ASIC
Australian Securities & Investments Commission

Independence of external administors: A guide for creditors

This information sheet (INFO 84) provides general information for unsecured creditors in a liquidation, voluntary administration or deed of company arrangement to help assess whether the external administrator is independent. It covers:

- what it means to be independent
- who may be appointed
- relationships that prevent appointment
- disclosing relationships
- replacing an external administrator
- queries and complaints

The independence requirement in a receivership or a scheme of arrangement is not discussed in this information sheet.

If a company is insolvent or in financial difficulty, it can be put into external administration. The two most common forms of external administration are:

- voluntary administration (which may lead to a deed of a company arrangement)
- liquidation.

A company can also have a receiver, or receiver and manager, appointed, usually by a secured creditor that holds a security interest in some or all of its property.

When a company enters into voluntary administration, a deed of company arrangement or liquidation, it is important that the person put in charge (the 'external administrator') is independent of the company and its directors, and acts in the interests of creditors as a whole.

What it means to be independent

There are different groups of people with different interests involved in the insolvency of a company. These include directors, shareholders, creditors who hold a security interest in assets of the company, unsecured creditors, employees (who may also be creditors) and customers. The external administrator must treat all of these groups fairly and in accordance with their legal rights. For an external administrator to be independent, they must:

- not be biased towards any person or group
- not have, or have had, a close personal or business relationship with any person involved in the insolvency where that relationship might lead a fair minded observer to reasonably believe that the external administrator might not bring an impartial mind to their work
- not be in a position where their own personal or private interests conflict with their duties in the external administration.

It is important that the external administrator is, at all times, both independent and accepted as being independent by those people interested in the affairs of the insolvent company. An external administrator may not be accepted as being independent if there is a real chance that circumstances exist that may threaten the person's independence in the future.

Who may be appointed

A person appointed as an external administrator of an insolvent company must be a registered liquidator.

At the time of agreeing to take the appointment, the person must be independent and be accepted as being independent. If the person knows at the time there is the real prospect of a threat to actual or perceived independence arising in the future, the person should not take the appointment (even if they tell creditors about the threat) without the court's approval.

Relationships that prevent appointment

A person must not be appointed as an external administrator of an insolvent company if they have any of the following relationships with the insolvent company, unless the court gives its approval:

- either the person or a company where the person is a substantial shareholder owes more than $5,000 to the insolvent company or a related company
- the person is owed more than $5,000 by the insolvent company or a related company (other than fees they are owed through their role as an external administrator)
- the person is a director, secretary, senior manager or employee of the insolvent company
- the person is a director, secretary, senior manager or employee of a company that is a secured creditor in relation to the property of the insolvent company
- the person is an auditor of the insolvent company
- the person is a partner or employee of an auditor of the company
- the person is a partner, employer or employee of an officer of the company
- the person is a partner or employee of an employee of an officer of the company.

Even if none of these relationships exists, the person must not take on the appointment if, in the circumstances, there is a real risk they cannot be independent and be accepted as being independent by those interested in the affairs of the insolvent company.

Disclosing relationships

If a liquidator is appointed by the court, they act as an officer of the court and they should tell the court before they are appointed of any circumstances they are aware of that might cause doubts about their independence.

A person who is consenting to be appointed as voluntary administrator must send to creditors, with the notice of the first meeting of creditors, a declaration about any relationships they may have. A liquidator in a creditors' voluntary liquidation must send to creditors a declaration about any relationships they have within 10 business days after their appointment. The declaration must:

- set out whether the person, their partners in a firm, or their company or an associated company has, or has had in the past two years, a relationship with either:
    - the insolvent company
    - an associate of that company
    - a former liquidator or former provisional liquidator of that company
    - a secured creditor who holds a security interest in the whole or substantially the whole of the company's property
- state the person's reasons for believing that none of the relationships result in the person having a conflict in accepting the appointment.

The declaration must also be tabled at the meeting of creditors and lodged with ASIC.

If the voluntary administrator or liquidator later realises that the original declaration is out of date or contains an error, they must table a replacement at the next meeting of creditors (or the next meeting of the committee of inspection if a committee has been formed and its next meeting occurs before the next meeting of creditors).

A person who is consenting to be appointed as an external administrator must also disclose in writing any indemnities provided to the person to cover their fees and costs (for an explanation of the meaning of an indemnity, refer to Information Sheet 41 *Insolvency: A glossary of terms* (INFO 41)).

The declarations must be given to creditors to allow them to consider the person's independence and make an informed decision about whether they want to replace the person with someone of the creditors' choice.

If, as a creditor, you receive a declaration of relationships or indemnities, and you are concerned whether the circumstances might cast doubt on whether the person would be independent, you should ask the person about the circumstances that lie behind the declaration. You may also consider whether they should be replaced.

Replacing an external administrator

Before a person takes an appointment as an external administrator, they must make reasonable inquiries to ensure there are no real threats to their independence. The person must also continue to monitor their independence during the period of the appointment and take action should such a threat arise. Depending on the threat, this may involve applying to court or calling a meeting of creditors to give details of the potential threat and allow a decision to be made by the court or the creditors about how the threat should be managed and whether the person should continue to act or be replaced.

As discussed below, in some circumstances, creditors may seek to remove the person if there are doubts as to their independence and replace them with an external administrator of the creditors' choice. Any replacement external administrator must also prepare the relevant declarations about their relationships with various specified parties and also any indemnities they have been given for their fees and costs.

Voluntary administration

In a voluntary administration you are given an opportunity to replace an administrator at the first meeting of creditors, if there is another administrator who has consented to taking on the role and a majority of creditors (in number and value) approve the appointment of that replacement administrator. If you are a creditor, see Information Sheet 74 *Voluntary administration: A guide for creditors* (INFO 74) for more information about this meeting.

Deed of company arrangement

At the second creditors' meeting in the voluntary administration where creditors agree to accept the proposal for a deed of company arrangement, they can also choose who they wish to be deed administrator. This person does not have to be the current voluntary administrator, but may be someone else of the creditors' choosing.

If the deed of company arrangement fails and creditors resolve to terminate the deed and wind up the company, they can also choose someone other than the deed administrator to be the liquidator (provided the other person has agreed, in writing, to act as liquidator).

Liquidation

Creditors in either a court liquidation or creditors' voluntary liquidation can, by resolution passed at a meeting, remove the liquidator and appoint another person as the liquidator. At least five business days notice of the meeting must be given to creditors. A copy of the proposed replacement external administrator's declaration of relevant relationships must be given to creditors with the notice of meeting.

For further information about the creditors' right remove and replace the liquidator: see Information Sheet 45 *Liquidation: A guide for creditors* (INFO 45).

If, at the second meeting of creditors in a voluntary administration, creditors vote that the company go into liquidation, it is usual for the voluntary administrator to become the liquidator of the company. Creditors, by majority in number and value, may vote to appoint another person to act as liquidator.

Queries and complaints

You should first raise any queries or complaints with the external administrator. If this fails to resolve your concerns, including any concerns about their conduct, you can lodge a report of misconduct with ASIC – see How to complain.

Lodging your report of misconduct online ensures the quickest response from ASIC to your concerns.

ASIC usually does not become involved in matters of an external administrator's commercial judgement.

Reports of misconduct against companies and their officers can also be made to ASIC.

If you cannot report misconduct to ASIC online, you can contact us on 1300 300 630.

Where can I get more information?

For an explanation of terms used in this information sheet, see Information Sheet 41 *Insolvency: A glossary of terms* (INFO 41). For more on external administration, see the related information sheets listed in Information Sheet 39 *Insolvency information for directors, employees, creditors and shareholders* (INFO 39).

Further information is available from the Australian Restructuring Insolvency & Turnaround Association (ARITA) website. The ARITA website also contains the ARITA Code of Professional Practice for Insolvency Practitioners.

Important notice

Please note that this information sheet is a summary giving you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional advice. You should also note that because this information sheet avoids legal language wherever possible, it might include some generalisations about the application of the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases your particular circumstances must be taken into account when determining how the law applies to you.

This is **Information Sheet 84 (INFO 84)**, updated on 1 September 2017. Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

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