies.

Forms for lodgment of accounts/financial reports

RG 68.119 ASIC has introduced a new Form 388 for the lodgment of financial reports, directors' reports and auditors' reports in respect of years ended on or after 1 July 1998. This form is to be used for all entities reporting under the new Chapter 2M (although separate forms are still to be used for the lodgment of accounts by licensed securities dealers and futures brokers pursuant to s860(2) and s1218(2)).

RG 68.120 For years ended on or before 30 June 1998, proprietary companies should continue to lodge their accounts, directors' report and auditors' report with the old Form 371 and all disclosing entities should continue to use the old Form 1002/7052.

RG 68.121 For years ended on or before 30 June 1998, public companies which are not disclosing entities are no longer able to lodge accounts and reports with their annual return: RG 68.109. Such companies should use the new Form 391C to lodge those accounts and reports. Public companies which are disclosing entities should use Form 1002/7052.

RG 68.122 ASIC will not take action against entities which have lodged accounts for years ended on or before 30 June 1998 with Form 388 prior to the date of this guide.

Annual general meetings ("AGMs")

AGM must be held in every calendar year

RG 68.123 The new s250N(2) requires public companies which have more than 1 member to hold an AGM in each calendar year and within 5 months of the end of the financial year. This is similar to the requirement in the old s245(1).

RG 68.124 A public company which, for example, changes its financial year from the 12 months ending 30 June 1999 to the 18 months ending 31 December 1999 (to synchronise with a parent pursuant to the new s 323D(3) and 323D(4) or ASIC Class Order [CO 98/96], or in accordance with individual relief granted by ASIC pursuant to s340), will still be required to hold an AGM during the 1999 calendar year.

RG 68.125 The new s 317 requires the directors to lay the financial report, directors' report and auditor's report ("the reports") for the last financial year before the AGM. In the example, it would be necessary to lay the reports for the financial year ended 30 June 1998 before the

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1999 AGM even though those reports should have already been laid before the 1998 AGM.

RG 68.126 However, the new s315(1) does not require the reports to be sent to members for a second time.

RG 68.127 ASIC also has power under the new s250P to extend the time to hold an AGM and this has the effect of allowing ASIC to extend the period of 5 months as well as provide relief from the requirement to hold an AGM in each calendar year. Applications for extension of time should be lodged at the Regional Office in the state or territory where the company has its principal place of business. (For further information see Regulatory Guide 44 *Annual general meeting — extension of time* (RG 44).)

Timing requirements for first AGM

RG 68.128 The first AGM of a public company following registration is required to be held within 18 months of the registration of the company: s250N(1). However, the following might raise questions as to whether the timing of the first AGM is also governed by the requirements of s250N(2) that an AGM be held in each calendar year and within 5 months of the end of the financial year:

(a) the absence of a specific exception from s250N(2) for the first financial year (as there had been with the old s245(1));

(b) the use of the word "must" in s250N(1) rather than "may" in the old s245(2), which might appear to impose an obligation on a company to hold its first AGM within 18 months but not give a company the right to hold an AGM at any time within the first 18 months;

(c) the note to s250N(2), which indicates that both s250N(1) and s250N(2) to be must be complied with in relation to the first AGM; and

(d) paragraph 10.74 of the Explanatory Memorandum to the Company Law Review Bill 1998 — "For a newly formed company there is a separate requirement for the company to hold its first AGM as well as the normal requirement to hold regular AGMs. However, one meeting may be held at a time which will satisfy both requirements (Bill s250N(1) and (2))."

RG 68.129 Despite the matters referred to in (a) to (d) of RG 68.128, ASIC considers the appropriate interpretation of the Act to be that only s250N(1) has operation in relation to the first AGM of a company. If it were interpreted that both s250N(1) and s250N(2)

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applied to the first AGM, that could result in s250N(1) either having no effect (ie if the first AGM were required to be held within each calendar year and could never be held more than 12 months after registration) or having limited effect (ie if the first AGM were required to be held within 5 months of the end of the first financial year, where that first financial year ended substantially before the end of 18 months).

RG 68.130 In some cases, it may be possible to hold one or more AGMs prior to the end of the first financial year after registration. For example, if a company's first financial year is a period of 18 months, it would be required by s250N(1) to hold an AGM prior to completion of the financial report for that financial year. No financial report is required to be laid before an AGM held prior to the end of the first financial year: see also note 1 to s317.

[*Historical note:* RG 68.128–RG 68.130 replaced 22/12/2005. The paragraphs formerly read:
'RG 68.128 The first AGM of a public company following registration is required to be held within 18 months of the registration of the company: new s 250N(1). However, the timing of the first AGM is also governed by the requirements of s250N(2) that an AGM be held in each calendar year and within 5 months of the end of the financial year. There is no specific exception from s250N(2) for the first financial year (as there had been with the old s245(1)) and the requirement for both s250N(1) and s250N(2) to be complied with in relation to the first AGM is made clear by:

(a) the note to s 250N(2); and

(b) paragraph 10.74 of the Explanatory Memorandum to the Company Law Review Bill 1998 — "For a newly formed company there is a separate requirement for the company to hold its first AGM as well as the normal requirement to hold regular AGMs. However, one meeting may be held at a time which will satisfy both requirements (Bill s250N(1) and (2))."

RG 68.129 Because a company is required to hold an AGM each calendar year under s250N(2), the latest time which it can hold its first AGM is 12 months after registration (assuming it is registered on 1 January and holds the AGM on 31 December of the same year). In using the word "must", s250N(1) imposes an obligation on a company to hold its first AGM within 18 months but does not give a company the right to hold an AGM at any time within the first 18 months (the old s245(2) used the word "may" which created such a right).

RG 68.130 In some cases, it may be possible to hold the AGMs for two calendar years prior to the end of the first financial year after registration. However, a third AGM would still need to be held within 5 months of the end of the first financial year. No financial report is required to be laid before an AGM held prior to the end of the first financial year: see also note 1 to s317.'].

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General meeting notice period for public companies

Background

RG 68.131 The requirements to give notice of meetings and the requirements in relation to the distribution of financial reports to members are contained in separate provisions of the Law. The new requirements as to notice are generally operative from 1 July 1998 while the new requirements as to the distribution of financial reports are operative for financial years ending on or after 1 July 1998.

Notice requirements

RG 68.132 Up to 30 June 1998, the Law only required 14 days notice to be given of most general meetings: see old s 247(2). From 1 July 1998 (irrespective of the financial year of a company), the new s 249H requires 21 days notice of a meeting of members of a public or proprietary company other than a listed company (for which 28 days notice is required under s 249HA). Members can agree to shorter notice.

RG 68.133 Under s 1424A, the 28 day requirement for listed companies does not apply where notice of a meeting was given before 1 July 1998.

Requirements to distribute accounts/financial reports

RG 68.134 For financial years ended on or before 30 June 1998, the old s315(2) requires a public company to send its financial report and reports to members at least 14 days before the AGM. For financial years ended on or after 1 July 1998, the new s315(1) requires a public company to distribute its financial report to members by the earlier of:

(a) 21 days before the next AGM after the end of the financial year; and

(b) 4 months after the end of the financial year.

RG 68.135 There is no need for a public company to send its financial report to members at the same time as the notice of its AGM. For financial years ended on or before 30 June 1998, a public company which is unable to distribute its financial report earlier, could send notices of the AGM to its members in accordance with the 21 day or 28 day requirement and make a second mail out of its accounts to meet the 14 day requirement.

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No action situation

RG 68.136 ASIC recognises that the 28 day notice period for meetings of listed companies was introduced late in June 1998. ASIC will not take action against listed companies which, because of genuine logistical difficulties, are unable to comply with the requirement that they give members 28 days advance notice of an AGM held during the 1998 calendar year in respect of a financial year ended 30 June 1998. However, members must still be provided with at least 21 days notice of the meeting.

RG 68.137 Companies should seek their own advice on the operation of s1322 and the possibility of civil actions by third parties for non compliance with the Law.

More information

RG 68.138 For more information concerning the matters discussed in paras RG 68.131–RG 68.137, see Information Release [IR 98/11] *Transitional issues — 28 day notice of general meetings* (dated 10 July 1998) and Media Release [MR 98/215] *ASIC allows limited relief on 28 day notice period* (dated 21 July 1998).

Directors' and officers' remuneration of registered schemes

[*Historical note:* RG 68.139–RG 68.143 inserted 6/10/1999. RG 68.144 inserted 20/7/2004. For text of old paragraph RG 68.144 see historical note below under heading 'Market value accounting by registered schemes'.

Heading 'Directors' and officers' remuneration of registered schemes' and RG 68.139–RG 68.144 deleted 26/3/2007. RG 68.139–RG 68.144 formerly read:

'RG 68.139 Section 285(3)(b) of the Law deems directors and officers of responsible entities to be directors and officers of their registered schemes. ASIC has been asked whether this affects the disclosure of directors' and officers' remuneration by schemes under accounting standards AASB 1017 "Related party disclosures" and AASB 1034 "Information to be disclosed in financial reports".

RG 68.140 The standards require the amount paid indirectly to directors and executive officers to be disclosed. Concerns have been expressed by some that the application of s285(3)(b) would necessitate disclosure in registered scheme financial statements of any amounts paid to the directors and executive officers of a responsible entity which are supported by the fees paid by a registered scheme to the responsible entity.

RG 68.141 Section 285(3)(b) does not apply in this manner. It is only intended to allow the shorthand 'director (or 'officer') of a registered scheme' to be used in place of 'director (or 'officer') of the responsible entity of a registered scheme' in Chapter 2M (eg s290, 292 and 312). The better view is that this is all s285(3)(b) is intended to do. Notably, this shorthand has not been used within Chapter 2M itself

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to impose disclosure obligations about directors of responsible entities: see s300(12).

RG 68.142 There are specific requirements under the Law for disclosure of the remuneration of the responsible entity, its directors and officers, including:

(a) the scheme's directors' report must disclose fees paid to the responsible entity by the scheme during or since the financial year (see s300(13)(a)); and

(b) the responsible entity's financial statements (which must be lodged with ASIC for the public record) must disclose:

  (i) directors' remuneration in accordance with AASB 1017 which applies to reporting entities; and

  (ii) officers' remuneration in accordance with AASB 1034 if the responsible entity is a disclosing entity.

RG 68.143 The application of s285(3)(b) to extend the disclosure requirements of AASB 1017 and AASB 1034 would be indirect, permanent and mandatory. It would also override the intentions implicit in the choice of terms and definitions in AASB 1017 and AASB 1034 by the AASB prior to the enactment of s285(3)(b). By contrast, translation provisions resulting from legislative changes are usually explicit, transitional, subject to contrary intention and designed to preserve the effect of the relevant provisions, despite the change in context: eg s1442 and 1465.

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CLERP 9 and AASB 1046

[*Historical note:* Heading 'CLERP 9 and AASB 1046' and new paragraph RG 68.145 inserted 20/7/2004. For text of old paragraph RG 68.145 see historical note below under heading 'Market value accounting by registered schemes'.

Heading 'CLERP 9 and AASB 1046' and RG 68.145 deleted 26/3/2007. RG 68.145 formerly read:

'Until years commencing 1 July 2004, the sections of this practice note concerning the requirements of s.300A apply in full. This practice note does not reflect CLERP 9 amendments to s.300A and related regulations that come into effect for years commencing on or after 1 July 2004. For years ending on or after 30 June 2004, AASB 1046 must be applied by disclosing entities instead of Section 4 of AASB 1017 and Section 6 of AASB 1034 which are referred to in this practice note.'.]

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Market value accounting by registered schemes

[*Historical note:* Heading 'Market value accounting by registered schemes' and RG 68.144–RG 68.149 deleted 20/7/2004. This section was inserted on 6/10/1999 and read as follows:

'RG 68.144 Registered schemes which are not disclosing entities cannot apply market value accounting to their non-current assets and thereby recognise unrealised gains and losses to the profit and loss statement ("market value accounting"). These schemes must comply with accounting standard AASB 1010 "Accounting for the Revaluation of Non-Current Assets" which generally requires any recognised unrealised gains on non-current assets to be taken to a reserve.

RG 68.145 Market value accounting is permitted (but not required) for financial assets of prescribed interest undertakings which are disclosing entities under accounting standards AASB 1029 "Half-year accounts and consolidated accounts" and AASB 1030 "Application of accounting standards to financial year accounts and consolidated accounts of disclosing entities other than companies".

RG 68.146 Market value accounting would also appear to be available to registered schemes which are disclosing entities under AASB 1029 and AASB 1030 by virtue of s1465.

RG 68.147 Prescribed interest schemes which are not disclosing entities are not required to comply with accounting standards under the Law. However, registered schemes which are not disclosing entities are required to comply with accounting standards, including AASB 1010. AASB 1010 applies to non-current assets even where assets are shown in the balance sheet by nature and in order of liquidity.

RG 68.148 This practice note does not address the requirements for registered schemes which are not reporting entities because it is unlikely that a registered scheme could be regarded as a non-reporting entity.

RG 68.149 It is unlikely that a case will arise when it is appropriate for ASIC to grant relief under s340 or 341 for entities to use market value accounting. Historical cost accounting is unlikely to be misleading, inappropriate or unreasonably burdensome. Any extension of market value accounting should result from a change to the accounting standards.']

Attachment to RG 68 Comparison of reporting requirements in relation to directors' and officers' remuneration

[*Historical note:* Attachment deleted 22/12/2005.]

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