SENECA
INSOLVENCY PRACTITIONERS

The Online Debtor Bankruptcy Portal

Introduction

Following last month's article on the 'Online Debtor Bankruptcy Portal', we have decided to continue commenting on the move towards online resources in Insolvency, hence this article 'The Online D Report Portal' and the changes that came into effect on 6 April 2016.

Pursuant to the duties and obligations contained within the Statement of Insolvency Practice 4, more commonly known as SIP 4, and the Company Directors Disqualification Act 1986 ("CDDA 86"), Insolvency Practitioners who are appointed as either an Administrative Receiver, an Administrator, or a Liquidator in a Creditors' Voluntary Liquidation are required to submit information on the conduct of the company's directors, including former directors, to the Disqualification Unit of the Department of Trade and Industry ("DTI").

The DTI then considers whether the (former) directors have acted in a manner which makes them unfit to be concerned in the management of a company and whether it is appropriate to bring action against them to disqualify them from acting as directors in future under the CDDA 86. Where a Disqualification Order is sought, a director can potentially be disqualified for a period between two and 15 years.

The Old System

Under the old system, the reports submitted by Insolvency Practitioners came in three types. The first, a D1 Report, was submitted where the Insolvency Practitioner had become aware of conduct which may render the director unfit to be concerned in the management of a company. This leaves Form D2 which could either be submitted as an 'interim return' or a 'final return'. An interim return was used where the Insolvency Practitioner wished for more time to submit a report or final return and expected to be able to so at a later date. A final return was used where an Insolvency Practitioner had not become aware of any matters which would require them to submit a D1 report.

An Insolvency Practitioner was required to submit either a D1 Report or D2 Return within six months of the 'relevant date', which was usually their appointment, in order to discharge their statutory obligations, appending several documents to the report in the case of a D1 Report. Furthermore, the Secretary of State previously had two years from the relevant date in order to bring any disqualification proceedings.

The New System

Beginning 6 April 2016, the reporting process has been overhauled as a result of the various changes to Insolvency Law introduced by the Small Business, Enterprise and Employment Act 2015, which amended several provisions of the CDDA 1986.

Under the new system, using the Director Conduct Reporting Service, an Insolvency Practitioner is required, where they are appointed either on or after 6 April 2016, to submit a single report online via a secure portal, with no further requirement to submit a second report if an Administration converts to Creditor's Voluntary Liquidation. This must be done within three months of the relevant date.

The online report requires the answering of a structured, factual questionnaire and the practitioner will no longer be required to provide their opinion on whether the directors' actions may render them unfit to be concerned in the management of a company or provide any enclosures.

Reply to: Speedwell Mill | Old Coach Road | Tansley | Matlock | DE4 5FY

Head Office Speedwell Mill | Old Coach Road | Tansley | Matlock | DE4 5FY | T: 01629 761700 | F: 01629 761701

Oxford Office The Old Tannery | Hensington Road | Woodstock | Oxford | OX20 1JL | T: 01993 811180

W: www.seneca-ip.co.uk | E: enquiries@seneca-ip.co.uk

A rules engine will then conduct an initial bulk sift and identify which cases should be referred for further consideration.

Following the initial online report, if further information becomes available it must be submitted online as soon as reasonably practical.

The time limit for the Disqualification Unit to bring any disqualification proceedings will be increased from two years to three years from the relevant date, although the Unit will still seek as a matter practice to bring any proceedings within the first two years.

Other Changes

The following came into effect on 1 October 2015.

The matters determining unfitness under the CDDA 86 have also, due to the amendments from the Small Business, Enterprise and Employment Act 2015, been reduced, however the matters listed are now broader and therefore the scope of Disqualification Orders has effectively been widened.

Compensation orders have also been introduced by the Small Business, Enterprise and Employment Act 2015. These can be sought, or a compensation undertaking given, where a disqualification order or undertaking has been given and the conduct which gave rise to the disqualification order or undertaking 'has caused loss to one or more creditors of an insolvent company'.

These must be applied for within two years of the disqualification order or undertaking being obtained and will require payment by the director or former director of a sum for: the benefit of a creditor or creditors, the benefit of a call of creditors or as a contribution to the assets of the company.

As these are new to insolvency law, it is unclear how these will work in practice, such as whether they will be pursued after or at the same time as a disqualification order, whether there will be sufficient resources for them to be pursued and, as the compensation orders are provable as a bankruptcy debt, whether they will actually be pursued through to a director's Bankruptcy.

Conclusion

It is expected that the online portal will simplify the reporting process significantly although the shortened timeframe in which to provide a report, down from six months to three, will result in many practitioners not being in a position to report fully at this point in time. As such, it is anticipated that various follow up submissions will need to be made frequently on an *ad hoc* basis for practitioners to be satisfied that they have discharged their reporting obligations fully.

It is also hoped that the increase of the limitation period to bring disqualification from two years to three will allow both directors and the Disqualification Unit to spend more time looking at the matter pre-issue. This time could be used to attempt to seek further information and provide opportunities for meetings which may either strengthen applications or result in a reduction of the grounds for disqualification sought and a focus on the stronger grounds. It may even result in more Disqualification Undertakings being offered by directors as there will be time to negotiate an acceptable middle ground between the director and the Disqualification Unit. This is where the director agrees to a disqualification by consent and the obtaining of a Court Order is not necessary, the benefit being that no costs are awarded against the director which usually happens where an Order is pursued and granted.

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It remains unclear how compensation orders will work in practice. Concerns have been raised that the compensation orders may be sought at the same time and for the same behaviour that an officeholder may pursue under sections 212 to 214 as well as 238, 239 and other sections of the Insolvency Act 1986 for the benefit of creditors in an Insolvency estate. The Insolvency Service and Insolvency Practitioners may find themselves with competing interests seeking to obtain payment from a director to satisfy their claims who have limited funds.

Whilst a practitioner owes a duty to the creditors of an insolvent estate as a whole, it has been noted that compensation orders may be obtained for a particular creditor or a class of creditors. Concerns have been raised that the compensation orders may be used in order for the Insolvency Service to make payments to HM Revenue and Customs and that the system could effectively allow for HM Revenue and Customs to be preferred over other creditors.

It is also uncertain how any compensation will be paid out, whether it will be the Secretary of State, Official Receiver or the Insolvency Practitioner in the case who will deal with the distributions to creditors. If an Insolvency Practitioner is tasked with this work, will they be remunerated for doing it and how will it this happen. These are all sensible, practical concerns and it is hoped that clarity will be brought to the matter in the not too distant future.

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