

Insights

PRE-PACKAGED ADMINISTRATION SALES TO FACE GREATER SCRUTINY AS NEW REGULATIONS COME INTO EFFECT

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SUMMARY

A new set of regulations known as the [Administration \(Restrictions on Disposal etc. to Connected Persons\) Regulations 2021](#) (SI 2021/427) (the “**Regulations**”) came into effect on 30 April 2021. The Regulations contain numerous features which mean that pre-packaged administration sales (specifically to connected persons) will begin to face a greater level of independent scrutiny.

Purpose

The primary purpose of the Regulations is to prevent the administrator of a company from effecting:

- a disposal, hiring out, or sale of what is, in the administrator’s opinion, all or a substantial part of that company’s business or assets (including a disposal effected by a series of transactions);
- to one or more connected persons;
- within 8 weeks from the date of the company’s entry into administration,

unless one of two things has first been obtained: (i) the approval of the company’s creditors; or (ii) a written report from an independent evaluator opining on whether the consideration to be provided and the grounds for the disposal are reasonable in all of the circumstances (irrespective of whether that opinion is positive or negative).

Key Issues in Practice

Whilst the underlying objectives of the Regulations are clear, certain aspects have been left (perhaps deliberately) unclear in the drafting and will need to be further shaped and refined by market

practice. These are considered below:

1. Evaluator Eligibility – The bar to being an evaluator is low, so long as they: (i) are independent from the transaction; (ii) are satisfied that they have the relevant knowledge and experience to provide the report; and (iii) hold a clean record in respect of insolvency, dishonest offences, and directors' disqualification and charities regimes. The late (and welcome) addition of a requirement in the Regulations for the evaluator to hold professional indemnity insurance raises this bar somewhat, but may inadvertently serve to exclude otherwise capable evaluators who cannot afford the insurance premiums. Until the precise scope of the evaluator role is further developed and refined in practice, it is reasonable to anticipate that the members of the existing "Pre-Pack Pool" will fulfil the role of evaluator for many pre-packaged administration sales going forward.

Notwithstanding that it is for the connected person to choose the evaluator in each case, the administrator must also be satisfied that the evaluator has sufficient relevant knowledge and experience to opine on the transaction. Questions remain therefore as to the extent to which an administrator must positively verify the eligibility of the evaluator before proceeding to complete a pre-packaged administration sale (although this is perhaps less of a concern where the role of evaluator is taken on by the existing Pre-Pack Pool).

2. Opinion Shopping – There was concern in relation to earlier drafts of the Regulations that a connected person unhappy with an evaluator's opinion could effectively "*shop around*" until they find another evaluator willing to give a more favourable opinion, thereby doing little in reality to address the historic issue of a lack of transparency in pre-pack transactions. In response, an additional requirement was inserted providing that the evaluator must append to their report details of any previous reports disclosed to them, or to the extent such details are not disclosed to them, a statement as to why that is the case. It remains to be seen at this stage whether this additional requirement will sufficiently address the risk of a connected person simply failing to disclose the existence of any previous negative reports to the evaluator.

3. Creditor Approval – It is difficult to see at the outset in what circumstances it will be more expedient and desirable to obtain the approval of the company's creditors instead of an evaluator report. Pre-packaged administration sales are often negotiated and finalised at speed, intentionally without alerting a company's general body of creditors in order to minimise the risk of business disruption and erosion of value before the sale completes. Given the logistics of providing creditors with sufficient information and notice for them to make an informed decision on the sale, it may be that in practice this option is only utilised in circumstances where timing is less of an issue.

4. Continued Use of Pre Pack Pool? - The Regulations do not make it mandatory to refer a pre-packaged administration sale to the existing Pre-Pack Pool, but neither do they purport to replace the Pre-Pack Pool. This leaves the previous function of the Pre-Pack Pool in an

awkward position going forward, and it is uncertain whether it will continue to operate in any capacity other than as an evaluator under the new Regulations.

RELATED PRACTICE AREAS

- Restructuring & Insolvency/Special Situations
- Financial Services

MEET THE TEAM



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