Insolvency for investors and shareholders

If a company is in financial difficulty, it can be put under the control of an independent external administrator (liquidator or voluntary administrator) or receiver. The role of the external administrator or receiver depends on the type of appointment.

This information sheet (INFO 43) gives general information for shareholders on:

- liquidation
- voluntary administration
- receivership

Liquidation

There are two types of liquidation for an insolvent company – creditors' voluntary liquidation and court liquidation. The most common type is a creditors' voluntary liquidation, which usually begins when:

- an insolvent company's shareholders resolve to liquidate the company and appoint a liquidator, or
- creditors vote for liquidation following a voluntary administration or a terminated deed of company arrangement (DOCA).

In a court liquidation, a liquidator is appointed by the court to wind up a company following an application, usually by a creditor. Directors, shareholders and ASIC can also make a winding-up application to the court.

The liquidator's role

The liquidator's role is to:

- protect, collect and sell the company's assets
- investigate and report to creditors about the company's affairs, including:
    - unfair preference payments (payments to certain creditors over others) that may be recoverable
    - uncommercial transactions that may be set aside
    - possible claims against the company's officers (including insolvent trading)
    - creditor defeating dispositions, including illegal phoenix activity.
- inquire into the failure of the company – and possible offences by people involved with the company – and report to ASIC
- distribute money from the collection and sale of assets after payment of the costs of the liquidation, including the liquidator's fees (subject to the rights of any secured creditor) – first to priority creditors, including employees, and then to unsecured creditors.

Except for lodging documents and reports required under the *Corporations Act 2001* (Corporations Act), a liquidator is not required to incur an expense for the winding up unless there are enough assets to pay their costs.

The directors' role

Directors cannot use their powers after a liquidator has been appointed. They must help the liquidator, including providing the company's books and records, and a report about the company's affairs.

Shareholders and liquidation

The liquidator's main duty is to all the company's creditors. The shareholders will only get paid any return on their shares in an insolvent liquidation after all creditors get paid in full. If shareholders also have a claim as a creditor, then they may receive a payment as a creditor (separate from any return on shares).

Reporting to shareholders

An external administrator or receiver is not required to report to shareholders on the progress or outcome of the liquidation.

An external administrator (liquidator or voluntary administrator) must keep books that give a complete and correct record of the administration of the company's affairs – and shareholders are entitled to inspect these books at the external administrator's office. A managing controller (or receiver and manager) must also keep books that correctly record and explain all transactions entered into as managing controller – and allow shareholders to inspect these records.

Every year, on the anniversary of their appointment and at the end of the liquidation (or administration or receivership), the liquidator (or voluntary administrator or receiver) must lodge with ASIC a detailed list of receipts and payments (i.e. an annual administration return). A copy of these returns can be found on ASIC Connect.

Transfer or alteration of shares

A transfer of shares in a company or alteration of status of shareholders during liquidation (or voluntary administration or receivership) will not be effective unless the liquidator (or voluntary administrator or receiver) gives written consent or the court permits. The liquidator (or voluntary administrator or receiver) or court will need to be satisfied the transfer of shares, or the alteration in the status of shareholders, is in the best interest of the company's creditors and does not breach the rights of shareholders under the Corporations Act.

When giving written consent to a transfer of shares in a company or alteration of status of shareholders, the liquidator (or voluntary administrator or receiver) can impose conditions that must be satisfied before the transfer or alteration is effective. For share transfers, the affected shareholder, prospective shareholder or creditor may apply to the court to set aside any or all these conditions.

Similarly, a shareholder or a creditor may apply to the court to set aside any or all conditions that must be satisfied for an alteration in the status of shareholders to have effect. A shareholder or creditor may also apply to the court to authorise an alteration in the status of shareholders if the liquidator (or voluntary administrator or receiver) refuses the alteration.

A liquidator can call on the holders of any unpaid or partly paid shares in the company to pay the amount outstanding on those shares to the company.

If a liquidator makes a written declaration that they have reasonable grounds to believe there is no likelihood shareholders will receive any further distribution in the winding up, shareholders can realise a capital loss. To realise a loss, the shares in the company must have been purchased on or after 20 September 1985. If no such declaration is made by a liquidator, the deregistration of a company at the end of a liquidation also enables realisation of any capital loss.

Financial reporting and annual general meeting (AGM) requirements

The Corporations Act imposes financial reporting obligations on listed and very large companies. These obligations do not apply if the company is in liquidation. Companies in liquidation that are also AFS licensees may only rely on our relief from the financial reporting and AFS licensee reporting obligations if they have cancelled and do not hold an AFS license on the date they would be required to lodge the relevant report with ASIC. For more information, see ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251.

Public companies in liquidation do not need to hold AGMs.

Voluntary administration

Voluntary administration is designed to resolve a company's future direction quickly. An independent registered liquidator (the voluntary administrator) takes full control of the company to try save the company or the company's business.

The voluntary administrator aims to administer the company's affairs to obtain a better return to creditors than if the company had been placed straight into liquidation. A better return may be achieved through a DOCA which is generally proposed by the directors or other third-parties, usually in consultation with the voluntary administrator.

The voluntary administrator's role

After taking control of the company, the voluntary administrator investigates and reports to creditors about the company's business, property, affairs and financial circumstances. They also report on the three options available to creditors:

- end the voluntary administration and return the company to the directors' control
- approve a DOCA through which the company will pay all or part of its debts and then be free of those debts
- wind up the company and appoint a liquidator.

The voluntary administrator must give an opinion on each option, including an opinion on any DOCA proposal and recommend which option is in the best interests of creditors.

The voluntary administrator has all the powers of the company and its directors, including the power to sell or close the company's business or sell individual assets in the lead up to the creditors' decision on the company's future.

The voluntary administrator is also responsible for reporting possible offences committed by people involved with the company to ASIC.

If a DOCA proposal is approved, the voluntary administrator will usually become the deed administrator and oversee its operation.

The directors' role

Directors cannot use their powers while the company is in voluntary administration. They must help the voluntary administrator by providing the company's books and records and completing ASIC form Report on Company Activities and Property (ROCAP) – as well as any further information about these that the voluntary administrator reasonably requires.

If the company goes from voluntary administration into a DOCA, the directors' powers depend on the DOCA's terms. When the DOCA is completed, the directors regain full control of the company, unless the DOCA provides for the company to go into liquidation on completion.

If the DOCA is not completed and the company goes into liquidation, the directors cannot use their powers.

Shareholders and voluntary administration

Reporting to shareholders

Shareholders do not get to vote on the future of the company. A voluntary administrator (or receiver) is not required to report to shareholders on the progress or outcome of the voluntary administration.

Transfer or alteration of shares

Shareholders are bound by a DOCA approved by creditors. The deed administrator may transfer shares in the company with the written consent of the shareholder or with the court's permission. A shareholder, a creditor, ASIC or any other interested person can oppose a court application to approve a share transfer.

Financial reporting and annual general meeting (AGM) requirements

While subject to voluntary administration or under a DOCA (or in receivership), listed and very large companies must still comply with their statutory financial reporting obligations.

ASIC provides relief so that a company in voluntary administration (or receivership) automatically has a six-month extension of time for lodging financial reports that are due when the administrator (or receiver and manager) is appointed or will become due in the six-month period after the appointment. The automatic relief applies even if the company enters a DOCA during the six-month period after the voluntary administrator's appointment. If a voluntary administrator is appointed before a receiver and manager is appointed, then our automatic deferral relief will apply from the date the voluntary administrator is appointed.

To get the benefit of this automatic deferral relief, the voluntary administrator (or receiver and manager) must have arrangements during the deferral period to answer, free of charge, reasonable questions from shareholders about the administration (or receivership). At the end of this deferral period, if the company remains in voluntary administration or under a DOCA (or in receivership), the company may apply to ASIC for further deferral relief.

A public company in voluntary administration (or receivership) may also apply for an extension of time to hold an AGM. A public company under a DOCA may also apply for an extension of time to hold an AGM in certain circumstances.

Listed companies should also inform the relevant securities exchange if the company relies on automatic relief or is granted further relief or an extension of time to hold an AGM. This information should also be available on the company's website and the voluntary administrator's (or receiver and manager's) website.

For more information on ASIC's automatic relief or applying for other relief, see Regulatory Guide 174 *Relief for externally administered companies and registered schemes being wound up* (RG 174).

Receivership

A company goes into receivership when an independent registered liquidator (the receiver) is appointed by a secured creditor or by the court to take control of some or all the company's assets.

Court receiverships and controllerships are not covered in this information sheet.

A secured creditor is someone who holds a security interest, such as a mortgage, in some or all the company's assets, to secure a debt owed by the company. Lenders usually require a security interest in company assets when they provide a loan.

Security interests over personal property other than land are registered on the Personal Property Securities Register (PPSR) if the creditor wants to ensure their security interest is enforceable and given priority in an insolvency. You can search the PPSR to find out if anyone holds a security interest (other than a mortgage over land) in the company's assets.

The powers of the receiver are set out in the security agreement between the company and the secured creditor, the appointment documentation and the Corporations Act.

Under the terms of appointment, if a receiver has the power to manage the company's affairs, they are known as a receiver and manager or a managing controller.

The receiver's role

Generally, the receiver's role is:

- to collect and sell enough of the secured assets to repay the debt owed to the secured creditor
- if they have been appointed under a non-circulating security interest (e.g. over land, plant or equipment), to pay the money collected:
    - first, to the secured creditor
    - second, to the company or an external administrator (if appointed) if there are any funds left over
- if they have been appointed under a circulating security interest (e.g. over cash, debtors or stock), to pay the money collected:

  - first, to priority creditors (including certain employee entitlements)
  - second, to the secured creditor
  - third, to the company or an external administrator (if appointed) if there are funds left over

- to report to ASIC any possible offences or irregular matters.

The receiver is usually paid from the money collected during the receivership.

The directors' role

Receivership does not affect the legal existence of the company. The directors continue to hold office, but their powers depend on the powers of the receiver and the extent of the assets over which the receiver is appointed. Control of the secured assets, including the company's business, is taken away from the directors.

Directors must provide the receiver with a ROCAP and must allow the receiver access to books and records relating to the charged property.

Shareholders and receivership

The receiver's main duty is to the company's secured creditor. The duty owed to unsecured creditors and shareholders is an obligation to take reasonable care to sell the secured assets for not less than its market value or, if there is no market value, the best price reasonably obtainable. A receiver also has the same general duties as a company director.

Reporting to shareholders

See above for information on reporting to shareholders.

Financial reporting and annual general meeting (AGM) requirements

See above for information on financial reporting and AGM requirements.

More information

- Information Sheet 39 *Insolvency information for directors, employees, creditors and shareholders* (INFO 39)
- Australian Restructuring Insolvency & Turnaround Association (ARITA) website
- 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.

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