



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 109

Assetless Administration Fund: Funding criteria and guidelines

November 2012

About this guide

This guide is for registered liquidators appointed under Ch 5 of the *Corporations Act 2001* (Corporations Act) as a liquidator in a creditors' voluntary winding up or a court-ordered winding up of a company.

It outlines:

- ASIC's approach to, and criteria for, funding liquidator investigations, reports and actions from the Assetless Administration Fund (AA Fund);
- how to apply for funding from the AA Fund, including guidance on completing an application form; and
- what to include in a funded supplementary s533 report.

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 November 2012 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 109, issued 23 February 2006, reissued 26 November 2009
- Superseded Regulatory Guide 109A, issued 13 June 2006
- Superseded Regulatory Guide 109B, issued on 21 December 2007 and effective as of 1 January 2008.

Disclaimer

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

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

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A Overview

Key points

The Assetless Administration Fund (AA Fund) finances preliminary investigations and reports into the failure of companies with few or no assets: see RG 109.5–RG 109.8.

The funding process differs depending on whether s206F disqualification proceedings may result or there is evidence of possible offences or other misconduct: see RG 109.10–RG 109.15.

The AA Fund may also provide funds to a liquidator to take action to recover assets in certain circumstances: see RG 109.3 and Section E.

- RG 109.1 When a company fails with few or no assets, the liquidator may not be able to carry out full investigations into the circumstances of the insolvency or prepare full reports for ASIC. As a result, possible offences or other misconduct by company officers may not be brought to our attention or actions may not be taken to recover assets for the benefit of creditors where directors have breached their duties.
- RG 109.2 A liquidator in a creditors' voluntary winding up or a court-ordered winding up can apply for assistance from the AA Fund to carry out preliminary investigations and prepare supplementary s533 reports.
- RG 109.3 A liquidator in a creditors' voluntary winding up or a court-ordered winding up can also apply for assistance from the AA Fund to enable the liquidator to bring an action to recover assets where fraudulent or unlawful phoenix activity is suspected.

Note: This includes actions to deprive persons of the benefits of breaches of duty by company officers (including breaches by corporate insolvency practitioners) that have a sizeable adverse effect on employees, consumers or small business. This may include funding replacement liquidators to investigate a former liquidator if there are concerns that the liquidator was complicit in the breach of duty.

- RG 109.4 We are providing this guidance for liquidators to outline:
- (a) the criteria for assistance from the AA Fund;
 - (b) how to apply for funding;
 - (c) our approach to funding liquidator investigations, reports and actions;
 - (d) what to include in a funded supplementary s533 report; and
 - (e) your rights to request a review of our decision.

This regulatory guide can be read in conjunction with Regulatory Guide 16 *External administrators: Reporting and lodging* (RG 16).

What is the AA Fund?

RG 109.5 The AA Fund was established by the Australian Government to finance preliminary investigations and reports by liquidators into the failure of companies with few or no assets, where it appears to ASIC that enforcement action may result from the investigation and report. It may also finance actions by liquidators to recover assets in certain circumstances. The AA Fund is administered by ASIC.

RG 109.6 A particular focus of the AA Fund is to curb fraudulent or illegal phoenix activity.

Note: Phoenix activity does not have a statutory or legal definition. However, fraudulent or unlawful phoenix activity can be regarded as typically involving:

- the transfer of assets (such as the business) of a company (the previous company) to a subsequent company in circumstances where the previous company:
 - was unable to pay its debts; and
 - may have been conducted in a manner so as to deprive unsecured creditors equal access to its assets; and
- there is a connection between the management or shareholding of the previous company and the subsequent company.

RG 109.7 The AA Fund helps close the regulatory gap that arises when a failed company is not properly investigated. This can happen because liquidators are not obliged to incur any expense, other than an expense necessary to comply with their minimum statutory duties, unless the company in liquidation has sufficient available property to fund it. As a result, when a company is left with few or no assets, the liquidator is without funds to bring an action to recover assets for the benefit of creditors and often performs only a perfunctory investigation. This may allow misconduct in the lead up to a formal insolvency to go undiscovered or without penalty.

Liquidator investigations and reports to ASIC

RG 109.8 The AA Fund enables a liquidator to carry out a proper investigation and put together a liquidator report, which then helps ASIC decide whether to commence its own investigation or enforcement action. Addressing the regulatory gap through more rigorous investigation and reporting will improve corporate conduct generally, improve returns for creditors, and reduce the scope for phoenix activity.

Liquidator actions to recover assets

RG 109.9 A liquidator may also seek funding assistance from the AA Fund to take action to recover assets where fraudulent or unlawful phoenix activity is suspected.

Note: We may provide funding to a liquidator to perform mandatory functions in relation to an insolvency administration where ASIC orders the winding up of the

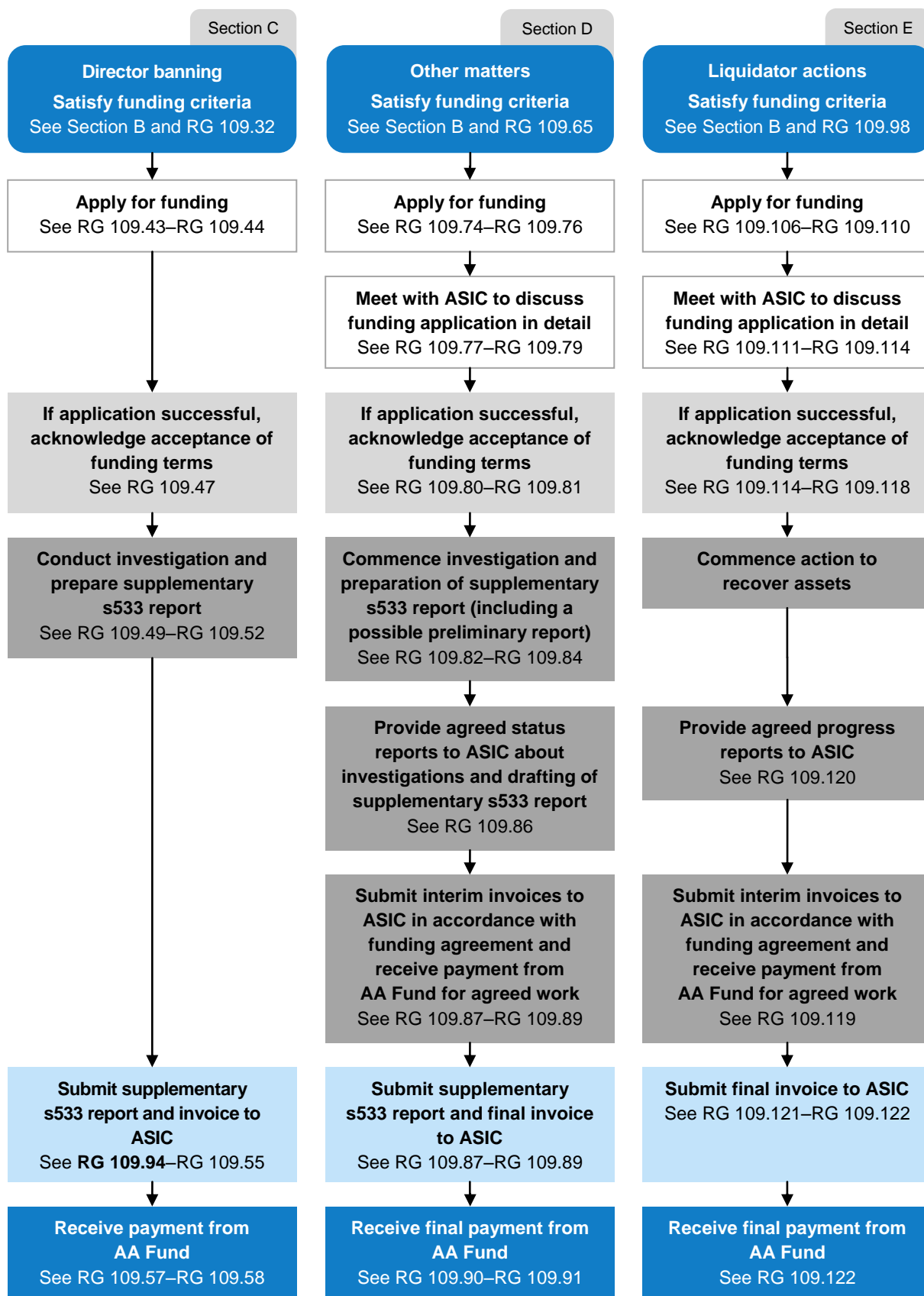
company under Pt 5.4C of the Corporations Act: see Regulatory Guide 242 *ASIC's power to wind up abandoned companies* (RG 242).

What is the funding process?

- RG 109.10 The first step in applying for assistance from the AA Fund is always to determine whether or not the funding criteria are satisfied. Section B of this guide outlines four criteria that must be satisfied:
- (a) the liquidation must be 'assetless' (see RG 109.22–RG 109.24);
 - (b) the initial s533 report must have been lodged (see RG 109.25);
 - (c) the issue to be reported on must be of a type we may consider pursuing (see RG 109.26–RG 109.27); and
 - (d) there is or may be material, information or evidence available to support any allegations or concerns of the liquidator (see RG 109.28–RG 109.29).
- RG 109.11 Once the funding criteria are satisfied, the process differs depending on whether:
- (a) the case may result in s206F administrative proceedings to disqualify a person from managing corporations;
 - (b) there is evidence of possible offences or other misconduct, requiring investigation and lodgement of a supplementary s533 report; or
 - (c) a liquidator seeks to commence an action to try to recover assets where fraudulent or unlawful phoenix activity is suspected.

Figure 1 shows the steps that apply to the different types of funding applications.

Figure 1: Flowchart of the assetless administration funding process



- RG 109.12 In circumstances where s206F administrative proceedings to disqualify persons from managing corporations (director banning) may be appropriate, the process outlined in Section C should be followed.
- RG 109.13 Where there may be evidence of possible offences or other misconduct in relation to the Corporations Act and funding is required to investigate and report to ASIC where enforcement action may be warranted, liquidators should read Section D.
- RG 109.14 In a limited number of cases we may fund a liquidator seeking to commence an action to recover assets where fraudulent or unlawful phoenix activity is suspected. This may include funding replacement liquidators to investigate a former liquidator if there are concerns that the liquidator was complicit in a breach of duty that had a sizeable adverse effect on employees, consumers or small business. For information about this, see Section E.
- RG 109.15 The appendices to this guide will also help liquidators prepare their funding applications and supplementary s533 reports.

B Assessment of applications and funding criteria

Key points

We will assess applications for funding that meet the funding criteria on a case-by-case basis. Generally, eligible applications relating to possible director bannings under s206F that meet the criteria will be funded.

Eligible applications for funding to investigate and report to ASIC on matters other than a s206F banning, or for the liquidator to take action to recover assets where fraudulent or unlawful phoenix activity is suspected, will be considered consistently with our general approach to selecting matters for formal investigation and enforcement action.

We will take a number of factors into account in assessing applications for funding, including:

- the possibility of s206F disqualification proceedings;
- the strategic significance and benefits of pursuing the alleged misconduct;
- the regulatory impact of any resulting action;
- issues specific to the particular case like the seriousness of the misconduct, the sufficiency of available evidence and the currency of the misconduct or history of similar conduct;
- alternatives to investigation and enforcement action; and
- whether a funded action is likely to result in a material dividend to creditors, including the likely availability of assets to satisfy a judgment debt or costs order.

To be eligible for funding from the AA Fund, the following criteria must be satisfied:

- the liquidation must be 'assetless' (see RG 109.22–RG 109.24);
- the initial s533 report must have been lodged (see RG 109.25);
- the issue to be reported on must be of a type we may consider pursuing (see RG 109.26–RG 109.27); and
- there is or may be material, information or evidence available to support any allegations or concerns of the liquidator (see RG 109.28–RG 109.29).

How we assess funding applications

- RG 109.16 We will assess each application for funding that meets the funding criteria set out at RG 109.22–RG 109.29 on a case-by-case basis. There are three types of funding applications:

- (a) possible director banning under s206F;
- (b) matters, other than director banning, where funding is provided to the liquidator to investigate and report alleged misconduct to ASIC where enforcement action may be warranted; and
- (c) matters where funding is provided to the liquidator to take action to recover assets where fraudulent or unlawful phoenix activity is suspected. This may include funding replacement liquidators to investigate a former liquidator if there are concerns that the liquidator was complicit in a breach of duty that has had a sizeable adverse effect on employees, consumers and small business.

RG 109.17 We anticipate that, generally, applications relating to possible director banning under s206F that meet the criteria set out in RG 109.32 and seek funding of \$7500 (exclusive of GST) or less will be funded, other than in exceptional circumstances. Where these applications meet the criteria but are seeking funding of more than \$7500 (exclusive of GST), approval for funding may only be given where:

- (a) we consider the extent and nature of the work proposed to be undertaken is necessary and justifies the additional cost; and
- (b) we come to an agreement with the liquidator on the amount of funding.

Note: Detailed information about the application process for applications relating to s206F bannings is in Section C.

RG 109.18 Applications for funding relating to further investigations and supplementary s533 reports (set out in RG 109.16(b)–RG 109.16(c)) that meet the funding criteria in Section B will be considered on a case by case basis consistently with our general approach to selecting matters for formal investigation and enforcement.

Note: Detailed information about the application process for matters other than s206F banning is in Section D. For detailed information about the application process for liquidator actions, see Section E.

RG 109.19 The specific factors that we consider will vary according to the circumstances of the case. Broadly, however, we consider four issues (set out in Table 1) when deciding whether to fund a liquidator investigation or supplementary s533 report, or whether to fund a liquidator action against a company officer to deter or prevent fraudulent or unlawful phoenix activity or to try to recover assets.

Note: See Information Sheet 151 *ASIC's approach to enforcement* (INFO 151).

RG 109.20 We will also take into account the total funds available in the AA Fund and the likely future requirements for funding from the AA Fund when considering a funding application. Therefore, an application that meets the eligibility criteria may still be refused.

Table 1: Issues considered when deciding applications

Strategic significance	We assess the seriousness of the matter, particularly its market impact. We also examine the consequences of the misconduct, and of providing funding to the liquidator, for creditors and others. For instance, we consider the amount of money lost and the impact of that loss on the people affected, or whether there will be repayment of funds in the event of a successful outcome.
Benefits of pursuing misconduct	We consider whether the misconduct suspected or alleged by the liquidator is widespread or part of a growing trend, and whether funding an action by the liquidator will send an appropriate message to the market, or whether an alternative course of action is more appropriate.
Issues specific to the case	<p>A variety of factors can influence a decision about whether to fund a matter from the AA Fund, and these will vary according to circumstances. They include:</p> <ul style="list-style-type: none"> • the seriousness of the misconduct; • the time that has lapsed since the misconduct occurred; • whether it was an isolated instance of misconduct or whether it is continuing; and • whether the liquidator has admissible evidence to prove allegations of misconduct, or whether such evidence is known to be available and is likely to be obtained.
Alternatives available	<p>We are unlikely to fund matters where other enforcement or regulatory outcomes might appropriately address the concerns. This may include a possible class action (though not a possible ASIC representative action) or the availability of litigation funding.</p> <p>In some cases there may be an alternative, and more appropriate, source of ASIC assistance available—for example, the Liquidator Assistance Program, which can help liquidators to obtain information compulsorily from directors or officers.</p>

Liquidator actions to recover assets

RG 109.21 When dealing with applications relating to liquidator actions to recover assets where fraudulent or unlawful phoenix activity is suspected, we will additionally consider other factors, which will vary in importance according to the circumstances of each case. These factors will include whether:

- (a) there are reasonable prospects of a successful outcome;
- (b) creditors or other potential litigation funders have been approached to provide funding; and
- (c) the action is likely to result in a material dividend payment to creditors after payment of the liquidator's costs, including the likely availability assets to defendants to satisfy a judgment debt or costs order.

Note: For further information on funding applications for liquidator actions, see Section E.

What are the funding criteria?

Assetless administration

- RG 109.22 Table 2 sets out what an ‘assetless administration’ is for the purposes of the AA Fund. When considering which applications to fund, we will give priority to applications in Category 1 over Categories 2 and 3.
- RG 109.23 For applications for funding to recover assets where fraudulent or unlawful phoenix activity is suspected, the criteria set out in Category 3 will also be applied.

Table 2: What is an assetless administration?

Application category	Explanation
<p>Category 1</p> <p>A liquidation with:</p> <ul style="list-style-type: none"> • no assets; or • only enough assets to cover the basic tasks of an insolvent liquidation, such as: <ul style="list-style-type: none"> – securing books and records; – making initial inquiries to identify and collect assets; – providing a basic report to creditors; – dealing with creditors’ inquiries; and – lodging an initial s533 report. 	<p>To qualify as an assetless administration under Category 1, the liquidation must have less than \$10,000 of net realisable assets. In such a liquidation, there are usually insufficient resources to enable a liquidator to conduct proper investigations into possible misconduct under the Corporations Act.</p> <p>For liquidations in Category 1, net realisable assets are the actual or estimated gross proceeds from the realisation of assets, <i>less</i>:</p> <ul style="list-style-type: none"> • actual or estimated direct third-party realisation costs (e.g. auctioneer’s fees and real estate agent’s commission); • proceeds subject to a claim by a secured creditor; and • petitioning creditor’s costs paid under s556(1)(b). <p>Note: See also RG 109.24 for what is excluded from net realisable assets for the purposes of the AA Fund.</p>
<p>Category 2</p> <p>A liquidation where some work has been undertaken and, as a result, less than \$10,000 remains in net realisable assets.</p>	<p>To qualify as an assetless administration under Category 2, a liquidation must have less than \$10,000 of net realisable assets.</p> <p>For liquidations in Category 2, net realisable assets are the actual or estimated gross proceeds from the realisation of assets, <i>less</i> (at the date of lodgement of the application for funding):</p> <ul style="list-style-type: none"> • the costs listed under Category 1; and • all other outlays of the liquidation. <p>Note: See also RG 109.24 for what is excluded from net realisable assets for the purposes of the AA Fund.</p>

Application category	Explanation
<p>Category 3</p> <p>A liquidation where there are insufficient net realisable assets to pay the liquidator's outlays to take action to recover assets where fraudulent or unlawful phoenix activity is suspected.</p>	<p>To qualify as an assetless administration under Category 3, a liquidator must have insufficient net realisable assets to pay the estimated costs to pursue recovery action.</p> <p>For liquidations in Category 3, net realisable assets are the actual or estimated gross proceeds from the realisation of assets, less:</p> <ul style="list-style-type: none"> • actual or estimated direct third-party realisation costs (e.g. auctioneer's fees and real estate agent's commission); • proceeds subject to a claim by a secured creditor; • petitioning creditor's costs paid under s556(1)(b); and • all other outlays of the liquidation, at the date of lodgement of the application for funding. <p>Note: See also RG 109.24 for what is excluded from net realisable assets for the purposes of the AA Fund.</p>

RG 109.24 Net realisable assets exclude:

- (a) in relation to all categories:
 - (i) choses in action which have not been settled or judicially determined; and
 - (ii) assets that are not readily realisable and that will take longer than 12 months from the date of lodgement of the application for funding to realise; and
- (b) in relation to Categories 1 and 2—specific purpose funding from creditors (usually for asset recovery purposes).

Note 1: These definitions are for the purposes of the AA Fund only. They do not apply for the purposes of the Corporations Act (e.g. in determining whether there is sufficient available property under s545(1) or if the company has enough property to cover the costs of obtaining a court order for the company's deregistration under s601AB(2)).

Note 2: While assets that will take longer than 12 months from the date of estimation of net realisable assets to realise are generally excluded from the definition of net realisable assets, we still require an estimate of the value of such assets to be provided in the application form.

Section 533 report

RG 109.25 To be eligible to apply for funding from the AA Fund, the liquidator must have lodged an initial s533 report.

Note 1: The statutory requirement to lodge a s533 report is not dependent on whether or not a company is assetless. Liquidators who are required to lodge a s533 report and who are ineligible for funding must still investigate and report on possible misconduct to the required standard.

Note 2: We prefer that the initial s533 report be in the form of Schedule B to RG 16.

Types of matters funded

- RG 109.26 We will consider funding the liquidator from the AA Fund to undertake investigations and prepare a supplementary s533 report in circumstances where:
- (a) s206F director banning proceedings may be appropriate (see Section C); or
 - (b) court proceedings for serious misconduct under the Corporations Act may be warranted, including matters such as breaches of directors' and officers' duties, insolvent trading, and concealment, misappropriation or removal of company property (see Section D).

Note: After lodging their initial s533 report, a liquidator may lodge a further report under s533(2).

- RG 109.27 We may also fund a liquidator to commence an action against a company or a company officer to try to recover assets where fraudulent or unlawful phoenix activity is suspected. This may include an action against a former liquidator where there are concerns that the liquidator was complicit in a breach of duty: see Section E.

Sufficient evidence

- RG 109.28 Our decision about whether to provide funding will be heavily influenced by whether:
- (a) sufficient evidence is likely to be available to support the allegations made in the supplementary s533 report, either to conduct s206F direct banning proceedings or to enable ASIC to take subsequent enforcement action; or
 - (b) in the case of an application for funding for a liquidator action, sufficient evidence is available to enable an assessment of the prospects of success of the proposed action by the liquidator to pursue recovery of assets where fraudulent or unlawful phoenix activity is suspected.

For these purposes, any assertion of possible wrongdoing needs, where possible, to be supported by the identification of documents or witnesses likely to be able to support or prove that assertion. The absence of such identification may mean that no funding is granted.

- RG 109.29 The extent and nature of evidence required is different for s206F director banning proceedings and recovery actions or court proceedings commenced as a result of possible misconduct in relation to a company: see RG 109.37–RG 109.38 and RG 109.67–RG 109.69.

Your right to seek a review

- RG 109.30 If you are dissatisfied with the outcome of our decision about your funding application, you can request ASIC to review the decision. If, after the review, you remain dissatisfied with the decision, you may make a complaint to ASIC about the handling of your application. You may also contact the Commonwealth Ombudsman. Review requests should be submitted in writing within 28 calendar days of the date of our notification of the decision. If you are unable to meet this timeframe, you should contact ASIC before expiry of the 28-day period to request an extension of time for lodgement.
- RG 109.31 For more information about your review rights, see Appendix 11. For further information about making a complaint to the Commonwealth Ombudsman, see www.ombudsman.gov.au.

C Director banning (administrative)

Key points

In addition to the general funding criteria there are certain requirements that must be met for ASIC to consider funding a matter that may result in a director being banned: see RG 109.32–RG 109.33.

While we are not bound by the rules of evidence in such proceedings, there must be sufficient evidence that is relevant and logically probative: see RG 109.37–RG 109.39 and Appendix 10.

Funding will only be approved for future remuneration and disbursements for investigations and preparation of the supplementary s533 report: see RG 109.40–RG 109.42.

Applications for funding are lodged electronically. If successful, the liquidator must enter into a funding agreement: see RG 109.43–RG 109.48 and Appendices 1 and 2.

Once the funding agreement is accepted, the liquidator should promptly start their investigations and the preparation of the supplementary s533 report: see RG 109.49–RG 109.52 and Appendix 3.

Our view is that a liquidator does not require creditor approval to draw fees for work funded by the AA Fund: see RG 109.93–RG 109.58.

Supplementary s533 reports are confidential and protected by qualified privilege, but may be made available to the director subject to s206F disqualification proceedings: see RG 109.59–RG 109.61.

The liquidator may be required to attend the s206F banning hearing or a subsequent appeal: see RG 109.62–RG 109.64.

Eligibility for funding

RG 109.32 As well as satisfying the criteria in Section B, to be eligible to apply for this category of funding, a liquidator must still be in office for at least one of the companies with which the director has been involved and:

- (a) be aware that the director has been involved with one or more other companies that have gone into liquidation within the last seven years;
- (b) reasonably believe that the director meets the requirements of s206F(1)(a);
- (c) reasonably believe that there is, or will be, sufficient information or material to support their concerns about the director's conduct, taking into account s206F(2)(b)(i); and
- (d) reasonably believe that their concerns may warrant ASIC taking director banning proceedings, taking into account s206F(2)(b)(ii).

RG 109.33 We will consider funding for all matters that meet the above requirements.

Note: Section 206F states:

Power to disqualify

- (1) ASIC may disqualify a person from managing corporations for up to 5 years if:
- (a) within 7 years immediately before ASIC gives a notice under paragraph (b)(i):
 - (i) the person has been an officer of 2 or more corporations; and
 - (ii) while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under subsection 533(1)...about the corporation's inability to pay its debts; and
 - (b) ASIC has given the person:
 - (i) a notice in the prescribed form requiring them to demonstrate why they should not be disqualified; and
 - (ii) an opportunity to be heard on the question; and
 - (c) ASIC is satisfied that the disqualification is justified.

...

Grounds for disqualification

- (2) In determining whether disqualification is justified, ASIC:
- (a) must have regard to whether any of the corporations mentioned in subsection (1) were related to one another; and
 - (b) may have regard to:
 - (i) the person's conduct in relation to the management, business or property of any corporation; and
 - (ii) whether the disqualification would be in the public interest; and
 - (iii) any other matters that ASIC considers appropriate.

...

Notice of disqualification

- (3) If ASIC disqualifies a person from managing corporations under this section, ASIC must serve a notice on the person advising them of the disqualification. The notice must be in the prescribed form.

Start of disqualification

- (4) The disqualification takes effect from the time when a notice referred to in subsection (3) is served on the person.

ASIC power to grant leave

- (5) ASIC may give a person who it has disqualified from managing corporations under this Part written permission to manage a particular corporation or corporations. The permission may be expressed to be subject to conditions and exceptions determined by ASIC.

Locating the director

RG 109.34 The s206F disqualification process includes an obligation for ASIC to give a director notice of the intention to disqualify, and notice of the disqualification decision. We must serve these documents on the director for

a disqualification to have effect. Accordingly, you should provide the most current information about:

- (a) the last known, current, and/or alternative addresses where the director may be located; and
- (b) any information the liquidator has that suggests the director has since become uncontactable.

Liquidator assistance program

RG 109.35 A liquidator should request liquidator assistance from ASIC in circumstances where a company officer or third party fails to assist the liquidator to:

- (a) obtain the relevant books and records of a company; or
- (b) provide a Report as to Affairs under the Corporations Act.

RG 109.36 Such assistance should be sought before making an application for funding and before raising allegations of non-compliance with the statutory obligation to assist the liquidator in a supplementary s533 report, as it may produce further information or evidence relevant to an application for funding from the AA Fund or relevant to allegations of non-compliance.

Note: To request assistance, notify ASIC in writing. The procedure is set out at www.asic.gov.au/liquidatorassistance.

Sufficient evidence

RG 109.37 The administrative hearing conducted under s206F should not be equated to a civil, criminal or quasi-judicial process. In conducting the hearing, we are performing an administrative function. We are not bound by the rules of evidence and the traditional rules of procedure of courts or quasi-judicial bodies do not apply: see s59(2) of the *Australian Securities and Investments Commission Act 2001*. A s206F hearing is a critical part of our decision-making process. The hearing is used both in finding the facts about a matter and in considering the significance of those facts to the law.

RG 109.38 While the rules of evidence do not apply, adverse findings we make must be based on logically probative material. This means that the available information or material must:

- (a) be relevant;
- (b) logically tend to prove or disprove the matters that we must determine; and
- (c) be probative (i.e. have sufficient weight and cogency to be relied on).

For more information on the conduct of administrative hearings, see Regulatory Guide 8 *Hearings practice manual* (RG 8).

- RG 109.39 We have also provided additional guidance in Appendix 10 about the types of information and supporting documents that could be considered by a liquidator when investigating possible misconduct and reporting to ASIC in a supplementary s533 report.

What funding is provided?

- RG 109.40 Funding will only be approved for anticipated future remuneration, together with actual disbursements reasonably incurred and directly relevant to the additional investigations and preparation of the supplementary s533 report. It will not be available to meet remuneration already incurred.
- RG 109.41 It is expected that most liquidator investigations and reports will be funded up to a capped total of \$7500 (exclusive of GST), for remuneration charged on an hourly basis and disbursements combined.
- RG 109.42 If a liquidator considers that the cost of the work to be carried out, including expenses, will be greater than \$7500 (exclusive of GST), this should be stated in the application form. In this case, we will contact the liquidator to discuss the estimated cost (see RG 109.17).

Funding applications

Lodging an application

- RG 109.43 If a liquidator considers that the liquidation satisfies the funding criteria in Section B and RG 109.32, they may lodge a funding application. For assistance with completing and submitting a funding application see Appendix 1.
- RG 109.44 The funding application (Form EX02 *Assetless administration funding request (Section 206F—Director bannings)*) must be lodged electronically through ASIC's Registered Liquidators portal. If you have difficulties with registering your application online, call the Client Contact Centre on 1300 300 630 or email online@asic.gov.au.

Assessing the application

- RG 109.45 In assessing the application, we may contact the liquidator to obtain a more detailed understanding of the matter. We may also contact the liquidator to discuss the level of funding sought.

RG 109.46 We will notify liquidators in writing of the outcome of their application.

Funding agreement

RG 109.47 If an application is successful, a funding agreement will be sent to the liquidator setting out the terms on which the funding is offered. The liquidator must acknowledge acceptance of the terms by returning a signed and dated copy of the agreement within 10 business days.

RG 109.48 A sample funding agreement for director banning investigations and supplementary s533 reports is set out in Appendix 2.

Preparing and submitting reports

RG 109.49 When a liquidator has accepted the terms of the funding offer, they should promptly start their investigation and preparation of the supplementary s533 report. ASIC officers are also available to discuss with the liquidator any issues involved in the preparation of the report. Liquidators should contact ASIC as soon as possible if they are unable to lodge the report within the agreed time under the funding agreement.

RG 109.50 To streamline the preparation of these supplementary s533 reports and ensure they are of a suitable standard, we have developed a sample layout of a report that meets these requirements: see Appendix 3.

RG 109.51 Liquidators should prepare their supplementary s533 reports with a view to providing logically probative material to ASIC. As noted in RG 109.38, when conducting administrative hearings, we can only base adverse findings on such material.

RG 109.52 The supplementary s533 report must focus on matters that illustrate the person's conduct in relation to the management, business or property of a corporation: see s206F(2)(b)(i).

Payments from the AA Fund

RG 109.53 In accordance with the funding agreement the liquidator should submit, at such times and to the person specified, their tax invoice(s) and detailed fee account(s) for the agreed investigation and supplementary s533 report.

RG 109.54 The funding agreement will also provide details for submitting the completed supplementary report.

RG 109.55 We will not disburse funding unless the funding agreement has been executed and returned within 10 business days.

- RG 109.56 In accordance with the terms of the funding agreement, each fee account must disclose:
- (a) the amount of time spent by the liquidator and each employee at the relevant charge-out rate;
 - (b) a description of the work performed; and
 - (c) details of the disbursements being claimed.
- RG 109.57 Cheques for fees and disbursements that liquidators receive from the AA Fund must be paid into the liquidation bank account. Both the receipt and subsequent payment to the liquidator from the liquidation bank account must be recorded in Form 524 *Presentation of accounts and statement*, broken down into fees and disbursements, and attributed to the 'Assetless Administration Fund'.
- RG 109.58 We consider that s473(3) and 499(3) of the Corporations Act do not require a liquidator to seek approval from the committee of inspection, the creditors or the court for funding from the AA Fund. We will administer the law on this basis.

Disclosure of liquidators' reports

- RG 109.59 Supplementary s533 reports attract qualified privilege in accordance with s535: see s89. Supplementary s533 reports are not public documents and are confidential: see s1274(2).
- RG 109.60 As part of any s206F banning proceedings, the director is given the opportunity to have access to those documents that are relied upon by ASIC. To meet the requirements of procedural fairness, it will usually be necessary to provide the s533 report(s) to the director.
- RG 109.61 Access to the s533 reports is usually given on the condition that they only be used for the purposes of the preparation for, and conduct of, the s206F hearing and that the reports cannot be copied or disclosed to a third party without our written consent.

Other requirements

- RG 109.62 We anticipate that, in most cases, we will require no information or assistance from a liquidator, other than the funded supplementary s533 report.
- RG 109.63 Occasionally a liquidator may be required to attend a s206F banning hearing to give evidence relating to the content of their report. Should the director appeal our decision, it is possible that a liquidator may be required to attend

that hearing. The usual avenue for appeal is to the Administrative Appeals Tribunal.

RG 109.64 In the unlikely event that we require a liquidator to undertake additional work (other than attending the banning or appeal hearing), we will negotiate an amount to be paid for this work based on the same hourly rates as those agreed in the original funding agreement.

D Funding investigations—Matters other than director banning

Key points

We will consider funding matters involving possible offences or serious misconduct that may warrant proceedings by ASIC: see RG 109.65–RG 109.66. The liquidator should consider the material they will need to gather to show an offence or other misconduct has been committed, bearing in mind it may be evidence in subsequent legal proceedings: see RG 109.67–RG 109.70 and Appendix 10.

We will determine the level of funding to undertake investigations and prepare supplementary s533 reports based on the information provided by the liquidator: see RG 109.71–RG 109.73.

Where we decide to fund the matter, we will advise the liquidator of those aspects we are interested in pursuing: see RG 109.74–RG 109.81 and Appendices 4–8.

Once funding is approved and investigations commenced, we may require regular status reports or meetings to discuss progress: see RG 109.82–RG 109.86 and Appendices 9–10.

Our view is that a liquidator does not require creditor approval to draw fees for work funded by the AA Fund: see RG 109.87–RG 109.91.

Supplementary s533 reports are confidential and protected by qualified privilege, but may need to be produced in any proceedings relating to the matters alleged: see RG 109.92–RG 109.93.

Where enforcement proceedings are commenced, the liquidator may be required to prepare an affidavit or attend court to give evidence: see RG 109.94–RG 109.97.

Eligibility for funding

RG 109.65 As well as satisfying the criteria in Section B, for a liquidator to be eligible to apply for this category of funding, the liquidator must form a reasonable belief that:

- (a) there has been serious misconduct in relation to the company;
- (b) there is, or will be on completion of the investigation, sufficient admissible evidence to prove allegations of misconduct; and
- (c) their concerns may warrant the taking of proceedings by ASIC, taking into account the age of the relevant conduct and history of such conduct.

- RG 109.66 The most common types of matters that we expect to consider for funding are:
- (a) breaches of directors' and officers' duties (s180–184). Of particular interest to ASIC are breaches arising out of fraudulent or unlawful phoenix activity;
 - (b) continuing to take part in the management of a company while disqualified (s206A);
 - (c) failure by a director to take reasonable steps to ensure that the company maintains adequate books and records (Pts 2M.2 and 2M.3, and s344);
 - (d) unauthorised use of an officer's powers following the winding up of the company (s471A);
 - (e) insolvent trading (s588G);
 - (f) fraud, misrepresentation or theft of property (s590);
 - (g) entering into agreements or transactions to avoid employee entitlements (s596AB); and
 - (h) complicity by a former liquidator in a breach of duty

Sufficient evidence

- RG 109.67 In seeking funding for further investigations, the liquidator should take into account the extent of the material they may need to gather or consider to establish their belief that an offence or other misconduct may have been committed. This must be sufficient to enable ASIC to bring enforcement action. The liquidator should be aware that this material might form evidence that will establish the offence or misconduct in subsequent legal proceedings. For further information about the likelihood of sufficient evidence being available, see RG 109.28.
- RG 109.68 The liquidator should be aware that the application for funding from the AA Fund and related correspondence with ASIC may be required to be disclosed in subsequent court proceedings. References to person who may be responsible for misconduct should be neutral and factually based.
- RG 109.69 Appendix 10 sets out additional guidance on the types of information and supporting documents that a liquidator could consider when investigating possible misconduct and reporting to ASIC in a supplementary s533 report.

Liquidator assistance program

- RG 109.70 A liquidator may experience difficulties in obtaining relevant information—for example, because the directors have failed to:
- (a) provide a Report as to Affairs under the Corporations Act; or

- (b) deliver the books and records of the company to the liquidator.

In such situations, the liquidator should consider exercising their powers in this regard, or seek our assistance to compel the directors' compliance. That assistance should be sought before making an application for funding and before raising allegations in a supplementary s533 report of non-compliance with the statutory obligation to assist the liquidator.

Note: To request assistance, notify ASIC in writing. The procedure is set out at www.asic.gov.au/liquidatorassistance.

What funding is provided?

- RG 109.71 Funding will generally only be available to meet the costs (including agreed disbursements) directly associated with undertaking the investigation and completing the supplementary s533 report.
- RG 109.72 We will consider the level of funding requested, taking into the account the information provided by the liquidator. The funding approved will be determined after an assessment of the initial facts of a particular case and after consultation with the liquidator.
- RG 109.73 We recognise that there may be instances where the liquidator does not have sufficient available information to enable a fully informed assessment to be made of the merits of a funding application. In these circumstances, we may consider funding the liquidator to conduct preliminary investigations and prepare a preliminary supplementary s533 report to enable ASIC to decide whether to provide further funding.

Funding applications

Lodging an application

- RG 109.74 If the liquidator considers that the circumstances of the liquidation satisfy the funding criteria in Section B and RG 109.65, they may lodge a funding application. For assistance with completing and submitting a funding application to carry out an investigation and prepare a supplementary s533 report, see Appendix 4.
- RG 109.75 The liquidator must provide a summary of the alleged offences and conduct together with details of the material that enables the liquidator to form the reasonable belief required in the funding application: see RG 109.65. They will also be required to detail the nature and extent of investigations that they consider necessary to enable the supplementary s533 report to be prepared. This information will need to be sufficiently detailed to enable ASIC to

make a preliminary assessment of the matter. An example summary of alleged offences and misconduct has been provided at Appendix 5. This document can be attached to the initial funding application.

- RG 109.76 The liquidator should also provide additional information in the initial funding application in relation to:
- (a) books and records of the company (see Appendix 6); and
 - (b) estimated liquidator's fees and disbursements to prepare the supplementary s533 report (see Appendix 7).

These documents should also be attached to the initial funding application.

The funding application (Form EX03 *Assetless administration funding request (Matters other than section 206F—Director banning)*) must be lodged electronically through the Registered Liquidator portal. If you have difficulties with registering your application online, call the Client Contact Centre on 1300 300 630 or email online@asic.gov.au.

Assessing the application

- RG 109.77 In assessing the application's eligibility for funding against the criteria set out in Section B and RG 109.65, we may contact the liquidator to obtain a more detailed understanding of the issues and to discuss the level of funding sought. If we form the preliminary view that the matter may warrant funding, we will arrange a meeting with the liquidator to discuss the matter further and review the available information.
- RG 109.78 Following this meeting, if we are of the view that the matter should be funded, we will write to the liquidator detailing those aspects of the investigation we are interested in pursuing and request the liquidator to provide a detailed estimate of anticipated costs, a schedule of the work to be undertaken and the likely timeframe within which the further work will be completed. We may contact the liquidator to discuss the detailed estimate of costs after it has been provided.
- RG 109.79 On completing our review of the above material and further discussions with the liquidator, we will notify the liquidator in writing of the outcome of their application.

Funding agreement

- RG 109.80 If an application is successful, a funding agreement will be sent to the liquidator setting out the terms on which funding is offered. The liquidator must acknowledge acceptance of the terms by returning a signed and dated copy of the agreement within 10 business days.
- RG 109.81 A sample funding agreement is set out in Appendix 8.

Preparing supplementary s533 reports

- RG 109.82 When a liquidator has accepted the terms of the funding offer, they should promptly start their investigation and preparation of the supplementary s533 report. ASIC officers are also available to discuss with the liquidator any issues involved in the preparation of the report.
- RG 109.83 For ASIC to bring proceedings in relation to possible offences or other misconduct, there must be sufficient evidence that is both credible and relevant to establish the offence or misconduct to the standard required for either civil or criminal proceedings.
- RG 109.84 To streamline the preparation of supplementary s533 reports and ensure they are of a suitable standard, we have developed a sample layout of a report that meets these requirements: see Appendix 9. We also provide guidance on the types of information and supporting documents that a liquidator could consider when investigating possible misconduct and reporting to ASIC in a supplementary s533 report: see Appendix 10.
- RG 109.85 The liquidator should also be aware that, if we commence proceedings arising from allegations made in the supplementary s533 report, the subject matter of that report may be used to form the basis of an affidavit from the liquidator and that the liquidator may be called to attend court as a witness. Accordingly, the liquidator should ensure that any material relied on in the report to support an allegation is credible and relevant: see RG 109.92–RG 109.93.
- RG 109.86 Under the terms of the funding agreement, the liquidator may be required to provide regular status reports to ASIC concerning their investigation and progress in completing the supplementary s533 report. The liquidator may also be required to meet with ASIC from time to time to discuss the progress of the matter.

Payments from the AA Fund

- RG 109.87 In accordance with the terms of the funding agreement the liquidator should submit, at such times and to the person specified, their tax invoice(s) and detailed fee account(s) for the agreed investigation and supplementary s533 report.
- RG 109.88 The funding agreement will also provide details for submitting the completed supplementary s533 report.
- RG 109.89 In accordance with the terms of the funding agreement each fee account must disclose:
- (a) the amount of time spent by the liquidator and each employee at the relevant charge-out rate;

- (b) a description of the work performed; and
- (c) details of the disbursements being claimed.

- RG 109.90 Cheques for fees and disbursements that liquidators receive from the AA Fund must be paid into the liquidation bank account. Both the receipt and subsequent payment to the liquidator from the liquidation bank account must be recorded in Form 524, broken down into fees and disbursements, and attributed to the 'Assetless Administration Fund'.
- RG 109.91 We consider that s473(3) and 499(3) of the Corporations Act do not require a liquidator to seek approval from the committee of inspection, the creditors or the court, for funding from the AA Fund. We will administer the law on this basis.

Disclosure of liquidators' reports

- RG 109.92 Supplementary s533 reports attract qualified privilege in accordance with s535. Supplementary s533 reports are not public documents and are confidential: see s1274(2).
- RG 109.93 If we commence proceedings in relation to any of the matters alleged in the supplementary s533 report, the report may be discoverable in those proceedings or we may be required to produce it under a subpoena or other court process.

Other requirements

- RG 109.94 We anticipate that there may be a requirement for further information and assistance from a liquidator after the funded supplementary s533 report has been lodged.
- RG 109.95 After receiving the supplementary s533 report, we will assess the evidence and determine what further action, if any, we will take.
- RG 109.96 If we commence enforcement action after receiving the funded supplementary s533 report, the liquidator may be asked to prepare an affidavit or sworn statement in support of those proceedings. The liquidator may also be required to attend the court proceedings to give evidence relating to the content of their affidavit or sworn statement.
- RG 109.97 If we require a liquidator to undertake additional work in relation to criminal proceedings, then any further payment to the liquidator will need the prior approval of the Commonwealth Director of Public Prosecutions (which may be withheld). Liquidators should note that ordinarily witnesses of fact cannot be paid for the purposes of giving evidence. Otherwise, and in relation to

civil proceedings, any payments (including any disbursements directly relevant to undertaking the additional work) will be based on the same hourly rates as those agreed in the original funding agreement.

E Liquidator actions to recover assets

Key points

We will consider funding liquidator actions to recover assets where fraudulent or unlawful phoenix activity is suspected on a case-by-case basis: see RG 109.112.

We will determine the level of funding to undertake a recovery action based on the information provided by the liquidator: see D–RG 109.105

When we decide to fund a matter, we will advise the liquidator. Our decision will be conditional on the liquidator obtaining the approval of the court, committee of creditors or the creditors before signing the funding agreement and commencing work: see RG 109.123

Once funding is approved and an action is commenced, we may require regular status reports or meetings to discuss progress: see Appendix 12.

Eligibility for funding

RG 109.98 As well as satisfying the criteria in RG 109.22–RG 109.29, for a liquidator to be eligible to apply for this category of funding, the liquidator must form a reasonable belief that:

- (a) there has been fraudulent or unlawful phoenix activity in relation to the company;
- (b) there is sufficient admissible evidence to prove allegations of misconduct and other factors necessary for a court to order recovery of assets; and
- (c) there is a real prospect that assets will be recovered for creditors after payment of the liquidator's costs.

RG 109.99 The most common types of matters that we expect to consider for funding where fraudulent or unlawful phoenix activity is suspected are:

- (a) breaches of directors' and officers' duties (s180–184);
- (b) uncommercial transactions (s588FB);
- (c) unreasonable director-related transactions (s588FDA);
- (d) entering into agreements or transactions to avoid employee entitlements (s596AB); and
- (e) complicity in any of these matters by a former liquidator.

Sufficient evidence

- RG 109.100 When applying for funding to take action to recover assets where fraudulent or unlawful phoenix activity is suspected, a liquidator should take into account the extent of evidence:
- (a) currently available to them to substantiate the alleged misconduct; and
 - (b) that would be sufficient to establish that an order for recovery of assets would be made.
- RG 109.101 The evidence available must be sufficient to establish to ASIC that there are reasonable prospects of a successful outcome and evidence of the defendants having assets that are likely to be available to satisfy a judgment debt or costs order.
- RG 109.102 The liquidator will also need to show that they have approached creditors (or other potential litigation funders) for funding and provide information about why these parties declined to fund or indemnify the liquidator's action.

What funding is provided?

- RG 109.103 Funding will only be available to meet the future costs and expenses directly associated with taking the action. The AA Fund will not fund costs and expenses already incurred by the liquidator.
- RG 109.104 We will consider the level of funding requested, taking into account the information provided by the liquidator. The funding approved will be determined after an assessment of the information provided and after consultation with the liquidator.
- RG 109.105 We will generally fund only part of the expected costs of the action, including only part of the liquidator's remuneration.

Funding applications

Lodging an application

- RG 109.106 If the liquidator considers that the circumstances of the liquidation satisfy the funding criteria in Section B and RG 109.98, they may lodge a funding application. For assistance with completing and submitting a funding application to take action to recover assets where fraudulent or unlawful phoenix activity is suspected, see Appendix 12.

RG 109.107 The application should include:

- (a) a summary of the alleged misconduct together with details of supporting evidence. A supplementary s533 report may be included to support their application;
- (b) the estimated costs and expenses of the action, including legal costs. The estimate of costs must set out the cost of each activity to be undertaken and who will perform each activity;
- (c) details of any alternative funding sources, including:
 - (i) information outlining steps taken by the liquidator to obtain funding from creditors or other potential litigation funders and why these parties declined funding; and
 - (ii) if funding has been provided by creditors or litigation funders, the amount of such funding and any conditions that have been imposed on the funding;
- (d) when the alleged misconduct occurred;
- (e) a litigation plan, including:
 - (i) details of the nature and basis of the action to be taken and the court in which the action will be filed;
 - (ii) a description of the assets to be recovered, including:
 - (A) the location of each asset;
 - (B) the value of each asset;
 - (C) details of any asserted security over each asset; and
 - (D) details of any other known claim to the asset (e.g. third party without notice);
 - (iii) details of any limitation period applying to the litigation;
 - (iv) details of solicitors and a quote or estimate of costs;
 - (v) details of counsel and estimate of fees;
 - (vi) details of any work required prior to commencing proceedings (e.g. valuations of assets, locating witnesses); and
 - (vii) a timetable for commencement and conduct of litigation; and
- (f) a statement of any existing or prior (within the past five years) association between the proposed solicitor or counsel and:
 - (i) the liquidator;
 - (ii) the liquidator's firm;
 - (iii) the company in liquidation; or
 - (iv) the company's directors.

RG 109.108 To support their application, liquidators may (if they wish) provide ASIC with counsel's advice on prospects, including details of any legal or practical impediments to the proceedings.

Note: Voluntary provision of material protected by legal professional privilege to ASIC may raise a question of waiver of the privilege. We advise the liquidator to first obtain legal advice about whether privilege is waived and the potential consequences of that.

RG 109.109 The information in the application needs to be sufficiently detailed to enable ASIC to:

- (a) make a preliminary assessment of the matter and the likely prospects of a successful outcome; and
- (b) consider the likely return to creditors, after costs of the action and payment of the liquidator's remuneration, if the action is successful.

RG 109.110 The funding application (see Appendix 12) must be lodged by email to info.enquiries@asic.gov.au.

Assessing the application

RG 109.111 In assessing the applicant's eligibility for funding against the criteria set out in Section B and RG 109.98, we may contact the liquidator to obtain a more detailed understanding of the issues and discuss the level of funding sought.

RG 109.112 We will consider each application for funding for a liquidator recovery action on a case-by-case basis. Some of the factors that we may take into account in considering the funding application include:

- (a) the nature and seriousness of the suspected misconduct;
- (b) the conduct of the person after the alleged contravention;
- (c) the strength of the liquidator's case;
- (d) the expected level of public benefit, such as the prospects of a material return to creditors in recovery actions, including the likely availability of assets to satisfy a judgment debt or costs order;
- (e) the likelihood that the action will lead to a change in the person's conduct or that the business community is generally deterred from similar conduct;
- (f) mitigating factors affecting the suspected contravener;
- (g) certainty of anticipated costs being sufficient to fund the action;
- (h) ability of the liquidator to fund the balance of the liquidation;
- (i) duration of the likely litigation; and
- (j) risks of an adverse outcome.

- RG 109.113 If we form a preliminary view that the matter may warrant funding, we will arrange a meeting with the liquidator to discuss the matter and review the available information.
- RG 109.114 On completing its review of the available information we will notify the liquidator of the outcome of their application.

Funding agreement

- RG 109.115 If an application is successful, a funding agreement specific to the application will be sent to the liquidator setting out the terms on which funding is offered.
- RG 109.116 ASIC's approval will be conditional on the liquidator obtaining approval from creditors, the committee of inspection or the court to enter into the funding agreement.

Note: See s477(2B), which prohibits the liquidator entering an agreement on behalf of the company in certain circumstances without approval of the court, the committee of inspection or a resolution of creditors.

- RG 109.117 After obtaining approval to enter into the funding agreement, the liquidator must acknowledge acceptance of the terms by returning a signed and dated copy of the agreement within 20 business days. The liquidator must also provide details of the approval to enter into the agreement.
- RG 109.118 We will only sign the funding agreement after evidence of such approval has been provided to ASIC.

Payments from the AA Fund

- RG 109.119 In accordance with the terms of the funding agreement the liquidator should submit, at such times and to the person specified, tax invoice(s) and detailed fee account(s) for the agreed liquidator actions.
- RG 109.120 The funding agreement will also provide for the requirements, if any, to give update reports on the progress of the litigation.
- RG 109.121 In accordance with the terms of the funding agreement, each fee account must disclose:
- (a) the amount of time spent by the liquidator and each employee at the relevant charge-out rate;
 - (b) a description of the work performed; and
 - (c) details of the disbursements being claimed, including supporting documentation.

- RG 109.122 Cheques for fees and disbursements that liquidators receive from the AA Fund must be paid into the liquidation bank account. Both the receipt and subsequent payment to the liquidator from the liquidation bank account must be recorded in Form 524, broken down into fees and disbursements, and attributed to the 'Assetless Administration Fund'.
- RG 109.123 We consider that a liquidator will need to seek approval from the committee of inspection, the creditors or the court, before drawing remuneration for work performed by them and their staff out of funding from the AA Fund to recover assets for the benefit of creditors.

Appendix 1: Submitting Form EX02

- RG 109.124 Appendix 1 is a guide to submitting Form EX02. You must use this form to seek funding from the AA Fund to carry out an investigation and prepare a supplementary s533 report in circumstances where s206F administrative proceedings to ban a director may be appropriate. Appendix 1 contains:
- (a) instructions on how to complete the form;
 - (b) details of additional information that should be provided to assist us in the assessment of a funding application; and
 - (c) a sample printout of a completed form.
- RG 109.125 The form can only be lodged online via ASIC's Registered Liquidator portal. Before lodging, refer to the funding criteria to determine whether you are eligible for funding from the AA Fund: see Section B and RG 109.32.

Download Appendix 1:

www.asic.gov.au/RG109Appendix1

Appendix 2: Sample funding agreement—Director banning

RG 109.126 Appendix 2 is a sample funding agreement between ASIC and the liquidator that can be used in circumstances where s206F administrative proceedings to ban a director may be appropriate.

Download Appendix 2:

www.asic.gov.au/RG109Appendix2

Appendix 3: Sample layout of a supplementary s533 report—Director banning

- RG 109.127 Appendix 3 contains a sample layout of a supplementary report under s533: see Section C for further details. The sample report is in a format that you should use when preparing funded supplementary s533 reports for a director banning (administrative) under s206F.
- RG 109.128 The sample report sets out the information that we require in order to determine whether to disqualify a person from managing a corporation under this section and the term of the disqualification.
- RG 109.129 It is provided as a guide only and is indicative of the minimum information required. You should adapt it to suit the particular circumstances.
- RG 109.130 ASIC staff are available to discuss with you any issues involving the preparation of a supplementary s533 report. Contact officer details will be included in the funding agreement.

Download Appendix 3:

www.asic.gov.au/RG109Appendix3

Appendix 4: Submitting Form EX03

RG 109.131 Appendix 4 is a guide to submitting Form EX03. You must use this form to seek funding from the AA Fund to carry out an investigation and prepare a supplementary s533 report for matters other than a director banning under s206F. Appendix 4 contains:

- (a) instructions on how to complete the form;
- (b) details of additional information that should be provided to assist us in the assessment of a funding application; and
- (c) a sample printout of a completed form.

RG 109.132 The form can only be lodged online via ASIC's Registered Liquidator portal. Before lodging, refer to the funding criteria to determine whether you are eligible for funding from the AA Fund: see Section B and RG 109.65.

Download Appendix 4:

www.asic.gov.au/RG109Appendix4

Appendix 5: Example summary of alleged offences and misconduct—Matters other than director banning

- RG 109.133 Appendix 5 is an example of the summary of alleged offences and misconduct that you should submit when applying for funding to prepare a s533(2) supplementary report, for matters other than a director banning under s206F. The example is a guide only and is indicative of the minimum information we require to consider your funding application appropriately.
- RG 109.134 You should complete a separate summary for each alleged offence or instance of misconduct and attach the document(s) to your application.

Download Appendix 5:

www.asic.gov.au/RG109Appendix5

Appendix 6: Books and records listing and questionnaire—Matters other than director banning

RG 109.135 Appendix 6 is an example of the books and records listing and questionnaire that you should submit when applying for funding to prepare a s533(2) supplementary report, for matters other than a director banning under s206F. The listing and questionnaire supplements the information that is already provided in the funding application. The example is a guide only and is indicative of the minimum information we require to consider your funding application appropriately. If there are books and records that you would expect to be available and to be relevant to your application, but you have been unable to obtain them, then list these separately.

Download Appendix 6:

www.asic.gov.au/RG109Appendix6

Appendix 7: Example schedule of estimated liquidator's fees and disbursements—Matters other than director banning

- RG 109.136 Appendix 7 is an example of the schedule of estimated fees and disbursements that you should submit when applying for funding to prepare a s533(2) supplementary report, for matters other than a director banning under s206F. The schedule is a guide only and is indicative of the minimum information we require to consider a funding application appropriately.
- RG 109.137 You should provide as much information as you consider adequately demonstrates how you calculated your estimated fees and disbursements.

Download Appendix 7:

www.asic.gov.au/RG109Appendix7

Appendix 8: Sample funding agreement—Matters other than director banning

RG 109.138 Appendix 8 is a sample funding agreement between ASIC and the liquidator that can be used in relation to matters other than a director banning under s206F.

Download Appendix 8:

www.asic.gov.au/RG109Appendix8

Appendix 9: Sample layout of a supplementary s533 report—Matters other than director banning

- RG 109.139 Appendix 9 contains a sample layout of a supplementary report under s533: see Section D for further details. The sample report is in a format that you should use when preparing funded supplementary reports for matters other than a director banning under s206F.
- RG 109.140 The sample report sets out the information that we require in order to determine whether to take action against any relevant persons in relation to the misconduct reported by you.
- RG 109.141 It is provided as a guide only and is indicative of the minimum information required. You should adapt it to suit the particular circumstances.
- RG 109.142 ASIC staff are available to discuss with you any issues involving the preparation of a supplementary s533 report. Contact officer details will be included in the funding agreement.

Download Appendix 9:

www.asic.gov.au/RG109Appendix9

Appendix 10: Allegations of possible misconduct— Substantiation guide

RG 109.143 Appendix 10 is a guide to the types of information and supporting documents that could be considered when you are investigating possible misconduct and reporting to ASIC. It is set out as a series of tables, each listing the elements of a contravention or offence under the Corporations Act and the likely sources of evidence or information that will need to be considered to prove each element, if we commence a formal investigation.

RG 109.144 By providing guidance on the types of information and supporting documents that could be considered when investigating possible misconduct and reporting to ASIC, we are not asking you to form or obtain a legal opinion as to whether an offence or other misconduct has occurred. The guidance in Appendix 10 is simply to alert you to the evidence that may be useful in supporting formal action over a possible offence. If you do not possess or are unaware of any available evidence to support an allegation, you should consider whether it does, in fact, appear that an offence or other misconduct may have been committed and whether the allegation should, in fact, be made.

RG 109.145 Appendix 10 is provided solely to assist you and your staff and is not intended to serve as a definitive list of:

- (a) the facts that may amount to an offence or other misconduct;
- (b) the sources of material that may support allegations of offences or misconduct; or
- (c) the searches, inquiries or sources of information that we may rely on in the conduct of an investigation.

RG 109.146 You are encouraged to make your own inquiries into any possible misconduct from the material available to you.

RG 109.147 The most credible and useful sources of evidence will generally be:

- (a) the books and records that a company is required to keep under the Corporations Act; and
- (b) information from someone able to say what is in those records and who is prepared to be a witness.

A list of the books and records that a company is required to keep can be obtained from our website at www.asic.gov.au/companyrecords. These documents may provide a contemporaneous record or account of the relevant act or matter.

RG 109.148 If you consider that you have gathered sufficient evidence to take action against a company officer or to recover assets, and you wish to apply for

funding to facilitate such actions, you may use Appendix 10 as a guide to the information or evidence that you will need to have obtained to support your application.

Download Appendix 10:

www.asic.gov.au/RG109Appendix10

Appendix 11: Review rights

RG 109.149 If you disagree with our initial decision about your application for funding, you can request a review.

What is a review?

RG 109.150 You may ask ASIC to review the funding decision if you do not agree with our decision or if you have additional information that you think may change the decision we made about your application.

RG 109.151 You have one right of review in relation to our original decision.

RG 109.152 The review will be carried out by a different ASIC staff member to the original decision maker.

What if I am dissatisfied with the review decision?

RG 109.153 If you are dissatisfied with the review decision, you may lodge a complaint with ASIC or contact the Commonwealth Ombudsman.

RG 109.154 We will not further review a review decision.

How long do I have to lodge my review request?

RG 109.155 You should lodge your review request in writing within 28 calendar days of the date of our sending you notification of our decision about your application.

RG 109.156 If you are unable to meet this timeframe, you should contact us before expiry of the 28-day period to request an extension of time for lodgement. If you do not contact us before the expiry of the 28-day period to request an extension, we may refuse to consider your review request. Contact officer details will be included in the funding agreement.

Appendix 12: Applying for funding for a liquidator action

RG 109.157 Appendix 12 contains information about how to apply for funding for a liquidator action.

How to apply for funding

RG 109.158 Provide the Australian Company Number, Australian Business Number or Australian Registered Body Number of the company concerned.

Funding criteria

RG 109.159 You will need to:

- (a) confirm that a s533 report has been lodged for the company (see online Form EX01 *Report to ASIC under s422, 438D or 533 of the Corporations Act 2001 or for statistical purposes*);
- (b) confirm that the company of which you are liquidator meets the 'assetless' definition contained in RG 109 (see Table 1);
- (c) indicate whether there have been any receipts in the liquidation to date (if there are, provide a summary of receipts and payments to date as an attachment);
- (d) provide details of net realisable assets:
 - (i) to date of funding application;
 - (ii) within 12 months from date of funding application; and
 - (iii) expected after 12 months from date of funding application;

Note: For an explanation of what an assetless administration is and how to factor in net realisable assets, see Table 2.

- (e) provide the expected deficiency in the liquidation; and
 - (f) provide details of the number of creditors and estimated liability for:
 - (i) secured creditors;
 - (ii) unsecured creditors; and
 - (iii) total secured and unsecured creditors.
- RG 109.160 You will need to specify which of the following alleged breaches are relevant (you may specify more than one):
- (a) s180—care and diligence;
 - (b) s181—good faith;
 - (c) s182—use of position;

- (d) s184—good faith, use of position and use of information (criminal offence);
- (e) s588FB—uncommercial transactions;
- (f) s588FDA—unreasonable director-related transactions;
- (g) s596AB—entering into agreements or transactions to avoid employee entitlements; and
- (h) other—please specify.

RG 109.161 You will need to set out what evidence is available

- (a) to establish that there are reasonable prospects of a successful outcome; and
- (b) of the defendant's assets that are likely to be available to satisfy a potential judgment debt or costs order if the action is successful.

RG 109.162 You will need to list any creditors (or other potential litigation funders) that been approached for funding, and any funding for an action that has been obtained from these parties.

RG 109.163 If creditors (or other potential litigation funders) have declined to fund or indemnify the action, provide information about why they declined to do so.

Funding application

RG 109.164 See RG 109.106–RG 109.109 for information about the details to include in your application for funding.

Lodging the application

RG 109.165 Lodge the application by email to info.enquiries@asic.gov.au.

Key terms

Term	Meaning in this document
AA Fund	Assetless Administration Fund
ASIC	Australian Securities and Investments Commission
Ch 5 (for example)	A chapter of the Corporations Act (in this example numbered 5)
Corporations Act	<i>Corporations Act 2001</i> , including any regulations made for the purposes of the Act
liquidator action	An action to recover assets (including an action against a company director, officer or former liquidator) when fraudulent or unlawful phoenix activity is suspected
liquidation bank account	A liquidator's general account under reg 5.6.06
Pt 2M.2 (for example)	A Part of the Corporations Act (in this example numbered 2M.2)
reg 5.6.06 (for example)	A regulation of the Corporations Regulations 2001 (in this example numbered 5.6.06)
registered liquidator	A person registered by ASIC under s1282(2)
RG 16 (for example)	An ASIC regulatory guide (in this example numbered 16)
s533 (for example)	A section of the Corporations Act (in this example numbered 533)
s533 report	A report by the liquidator on possible breaches of the law as required under s533(1)
supplementary s533 report	A further report by the liquidator that the liquidator may provide to ASIC under s533(2)

Related information

Headnotes

AA Fund, assetless administration, Assetless Administration Fund, assessing an application, director banning, eligibility for funding, fraudulent or unlawful phoenix activity, funding agreement, funding application, funding criteria, funding process, liquidators, lodging an application, payments, preparing reports, qualified privilege, sufficient evidence, supplementary s533 report,

Regulatory guides

RG 8 *Hearings practice manual*

RG 16 *External administrators: Reporting and lodging*

RG 242 *ASIC's power to wind up abandoned companies*

Legislation

Australian Securities and Investments Commission Act 2001, s59(2)

Corporations Act, Pts 2D.6, 2M.2 and 2M.3, s9, 50, 50AAA, 180, 181, 182, 183, 184, 206A, 206B, 206F, 286, 344, 471A, 473(3), 475, 499(3), 530A, 533, 535, 538, 545(1), 566(1)(b), 588E(4), 588G, 588H, 590, 596AB, 597, 601AB(2) and 1274(2); Corporations Regulations 2001, regs 1.0.07 and 5.6.06

Information sheets

INFO 151 *ASIC's approach to enforcement*

ASIC forms

EX01 *Report to ASIC under s422, 438D or 533 of the Corporations Act 2001 or for statistical purposes*

EX02 *Assetless administration funding request (Section 206F—Director banning)*

EX03 *Assetless administration funding request (Matters other than Section 206F—Director banning)*

524 *Presentation of accounts and statement*