



ASIC
Australian Securities &
Investments Commission

REGULATORY GUIDE 81

External administration: Early destruction of books

July 2023

About this guide

This guide is for external administrators making applications under s70-35 of Sch 2 to the Corporations Act.

It deals with applications for the early destruction of books of companies that have been subject to external administration.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This guide was issued in July 2023 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Policy Statement 81, issued 5 April 1994, reissued 3 May 2000, rebadged as a regulatory guide 5 July 2007

Disclaimer

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

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

Process for the early destruction of books

Key points

Companies and external administrators have statutory obligations to keep books and records.

The last external administrator of a company must keep all books of the company, and of its external administration, for five years from the end of the external administration (retention period). After the retention period, these books may be destroyed.

To destroy the books within the retention period, you (as the last external administrator) must apply to ASIC for our consent to the early destruction. We can only provide consent where the company is (or was) in liquidation or provisional liquidation.

We will take into consideration a number of matters when deciding whether to consent to your application. You must also pay an application fee.

We will generally not give our consent to early destruction of the books of the external administration within the retention period.

Requirements to keep written financial records

- RG 81.1 A company must keep written financial records that:
- (a) correctly record and explain its transactions, financial position and performance; and
 - (b) would enable true and fair financial statements to be prepared and audited.
- This obligation extends to transactions undertaken as trustee: see s286 of the *Corporations Act 2001* (Corporations Act).
- RG 81.2 You, as an external administrator of a company, must keep proper books that include:
- (a) entries or minutes of proceedings at meetings relating to the external administration of the company; and
 - (b) such other entries as are necessary to give a complete and correct record of the external administrator's administration of the company's affairs (see s70-10(1) of Sch 2 to the Corporations Act).
- RG 81.3 If a company is in external administration, all the books of the company, and of the external administration of the company, that are relevant to the affairs

of the company are *prima facie* evidence of the truth of all matters purported to be recorded in those books: see s70-36 of Sch 2.

RG 81.4 If you are the last external administrator of a company, you must retain all books of the company, and of its external administration, that are:

- (a) relevant to the affairs of the company; and
- (b) in the possession or control of the external administrator at the end of the external administration.

You must retain the books for five years from the end of the external administration (the retention period): see s70-35(1) of Sch 2.

Note: For the definition of ‘end of external administration’, see s5-5 of Sch 2. For the definition of ‘books’, see s9 of the Corporations Act.

RG 81.5 You will commit an offence if you intentionally or recklessly fail to comply with s70-35(1): see s70-35(5) of Sch 2.

RG 81.6 The requirement to retain books set out in s70-35(1) does not apply if you have a reasonable excuse: s70-35(2) of Sch 2. For further information on what is a ‘reasonable excuse’, see RG 81.8–RG 81.11.

RG 81.7 Subject to compliance with other provisions of the Corporations Act or under other law, the books referred to in s70-35(1) may be destroyed:

- (a) at the end of the retention period; or
- (b) within the retention period (with ASIC consent):
 - (i) *in the case of a members’ voluntary winding up*—as the company by resolution directs;
 - (ii) *in the case of a creditors’ voluntary winding up or a court winding up*—as the committee of inspection directs (if there is a committee), or otherwise as the creditors direct; or
 - (iii) *if the external administrator is appointed as provisional liquidator*—as the court directs.

Note: See s70-35(3) of Sch 2.

Reasonable excuse for the early destruction of books

RG 81.8 A reasonable excuse is one that an ordinary member of the community would accept as reasonable in the circumstances. It might include that the records were destroyed by factors outside the external administrator’s control—for example, by a natural disaster.

RG 81.9 We do not consider that you have a reasonable excuse to destroy the books of the company, and of the external administration of the company, within

the retention period only because the external administration does not have enough funds to meet the cost of future storage.

- RG 81.10 If you consent to act as an external administrator of a company, you must be aware of the possibility that the external administration will be without sufficient funds to pay all your remuneration and costs.
- RG 81.11 Unless there is a reasonable excuse, you must apply to ASIC for consent if you are seeking the early destruction of records. This will ensure that we can make an appropriate assessment about whether the books are likely to be needed, taking into account the matters we consider: see RG 81.19.

How to apply for consent to the early destruction of books

- RG 81.12 You should only apply for ASIC consent to the early destruction of books of a company when the affairs of the company are fully wound up, except for outstanding matters that you cannot progress until we make a decision on the application for early destruction of books. Such matters may include:

- (a) calculation of final dividend to creditors; or
- (b) lodgement of [Form 5603](#) *End of administration return* under s70-6 of Sch 2.

Note: For guidance on ASIC's consent to the early destruction of the books of the external administration, see RG 81.2 and RG 81.23–RG 81.24.

- RG 81.13 The application should be submitted through the [ASIC Regulatory Portal](#).

- RG 81.14 It must include:

- (a) information on the decision to destroy the books:
 - (i) *for a members' voluntary winding up*—a minute recording the company's resolution directing the destruction of the books;
 - (ii) *for a creditors' voluntary winding up or court-ordered winding up*—a minute recording the committee of inspection's direction (or the creditors' resolution, if no committee of inspection was appointed) to destroy the books; and
 - (iii) *if the external administrator is appointed as a provisional liquidator*—a court order directing the destruction of the books;
- (b) the following amounts:
 - (i) funds remaining in the external administration (including the estimated value of any assets yet to be realised);
 - (ii) total outstanding costs of the winding up, estimated to the date of the end of the external administration of the company (excluding storage costs of books);

- (iii) estimated cost of storage of books (hard copy and electronic) based on a five-year retention period;
- (iv) the figure reached once the outstanding costs of winding up and the estimated cost of storage have been subtracted from the funds remaining; and
- (v) the amount owing to remaining creditors;
- (c) *for a members' voluntary liquidation*—information on who will cover any deficiency of funds;
- (d) *for a creditors' voluntary liquidation or a court liquidation*—a statement as to whether the company was able to pay more than 50 cents in \$1 for each dollar owed to creditors;
- (e) a statement as to whether you have received any requests for access to the books or the information contained in them. The statement should include information about these requests, including why you consider that access is no longer required;
- (f) a statement as to whether, to the best of your knowledge, any circumstances exist in relation to the company or an associate of the company (as defined in s11 of the Corporations Act) that may result in the books being required by any person during the retention period—for example, if the company is a party to or, to your knowledge, is likely to become a party to court proceedings;
- (g) a statement setting out why we should exercise our discretion to consent (see RG 81.19);
- (h) a statement that all lodging and reporting requirements applicable at the date of the application have been met. This includes a statement that you have lodged, or do not need to lodge, a report under s533 of the Corporations Act or reg 5.5.05 of the *Corporations Regulations 2001* (Corporations Regulations); and
- (i) a statement that you do not propose to take legal action in the name of or on behalf of the company.

RG 81.15 If you make the application before the affairs of the company are fully wound up (see RG 81.12), you must also include information about the remaining steps left to finalise the external administration.

Application fee

RG 81.16 The application fee is prescribed by item 13 of Sch 2 to the *Corporations (Fees) Regulations 2001* (because it is an application for which a fee is not provided by any other item).

RG 81.17 We have provided details about payment options in the [ASIC Regulatory Portal](#).

What we will consider when processing applications

- RG 81.18 When we are deciding whether to exercise our discretion to consent to an early destruction of books, our paramount consideration is whether the books are likely to be needed for any investigation, prosecution or other litigation. If we do not think this is likely, we will balance the anticipated cost of storage against the likelihood that the books will be required.
- RG 81.19 Matters we will consider include:
- (a) whether an investigation, prosecution or other litigation is pending or in progress in relation to the company or an associate of the company;
 - (b) whether we have received any complaints about the company or its associates;
 - (c) whether any reports have been lodged about the company or its associates under s422, 533 or 438D of the Corporations Act or reg 5.5.05 of the Corporations Regulations;
 - (d) whether we or you have received any requests for access to the books, or the information contained in them;
 - (e) the funds remaining in the administration;
 - (f) the estimated cost of storage of books;
 - (g) any unfinalised matters of the external administration;
 - (h) the surplus or deficiency of funds in the administration;
 - (i) the time between the date, or anticipated date, of the end of the external administration of the company and the date the books would be destroyed; and
 - (j) if the applicant is appointed as provisional liquidator, the terms of the court's directions.
- RG 81.20 If you make your application before the affairs of the company are fully wound up, we will not provide our consent until we are satisfied that the affairs of the company are fully wound up. The exception to this is when there are outstanding matters that you cannot progress until we make a decision on the application for early destruction of books.
- RG 81.21 If we give consent to the early destruction of books before the affairs of the company are fully wound up, our consent is conditional on you lodging [Form 5603](#) within 12 months after the date of the consent letter. We consider that 12 months is a sufficient time for you to finalise the outstanding matters, such as calculating and distributing the final dividend, and lodging Form 5603.
- RG 81.22 If you fail to lodge Form 5603 within the 12 month period, our consent lapses. You will be required to seek a new consent from ASIC to destroy the books within the retention period.

ASIC's consent to early destruction of the books of the external administration

- RG 81.23 We expect you to retain the books that give a complete and correct record of your administration of the company's affairs: see s70-10 of Sch 2. We will generally not consent to the destruction of these books within the retention period.
- RG 81.24 We consider that the books of the company's external administration should be retained for the duration of the retention period. This is because you may need the books to help you respond to questions about the affairs of the company, or the conduct of the external administration, that arise after the affairs of the company have been fully wound up and the company deregistered.