Administration Guidance Notes

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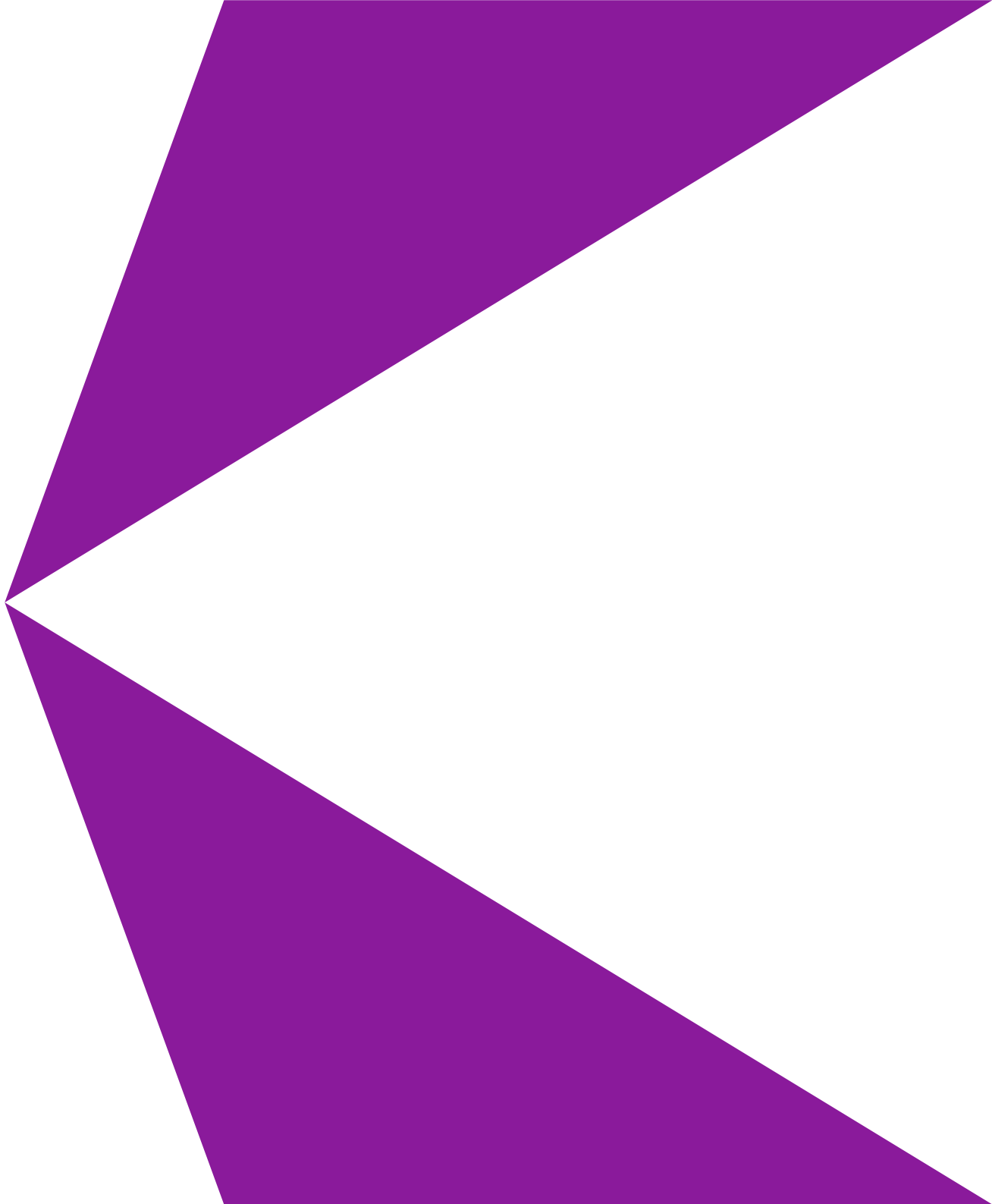

Administration Guidance Notes

Purpose of Administration

There is one overarching purpose, which is divided into 3 objectives. These objectives are hierarchical:

- Company rescue (as a going concern) is primary.
- If that is not possible (or if the second objective would clearly be better for the creditors as a whole), then the administrator should try to achieve a better result for the creditors than would be obtained through an immediate winding-up of the company, possibly by trading on for a while and selling the business(es) as a going concern.
- Only if neither of these objectives is possible should the administrator realise property to make a distribution to secured and/or preferential creditors.

Entry Routes into Administration

Appointment of Administrator by holder of a floating charge

The holder of a qualifying floating charge, as defined in paragraph 14 of Schedule B1 of the Insolvency Act 1986, as amended by the Enterprise Act 2002, can, in certain circumstances, appoint an administrator simply by filing a Notice of Appointment with the relevant court. This route into administration is not available if the floating charge on which the appointment relies is not enforceable, nor if a provisional liquidator has been appointed or if there is an administrative receiver in office.

Where there is one or more prior qualifying floating charge over the company's assets, the holders of those charges must give their consent to the proposed appointment before it is made. This consent can be sought and arranged in an informal manner, although written consent from each of these charge-holders must be attached to the notice of appointment when it is filed with the court. Alternatively, the holder of the qualifying floating charge proposing to make the appointment ("the appointor") can file a formal notice of intention to appoint an administrator at the court. The filing of such a notice will bring into effect an interim moratorium on insolvency proceedings and other legal actions being commenced o against the company. At the same time that this notice is filed at court, a copy must be sent to the company and each of the holders of any prior qualifying floating charges, who should provide their written consent; if they do not respond within 2 business days, the appointment can be made. During this interim period the holders of the prior qualifying floating charges could exercise their option to make a without court order appointment themselves, as long as they have the consent of the holders of any qualifying floating charge (that is, itself, prior to the charge being relied upon for such an appointment).

The notice of appointment is then filed with the court with the written consent(s) of the holders of any prior qualifying floating charges and the written consent of the proposed administrator. The notice of appointment must be filed within business days' of filing the notice of intention to appoint, if any; after these days the interim moratorium ceases to have effect. The appointment of the administrator is effective from the date and time that the notice of appointment is filed with the court. The appointor is responsible for sending a copy of the notice to the administrator, and commits an offence if he fails to do.

Filing of a notice of appointment can take place at a time when the court is not open for business. In England and Wales, the notice may be submitted online to the High Court, from where it is forwarded to the appropriate court that will deal with the administration. Here it will be placed on the court file. The administrator's appointment is effective from the date and time that this notice is endorsed by the court.

Appointment of Administrator by company or directors

In the same way that the holder of a qualifying floating charge can appoint an administrator by filing a notice of appointment, the company or the directors can, in certain circumstances, similarly appoint an administrator without a court order. This route into administration is not available if, within the preceding 12 months, a moratorium under Schedule A1 of the Insolvency Act 1986 ends with no voluntary arrangement being in force, or a voluntary arrangement ends prematurely, or if there is an outstanding winding up petition or administration application or if an administrative receiver is in office.

A resolution should be passed that the Company is or is likely to become unable to pay its debts. If a Directors appointment is proposed the resolution in passed at a properly

convened Board meeting; if a Company appointment is proposed the resolution is passed by the requisite majority of members at a general meeting.

Where there is a Qualifying Floating Charge Holder the appointor must file with the court a notice of intention to appoint an administrator, from which time an interim moratorium on insolvency proceedings and other processes being taken against the company is effective. At the same time that this notice is filed with the court, a copy must be sent to every holder of a qualifying floating charge, seeking their written consent to the appointment prior to it being made. Once all floating charge holders have provided their written consent, or if they do not respond after 5 business days have elapsed, the appointment can be made. Alternatively, the charge holder may exercise his right to make a without court order appointment himself in the interim period, as long as he has the consent of the holders of any qualifying floating charge that pre-dates his own charge.

The notice of appointment is then filed with the court with the written consent from the holders of all qualifying floating charges, if any, and the consent of the proposed administrator. This notice must be filed within 10 business days of filing the notice of intention to appoint; after these 10 days the interim moratorium ceases to have effect.

Where there are no floating charge holders, the process differs slightly depending on whether the appointment is to be made by the directors or the Company. There is no need to file a notice of intention first and the notice of appointment can be filed immediately. The appointment of the administrator is effective from the date and time that the notice of appointment is filed with the court. The appointor is then responsible for sending a copy of the notice to the administrator, and commits an offence if he fails to do so.

Appointment of Administrator by the Court

An application to court for an administration order can still be made. This will remain the only way in which a creditor acting alone or on behalf of a number of creditors, or the supervisor of a Company Voluntary Arrangement, will be able to initiate the appointment of an administrator to a company. It will also be necessary for all administrator appointments if the company is in liquidation (where the court can end the liquidation and make an administration order instead), or if there is an administrative receiver in office or if a provisional liquidator has been appointed or if there is an outstanding winding up petition against the company (in the case of the company or its directors).

The court order route into administration may also be favoured in larger or more complicated cases where a number of applications, perhaps concerning extending time-limits and sending out documents to creditors, are to be made at the outset. The court order route into administration is also the preferred way where recognition of the administration as a Main Proceeding is required for the purposes of the EC Regulation on Insolvency Proceedings.

The administration application is a prescribed form and an affidavit must be attached to it containing details of the company's financial position, any security held by the company's creditors and any outstanding insolvency proceedings, as well as any other matters that are relevant to the application. The written consent of the proposed administrator(s) must also be attached to the application. This confirms that they accept the appointment and believe that the purpose of administration is reasonably likely to be achieved, but need not, at this stage, specify which of the three objectives will be pursued. The applicant must serve a copy of the application on anyone who could appoint an administrative receiver and, where one has been appointed, on:

- the administrative receiver himself;
- the petitioner of any outstanding winding-up petition and any provisional liquidator in office;
- any person who is or may be entitled to appoint an administrator through the without court order route;
- any member State liquidator appointed in main proceedings in relation to the company;
- any supervisor of a company voluntary arrangement;
- the company (unless the application is by the company itself); and
- the person proposed to be the administrator.

An affidavit of service is prepared and filed with the court at least one day before the date set for the hearing of the application. Notice of the administration application must also be given to any sheriff or other officer charged with an execution or other legal process against the company or its property as well as any person who has distrained against the company's property.

When the holder of a qualifying floating charge is served with a copy of the administration application they can apply to the court to replace the proposed administrator with an appropriate person of their own choice. However, the holders of any qualifying floating charges that have priority over the charge relied upon to make such an appointment must

give their written consent and that 'appropriate person' must give his written consent that he accepts the appointment and believes that the purpose of administration is reasonably likely to be achieved. The holder of the qualifying floating charge will be required to demonstrate to the court that the charge is proper and enforceable.

Anyone with an interest in the application can attend the hearing and the court may make the administration order and/or any order that it thinks fit. If the court makes the administration order 2 sealed copies are sent to the applicant, who must then send one of them to the administrator.

When the court makes an administration order in respect of a company that is in liquidation it will also deal with the ending of that liquidation and the liquidator will be removed from office. When the administration application is in respect of a company where there is an administrative receiver in office, the court will only make the administration order if the person who appointed that administrative receiver consents to the administration. The administrative receiver must vacate office on the making of the administration order and any receiver of part of the company's property must vacate office if the administrator requires him to do so. Any outstanding winding up petition against the company will be dismissed.

Nature of Administration

An administrator is an authorised insolvency practitioner who is appointed to manage the affairs, business and property of a company. He will be an officer of the court and must perform his functions with the objective of rescuing the company wherever possible. This means rescuing the company as a going concern with all or most of its businesses intact – it does not mean ending up with the legal shell of the company.

Where company rescue is not a reasonably practicable option, either because it would not be the best way of realising the economic value in the company, or because the timescales involved would make it impracticable, the administrator will move onto the second objective. This is to seek a better result for the company's creditors as a whole than would be achieved if the company went straight into liquidation. This might encompass situations where the company's individual businesses are sold off as going concerns, or where the company continues to trade for a while to fulfil orders that have already been placed. To help ensure there is greater transparency in relation to the administrator's decisions, he will have to explain to creditors in his statement of proposals why it was not reasonably practicable to pursue the first objective.

Whenever the administrator is working to achieve one of these first two objectives, he will be under an express duty to act in the interests of the creditors of the company as a whole. This duty highlights the collective nature of administration, and is a key difference from administrative receivership, where the administrative receiver acts principally in the interests of the floating charge holder that appointed him.

Where it is not reasonably practicable to achieve either of the first two objectives, the administrator's objective will be to realise property in order to make a distribution to one or more secured or preferential creditors. But in doing so, the administrator will still have to act in a way that does not unnecessarily harm the interests of unsecured creditors. Again, the administrator will have to explain to all creditors in his statement of proposals why it was not reasonably practicable to pursue the first two objectives.

Process of Administration

Once a company is in administration, every business document must state the name of the administrator and the fact that the affairs and business of the company are being managed by him. Notice of the administration must also be placed on the company's website.

As soon as reasonably practicable after his appointment, the administrator must obtain details of the company's creditors and must notify the company and all its creditors of his appointment. This must also be advertised in the London Gazette and possibly in a relevant newspaper (if the administrator thinks it is appropriate for ensuring that the appointment comes to the notice of the company's creditors).
The administrator will then require one or more of the current or former directors or company officers to provide him (or her) with a statement of the company's affairs. This is a prescribed form which details the company's assets and liabilities, including those assets that are subject to any fixed or floating charges.

The administrator must as soon as reasonably practicable and, in any event, within 8 weeks of his appointment, send out to all the creditors and the members of the company a statement of his proposals, although this limit can be extended by the creditors and/or the court. These proposals will include full details relating to his appointment, and the

circumstances leading up to it, as well as exactly how the administrator proposes to achieve the purpose of administration, including details of how he anticipates the administration will end. A copy of the proposals will also be filed with the registrar of companies for placing on the company's public file. Where the information included in the statement of affairs are commercially sensitive, the administrator can apply to court to have the statement, or the relevant part of it, withheld.

Included with each creditor's copy of the administrator's proposals will be an invitation to the initial creditors' meeting, at which the creditors vote on those proposals. This meeting must be held within 10 weeks of the date that the company entered administration, and the creditors must be given at least 2 weeks' notice of the meeting, although these time limits can be extended by the creditors and/or the court. The business of this meeting can be carried out by correspondence, although if 10% or more of the creditors (in value of their claims or number) or more than 10 creditors in total requisition a meeting, then the administrator must call one. The proposals can be accepted (by a majority vote, in value of claims); modified and then accepted; or rejected. If they are rejected, then the administrator is required to report that fact to the court and seek further directions from the court.

In certain cases, the administrator's proposals may state that he thinks either that the company has sufficient property to enable every creditor to be paid in full, or that there is unlikely to be any distribution to unsecured creditors other than by way of sums of money that have been ring-fenced for unsecured creditors as a result of the abolition of the crown's preferential status as a creditor. In these cases, an initial creditors' meeting does not have to be called, and the proposals will be considered to have been approved unless one or more of the creditors requisitions a meeting in the proper manner and within 12 days of the date that the proposals are sent out.
In cases where an administrator intends, for whatever reason, to end the administration before he has sent out his statement of proposals, he must send out to all of the creditors of the company, so far as he is aware of their addresses, a report including all the information that would have been required in the proposals.

The time limits for sending out the proposals and holding the initial creditors' meeting can be extended, either by creditors' consent (that is the consent of all of the secured creditors and a majority of those unsecured creditors that vote) or by the court. When any time limits are extended, either by creditors' consent or by the court, the administrator must notify everyone affected of both the extension and of the relevant revised date(s). A copy of the relevant notice is also sent to the registrar of companies for placing on the company's public file.

Following the initial creditors' decision, and any subsequent meeting of creditors, the administrator must send a report of the outcome of the creditors decision/meeting in a prescribed form to each creditor, to the court and to the registrar of companies for filing on the company's public file.

The administrator must manage the company's affairs, business and property in accordance with the proposals that have been agreed by the creditors. He will send regular progress reports to the creditors, the court and the registrar of companies covering each 6-month period from the date that the company entered administration until the administration ends, or until he ceases to act. These reports will provide full details of the progress of the administration to date, including a receipts and payments account and any other relevant information.

As and when the administrator wishes to change the conduct of the administration from that set out in his proposals, and he considers that the revision is substantial, then he must send out revised proposals to all the creditors and obtain their approval of his revised proposals, either at a creditors' meeting or by correspondence. A report of the outcome of the meeting must then be sent to each creditor, to the court and to the registrar of companies, along with a copy of the revised proposals, as agreed by the creditors. Where the revised

proposals are neither agreed as they stand nor after modification, the administrator must report that fact to the court and seek the directions of the court.

During the administration, the administrator may call a meeting of members and is required to co-operate with the creditors' committee if one has been established. He can remove any of the directors from office and can appoint directors to the company, irrespective of whether there is a vacancy. He is also required, under the Company Directors Disqualification Act 1986, to submit a conduct report to the Secretary of State on the conduct of each of the directors and/or former directors of the company within 6 months of the company entering administration. Any directors and other officers that remain in office are prohibited from exercising any management powers that would interfere with the administration without the consent of the administrator.

An administrator may dispose of assets that are subject to a floating charge, although the holder of that charge will have the same priority in respect of the property subsequently acquired through the transaction as he had in respect of that which has been disposed of. Similarly, assets that are subject to a non-floating charge and/or hire-purchase property can also be disposed of, but only with permission of the court, and subject to the security of the relevant creditor(s) being discharged as a result of the disposal.

The administrator will be able to make distributions to secured and/or preferential creditors during the course of the administration. He will be able to make a distribution to unsecured creditors out of the prescribed part (that is, of any ring-fenced sums of money arising out of the abolition of the Crown's preferential status in insolvency proceedings) and can also make a distribution to the unsecured creditors out of realised assets, but in both cases only with the permission of the court. Distributions in administration will be made in the same way that a liquidator distributes realisations to creditors, but in those cases where sufficient assets have been realised to allow a distribution to be made to unsecured creditors it is anticipated that the company will usually move from administration into a creditors' voluntary liquidation, in order that a voluntary liquidator can make the distribution(s).

During the course of the administration a creditor or member of the company may apply to the court to challenge the conduct of the administrator if it appears that the administrator is acting, or intends to act, in a way that unfairly harms the interests of the applicant. An allegation of misfeasance may be made to the court by the official receiver, the administrator or liquidator of the company, a creditor or a member of the company if it is alleged that the administrator, or former administrator, has misapplied or retained monies or other property of the company or has breached a fiduciary or other duty in relation to the company.

Ending Administration

Administration will automatically end after one year from the date the company entered administration. In practice it is unlikely that an administration would end in such a way, but in those cases where an administration continues for 12 months and the administrator has not taken steps to ensure that an extension is arranged, either by the consent of the creditors or by the court, then the administration will cease. The administrator must then send the appropriate notice and a final progress report to every creditor and other person that received a copy of his original proposals. A copy must also be filed with the court and sent to the registrar of companies for placing on the company's public file.

In most cases an administration will be concluded because the purpose of administration has been successfully achieved. In a few cases it might end when it becomes apparent that the company should not have entered administration or that the purpose of administration cannot be achieved.

A successful administration, where the company is rescued as a going concern, will most likely lead either to a company voluntary arrangement or a scheme of arrangement. The proposals for such an arrangement could be incorporated into the administration proposals, and put to the initial creditors' meeting at the same time as those proposals. Alternatively, the administrator's proposals could include the further development and preparation of the necessary proposals for such an arrangement.

An administration that involves disposing entirely of the business(es) and other assets of the company will subsequently require the administrator to arrange for the proper winding up of the company. In such cases, money could be available for distribution to unsecured creditors and the administrator will be able to file an appropriate notice with the registrar of companies, upon which, the company will move from being in administration to a creditors' voluntary liquidation. The administrator's proposals, or revised proposals, which detailed this ending would, in such circumstances, need to include details of the person nominated to be the liquidator and, on accepting the proposals, either as set out by the administrator or with any relevant modifications, the creditors will also have accepted that nomination. The money can then be distributed by the liquidator and the company subsequently dissolved, at the conclusion of the liquidation.

Alternatively, the business(es) and/or assets could be disposed of and a distribution made to the secured and/or preferential creditors and the administrator can then file a notice with the registrar of companies which would move the company from administration to dissolution.

Irrespective of the reasons for the administration ending, the administrator must notify that fact to all the company's creditors and anyone else that was notified of his appointment, including the court and the registrar of companies. A final progress report summarising the administration and the outcome will have to be prepared and provided with this notice.

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