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**Insolvency
Service**

Insolvency Service Guidance for Northern Ireland

**Requirements for independent scrutiny of
the disposal of assets in administration,
including pre-pack sales**

June 2021

REQUIREMENTS FOR INDEPENDENT SCRUTINY OF THE DISPOSAL OF ASSETS IN ADMINISTRATION, INCLUDING PRE-PACK SALES

Contents

1. When there is a requirement to obtain independent scrutiny of sales in administrations	3
2. The regulations	3
3. Connected person	3
4. Substantial disposal	4
5. Obtaining a report from an independent evaluator	4
6. Timing	5
7. Role of the connected person	5
8. Role of the evaluator	7
9. Role of the administrator	9

REQUIREMENTS FOR INDEPENDENT SCRUTINY OF THE DISPOSAL OF ASSETS IN ADMINISTRATION, INCLUDING PRE-PACK SALES

1. When there is a requirement to obtain independent scrutiny of sales in administration

This guidance provides information about the requirement for independent scrutiny of disposals of company assets in an administration (a formal insolvency procedure). Specifically, disposals made within the first 8 weeks of administration to a party connected to the company (a 'connected person').

The legislation this guidance references is *The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations (Northern Ireland) 2021* (the regulations). The regulations can be found at: <https://www.legislation.gov.uk/nisr/2021/174/contents/made>

This guidance is not exhaustive and it may be necessary to obtain independent legal advice to establish whether the regulations apply or the nature and extent of the requirements.

In this guidance:

- 'the company' refers to the company in administration
- 'the creditors' refers to the creditors of that company
- a thing done by 'the insolvency practitioner' means that the thing in question may be done either before or after appointment as administrator
- a thing done, or to be done, by 'the administrator' means that the requirement specifically applies after an insolvency practitioner has been appointed as administrator for the company
- 'the recipient' means the person or entity a disposal is being made to.

2. The regulations

The regulations restrict when an administrator can make a disposal of a company's business or assets to a connected person.

An administrator must not make a substantial disposal to a connected person within the first 8 weeks of administration unless they either:

- obtain approval of the transaction from creditors
- have received and considered a report obtained by the connected person from an evaluator on the reasonableness of the proposed disposal

This guidance explains the process of obtaining a report from an evaluator.

3. Connected person

A connected person is either an individual or a company that is connected to the company entering administration. All references in this guidance to a connected person should be read in this way. Below is a list of those who would fall within the definition of a connected person.

This list is not exhaustive and you may need independent legal advice if there is any doubt about whether a person's relationship to the company makes them a connected person.

A connected person could be:

- director of the company
- secretary of the company
- spouse, ex-spouse, child or sibling of a director or any other officer of the company
- business partner of a director of the company
- a company that is controlled by any of the above listed individuals

REQUIREMENTS FOR INDEPENDENT SCRUTINY OF THE DISPOSAL OF ASSETS IN ADMINISTRATION, INCLUDING PRE-PACK SALES

- any person or company who has control over the company, including shareholders with a third or more voting rights. This could include secured lenders

It is the responsibility of the insolvency practitioner to establish if a party is connected to the company.

4. Substantial disposal

A substantial disposal is a disposal, hiring out or sale by the administrator of the company's assets (including one given effect by a series of transactions) if it:

- takes place within the first 8 weeks of administration
- involves one or more connected persons
- disposes of all or a substantial part of the company's business or assets

A disposal includes a situation where a connected person holding security over the company's assets purchases the business or assets to reduce their level of debt in the administration.

It is the responsibility of the insolvency practitioner to establish whether a disposal is substantial and whether it falls within scope of the regulations.

Establishing whether a disposal is substantial should include but is not limited to considering:

- the value of either the business, assets or both involved in the disposal
- how much of the business is being disposed of
- whether the trading style and good will of the business forms part of the disposal

5. Obtaining a report from an independent evaluator

The connected person is responsible for obtaining the report.

Where there are multiple connected persons involved in the same substantial disposal only one report is required.

Where there are multiple transactions that make up a substantial disposal there must be one report that covers all the transactions. Where there is more than one disposal and each disposal is substantial, each disposal will require a separate report. These situations may happen where different connected persons are proposing to buy different assets or parts of the business.

Where there are competing offers for a disposal from different connected persons, each connected person will need a report for their proposed disposal.

It should be the connected person with the greatest knowledge about the company and the proposed disposal who should instruct the evaluator. This will help to ensure that the evaluator gets all the information they require.

For example, where a director of the company is a party to a proposed disposal involving other connected persons then the director would be the best placed to instruct the evaluator. Out of all the connected persons it is the director who is most likely to have greatest knowledge about the company.

REQUIREMENTS FOR INDEPENDENT SCRUTINY OF THE DISPOSAL OF ASSETS IN ADMINISTRATION, INCLUDING PRE-PACK SALES

6. Timing

A report that meets the requirements set out in the regulations (a qualifying report) must be received and considered by the administrator before they can complete a substantial disposal within the first 8 weeks of administration.

Further information about what is required for a qualifying report.

Any connected disposal made by the administrator after 8 weeks is not in scope of the regulations but remains within scope of the insolvency rules and regulations for disposals in administration.

An administrator does not have to be appointed at the time the report is obtained. For example, a pre-pack sale in administration is where the sale is arranged prior to a company entering administration and completed on or very shortly after the appointment of the administrator. In those circumstances, the report should be obtained before the company enters administration so that the sale can be finalised as soon as possible by the appointed administrator.

It is important that all parties involved in the process act in a timely manner. Delays may increase costs and could jeopardise the proposed substantial disposal.

7. Role of the connected person

The connected person is responsible for obtaining the report. They must instruct an evaluator, and should provide them with the information required to complete their report, including any previous reports.

The person instructed as evaluator must meet certain requirements.

The administrator must be satisfied that the evaluator's knowledge and experience is sufficient to provide the report. They must have no reason to believe that the requirements for being an evaluator are not met.

If the evaluator fails to satisfy any one of the requirements then any report they produce will not be valid.

The connected person can consult with the insolvency practitioner involved with the company, on the suitability of an evaluator before instruction.

There are certain professions that are more likely to have the relevant knowledge and skills required to act as an evaluator. These include:

- accountants
- surveyors
- lawyers with a corporate background
- insolvency practitioners

This is not an exhaustive list and it is not necessary for an evaluator to have insolvency experience. The selection of an evaluator could depend on the nature of the business for sale. Someone with specialist knowledge of the business may be more suitable.

REQUIREMENTS FOR INDEPENDENT SCRUTINY OF THE DISPOSAL OF ASSETS IN ADMINISTRATION, INCLUDING PRE-PACK SALES

There are companies which offer the service of providing a report. A connected person is free to instruct such a company to provide a report on their behalf. In that case it is necessary that the individual who provides the statement in the report must themselves satisfy all the requirements for acting as an evaluator.

The connected person is responsible for providing information to an evaluator to complete their report. They should expect to be asked for information about the company entering administration, the recipient of the assets and the substantial disposal.

7.1 Information that may be needed to complete the report

About the company:

- name of company
- company number
- nature of business
- details of assets and liabilities
- list of creditors, whether they hold security and amounts owed
- personal guarantees given for debts, funding and guarantee limits
- details of any charges registered against the company
- number of staff
- asset or business valuations (or both)
- summary of events leading up to the current situation
- steps taken to avoid administration

About the recipient of the assets:

- name of recipient
- recipient's company number (where applicable)
- names of directors (where applicable)
- names of other companies in which the directors have an interest (where applicable)
- list of all connected persons involved in the proposed disposal
- nature of connection or connections to the company
- details of involvement in any previous companies that entered formal insolvency for all connected persons involved in the proposed disposal
- what will be different going forward
- personal guarantees given for debts, funding and guarantee limits

About the substantial disposal:

- details of the offer made and why the offer has been made at that value
- who (if anyone) is disadvantaged or favoured by the transactions
- copies of any previous reports obtained

In addition, some or all of the following supporting evidence may be required:

- viability study or statement
- summary financial accounts including balance sheet
- statement of affairs

REQUIREMENTS FOR INDEPENDENT SCRUTINY OF THE DISPOSAL OF ASSETS IN ADMINISTRATION, INCLUDING PRE-PACK SALES

- business statement
- business plans
- business forecasts
- documentary evidence

A viability statement or business plan (or both) is more likely to be requested where a disposal involves payments by instalments (referred to as deferred consideration). The viability statement or business plan (or both) will help the evaluator assess whether the deferred consideration is reasonable and the purchaser's likely ability to pay.

The evaluator may ask for further information instead of, or in addition to, that listed above. In the first instance, the connected person who is instructing the evaluator would be expected to provide this information. They should try to provide all information asked for as quickly as possible. Where the connected person does not hold some of the information required, the connected person should approach the insolvency practitioner or the company, or both, for the information requested.

Once the evaluator has completed their report they should provide the connected person with a copy. The report will include one of 2 statements about the reasonableness of the disposal along with the reasons for their opinion.

The administrator must consider the report but is not required to follow it.

If the administrator receives a competing offer, which represents a better outcome for creditors they may decide not to proceed with the disposal to the connected person. This can happen whether the evaluator deems the disposal reasonable or not.

An administrator can proceed with a disposal even where an evaluator has stated they are not satisfied that the disposal is reasonable. This can happen if the administrator considers that it would be in the best interests of creditors to do so.

If the connected person decides to make any material changes to the offer proposed for the disposal after the report is completed then a further report will be required for the amended proposed disposal.

8. Role of the evaluator

The evaluator is responsible for preparing a report in accordance with the regulations. A report that is prepared in accordance with the regulations is a 'qualifying report'.

In summary, the person instructed as evaluator must:

- be satisfied that they have sufficient relevant knowledge and experience to make the report
- be covered by professional indemnity insurance. This must cover them to act as an evaluator
- not be connected with the company
- not be connected with, or an associate of, the connected person
- not have a conflict of interest in relation to the substantial disposal
- not have provided advice to the company (or a connected person in relation to that company) in relation to or in anticipation of insolvency, or in relation to corporate rescue or restructuring within the last 12 months
- not be the administrator, an associate of the administrator or connected with a company with which the administrator is connected

REQUIREMENTS FOR INDEPENDENT SCRUTINY OF THE DISPOSAL OF ASSETS IN ADMINISTRATION, INCLUDING PRE-PACK SALES

- not been convicted of an offence involving dishonesty or deception (unless the conviction is spent)
- not be in an arrangement with creditors (unless they have been discharged from it)
- not have been made bankrupt or subject to specified bankruptcy proceedings including in a different jurisdiction (unless they have been discharged)
- not be subject to a moratorium period under a debt relief order or a debt relief restrictions order or under equivalent laws in a different jurisdiction
- not be disqualified from being a director or an insolvency practitioner or have given an undertaking not to act as a director or insolvency practitioner including under equivalent laws in a different jurisdiction
- not been removed from a position as trustee in relation to a charity on the grounds of misconduct or mismanagement including under equivalent laws in a different jurisdiction
- not be a patient or to lack capacity under specified legislation relating to mental health or capacity

Some of these requirements are defined in other legislation. This includes the definition of connected or associate. In some cases it may be necessary to obtain independent legal advice about these requirements.

The administrator must be satisfied that the evaluator has sufficient knowledge and skills to provide the report and is eligible to act. They will also want to be satisfied that the professional indemnity insurance provides a reasonable level of cover and extends to the individual for acting as an evaluator and providing the report.

An administrator may wish to see certain information to satisfy themselves that the requirements are met. For example, evidence that an individual holds suitable professional indemnity insurance. Evaluators should aim to provide such information as soon as practicable to avoid unnecessary delays.

The regulations do not alter the scope of any professional or regulatory requirements that may apply to an evaluator. If an evaluator is a member of a regulated profession then they will continue to be bound by any relevant rules of their profession while acting as an evaluator. Before accepting any appointment as an evaluator, individuals who are members of regulated professions should consider whether the appointment conflicts with any professional rules that apply to them and may wish to consult with their professional body as appropriate.

The connected person should provide information and supporting documents that are requested by the evaluator for the purposes of preparing their report. Where the connected person cannot provide information which the evaluator reasonably requires then the evaluator can ask the connected person to take steps to get that information from the relevant people, for example the insolvency practitioner or the company. Alternatively the evaluator may choose to approach those people directly.

The information provided by the connected person must be sufficient for the evaluator to make one of the following statements and give reasons for making the statement.

- Statement A – I am satisfied that the consideration to be provided for the relevant property and the grounds for the substantial disposal are reasonable in the circumstances.
- Statement B - I am not satisfied that the consideration to be provided for the relevant property and the grounds for the substantial disposal are reasonable in the circumstances.

REQUIREMENTS FOR INDEPENDENT SCRUTINY OF THE DISPOSAL OF ASSETS IN ADMINISTRATION, INCLUDING PRE-PACK SALES

The information an evaluator will require to satisfy themselves that a disposal is reasonable will vary from case to case. It is unlikely that an evaluator would be able to satisfy themselves that a disposal was reasonable without having been provided with at least the information listed above.

If, due to the absence of information, an evaluator is unable to be satisfied that a disposal is reasonable then they can still produce a report. That report would be required to include a statement that the evaluator was not satisfied that the disposal was reasonable. The connected person instructing the evaluator should use their best efforts to ensure that the evaluator is provided with all of the information that they need. In turn, evaluators should ensure that the connected person instructing them is aware of the possible consequences of failing to provide information.

If information is not available evaluators should discuss this with the connected person or the insolvency practitioner, or both and attempt to find a resolution. Under the Code of Ethics an insolvency practitioner or any accountant would only be able to share information with the consent of the client (the company).

Evaluators should bear in mind that certain individuals, for example, the insolvency practitioner, may refuse to share commercially-sensitive information. That might be the case where, for example, the information would compromise a bidding process. Where an evaluator considers that such information is needed for their report then they should discuss this with the insolvency practitioner in an attempt to find a resolution.

The evaluator's report must include:

- their name and contact details
- a statement that they fulfil the requirements to act as the evaluator
- details of their knowledge and experience, which they believe qualifies them to provide the report
- details about cover by professional indemnity insurance (listed below):
 - identify and describe the assets being disposed of
 - the offer being made for the assets and the terms of the offer
 - copies of any previous reports obtained by the connected person or where a copy is not provided details of the contents of the previous reports
 - where previous reports have not been provided steps taken by the evaluator to obtain this information or a statement that the connected person has said that no previous reports were obtained
 - details of the connected person and the nature of their connection to the company
 - one of two statements about the reasonableness of the proposal:
 - reasons to support the statement given along with a summary of the evidence relied upon

The report must include the following details about cover by professional indemnity insurance:

- name of the insurer
- policy number
- risks covered by policy
- amount covered
- exclusions from cover

REQUIREMENTS FOR INDEPENDENT SCRUTINY OF THE DISPOSAL OF ASSETS IN ADMINISTRATION, INCLUDING PRE-PACK SALES

The evaluator may also include in the report any further information they believe relevant.

An evaluator should keep in mind that their report is intended to give clarity to creditors and must be considered by the insolvency practitioner when deciding what is in the best interests of creditors.

Ideally, the turnaround time for a report should be 48 hours from when the evaluator is provided with sufficient information to undertake and complete a report.

9. Role of the administrator

Once an insolvency practitioner is appointed as administrator they must not make a substantial disposal to a connected person within the first 8 weeks of the administration without having received and considered a qualifying report or obtained creditor approval for the intended disposal. This requirement is in addition to (and does not replace) existing statutory and regulatory requirements which apply to administrators.

Insolvency practitioners should assist enquires made by an evaluator where this will assist the evaluator to complete their report. Where relevant, they should seek consent from the company to share information with the evaluator. Insolvency practitioners are not required to disclose commercially-sensitive information.

When a report is received the administrator must decide whether it is a qualifying report by establishing if it meets all the requirements set out in the regulations. A report which does not meet all the requirements will not be valid and a further report or creditor approval will be needed if the disposal is to take place within the first 8 weeks of the administration. The administrator must establish that all necessary content is included and be satisfied that the evaluator meets the necessary requirements to act.

The administrator must be satisfied that the evaluator's relevant knowledge and experience is sufficient to provide the report. The report must include a statement of the evaluator's relevant knowledge and experience.

When assessing the evaluator's knowledge and experience the administrator should consider:

- experience, both length and type
- any professional qualifications
- any specialist knowledge regarding the proposed disposal
- any other information the administrator believes to be relevant

Where an administrator is not satisfied that the statement of the evaluator's knowledge and experience in the report is sufficient, they should approach the evaluator to provide further information or evidence. If the administrator is not satisfied by the evidence provided they should take steps to verify it with third parties. If the administrator cannot be satisfied that the evaluator has sufficient relevant knowledge and experience then the report is not valid and a further report will be required from another evaluator.

The administrator must have no reason to believe that the evaluator does not meet the remaining requirements. In many cases administrators will be able to assume that these other requirements have been satisfied and no further inquiries will be necessary.

REQUIREMENTS FOR INDEPENDENT SCRUTINY OF THE DISPOSAL OF ASSETS IN ADMINISTRATION, INCLUDING PRE-PACK SALES

Where an administrator has reason to believe that one of the remaining requirements has not been met, the administrator should make further inquiries of either the evaluator or third parties. For example, the requirement for the evaluator to be independent. Where the administrator reasonably believes that a requirement was not met then the onus is on the evaluator to satisfy the administrator's concerns. If the evaluator does not satisfy the administrator that they have sufficient relevant knowledge and experience, or that the remaining requirements are met, then the report will not be valid for the purposes of the regulations.

Once they have received a valid report, the administrator must consider the evaluator's opinion when deciding whether to complete the proposed substantial disposal. It is expected that administrators will consider the matters set out in the report but they are not required to act upon the evaluator's opinion.

The administrator must send a copy of the report to all known creditors and the registrar of companies at the same time as the administrator's proposals. Where the report or any previous reports concluded that the disposal is not reasonable in the circumstances then the administrator must also send a statement setting out their reasons for proceeding with the disposal. The copy of the report and, where necessary, the statement should be sent to the registrar of companies as annexes to the administrator's proposals.

The statement should set out the reasons why the administrator decided to proceed with the disposal when the evaluator was not satisfied it was reasonable. If the administrator simply states that the disposal is justified without any explanation and reference to the evaluator's report, then it may be difficult for an administrator to show that they have complied with the requirement to consider the contents of the report.



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