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INSOLVENCY, RESTRUCTURING AND DISSOLUTION ACT 2018 (ACT 40 OF 2018)

INSOLVENCY, RESTRUCTURING AND DISSOLUTION (ASSIGNMENT OF PROCEEDS OF AN ACTION) REGULATIONS 2020

ARRANGEMENT OF REGULATIONS

In exercise of the powers conferred by section 449 of the Insolvency, Restructuring and Dissolution Act 2018, the Minister for Law makes the following Regulations:

Citation and commencement

1. These Regulations are the Insolvency, Restructuring and Dissolution (Assignment of Proceeds of an Action) Regulations 2020 and come into operation on 30 July 2020.

Definitions

2. In these Regulations, unless the context otherwise requires —

"company" means a company in liquidation or judicial management, as the case may be;

"funder" means a person who agrees to fund all or part of the costs of a relevant action pursuant to a Funding Agreement;

"Funding Agreement" means a contract or an agreement by a company, being a party or potential party to a relevant action, with a funder for the funding of all or part of the costs of the relevant action in return for a share or other interest in the proceeds or potential proceeds of the relevant action to which the company may become entitled;

"relevant action" means any action arising under section 224, 225, 228, 238, 239 or 240 of the Act;

"relevant insolvency practitioner" means an individual who is appointed to act as a liquidator or a judicial manager of a company under the Act;

"Third-Party Funder" means a person who carries on the business of funding all or part of the costs of dispute resolution proceedings to which the person is not a party.

Assignment of proceeds of relevant action in accordance with Regulations

3. A relevant insolvency practitioner may only assign proceeds of a relevant action under section 144(1)(*g*) of the Act (including section 144(1)(*g*) read with section 177(1)(*a*) of the Act) or paragraph (*f*) of the First Schedule to the Act in accordance with these Regulations.

Offer by potential funder to fund costs of relevant action

4.—(1) A relevant insolvency practitioner of a company may in accordance with this regulation solicit an offer from one or more creditors or members of the company, or one or more Third-Party Funders, to fund all or part of the costs of a relevant action, in return for the assignment of a share or other interest in the proceeds or potential proceeds of the relevant action to which the company may become entitled.

(2) When soliciting an offer from a creditor or member of the company, or a Third-Party Funder, the relevant insolvency practitioner must provide a copy of the written notice mentioned in paragraph (3) to the person.

(3) The written notice must contain all material information necessary for the consideration by the creditor or member of the company, or the Third-Party Funder, of the invitation, including but not limited to —

(*a*) the nature of the relevant action or contemplated relevant action;

(*b*) the parties or potential parties involved;

(*c*) the estimated potential proceeds of the relevant action or contemplated relevant action;

(*d*) the estimated amount of funding sought; and

(*e*) the date by which an offer of funding is to be received by the relevant insolvency practitioner.

(4) An offer by a member or creditor of the company, or a Third-Party Funder (called in this regulation the potential funder) to fund all or part of the costs of the relevant action or contemplated relevant action must be —

(*a*) made in writing;

(*b*) received by the relevant insolvency practitioner before the date mentioned in paragraph (3)(*e*) (or such later date as may be extended by the relevant insolvency practitioner);

(*c*) accompanied by a statement that there is no actual or potential conflict of interest between the potential funder and —

(i) the parties or potential parties in the relevant action or contemplated relevant action;

(ii) the lawyer acting for the company in bringing the relevant action or contemplated relevant action; or

(iii) the lawyer acting for the parties or potential parties in the relevant action or contemplated relevant action; and

(*d*) accompanied by a statement —

(i) that there is no actual or potential conflict of interest between the potential funder and the relevant insolvency practitioner; or

(ii) describing the actual or potential conflict of interest between the potential funder and the relevant insolvency practitioner.

(5) Where, at any time after a statement mentioned in paragraph (4)(*c*) or (*d*) has been given to the relevant insolvency practitioner, a potential funder or funder becomes aware of an actual or potential conflict of interest mentioned in that provision, that would render the statement incomplete or inaccurate, the potential funder or funder must immediately notify the relevant insolvency practitioner of the actual or potential conflict of interest concerned.

(6) Before entering into a Funding Agreement with a potential funder pursuant to an offer made under this regulation, the relevant insolvency practitioner must obtain approval from the following:

(*a*) in the case of a winding up by the Court — from the committee of inspection or failing such approval, from the Court;

(*b*) in the case of a creditors' voluntary winding up — from the committee of inspection or failing such approval, from the Court;

(*c*) in the case of a members' voluntary winding up — from the company by special resolution;

(*d*) in the case of a judicial management —

(i) from the committee of creditors;

(ii) failing such approval mentioned in sub-paragraph (i), from the meeting of creditors; or

(iii) failing such approval mentioned in sub-paragraph (i) or (ii), from the Court.

(7) Subject to paragraph (8), the relevant insolvency practitioner must not seek to obtain an approval mentioned in paragraph (6) if the

relevant insolvency practitioner is aware of an actual or potential conflict of interest mentioned in paragraph (4)(*c*) or (*d*).

(8) Where there is an actual or potential conflict of interest between the potential funder and the relevant insolvency practitioner, the relevant insolvency practitioner —

(*a*) must make a full and frank disclosure of the interest —

(i) in the case of a members' voluntary winding up — to the members of the company; or

(ii) in the case of a judicial management or any other type of winding up — to the creditors of the company; and

(*b*) may seek an approval mentioned in paragraph (6) if the relevant insolvency practitioner has obtained the informed consent to do so of —

(i) in the case of a members' voluntary winding up — the company by special resolution; or

(ii) in the case of a judicial management or any other type of winding up — a three-fourths majority in value of the creditors of the company.

(9) When seeking an approval mentioned in paragraph (6) from the committee of inspection, committee of creditors, meeting of creditors, the company by special resolution or the Court, the relevant insolvency practitioner must provide the material information relating to the offer, including —

(*a*) the efforts taken by the relevant insolvency practitioner to solicit offers from creditors or members of the company or Third-Party Funders;

(*b*) the identity of the potential funder; and

(*c*) a summary of the material terms of the offer, including, where applicable —

(i) the amount of funding to be provided;

(ii) the purpose for which the funding is provided (e.g. lawyer's fees);

(iii) the order of priority or structure of the assignment of proceeds of the relevant action to the potential funder; and

(iv) the share of the potential proceeds to be assigned to the potential funder.

(10) A creditor or member of the company who —

(*a*) has made an offer to fund all or part of the costs of the relevant action or contemplated relevant action for which approval is being sought; or

(*b*) is a defendant or potential defendant in the relevant action or contemplated relevant action,

must not attend or vote in a meeting of creditors, the committee of inspection, the committee of creditors, or the company to consider a special resolution, to approve the entering into a Funding Agreement to fund all or part of the costs of that relevant action.

Duties of relevant insolvency practitioner

5.—(1) A relevant insolvency practitioner must not solicit an offer under regulation 4 from a Third-Party Funder in which the relevant insolvency practitioner, directly or indirectly, holds any share or other ownership interest.

(2) A relevant insolvency practitioner must not acquire, directly or indirectly, any share or other ownership interest in a Third-Party Funder which has a Funding Agreement with the company concerned.

(3) A relevant insolvency practitioner must not receive any commission, fee or share of proceeds from a Third-Party Funder which has a Funding Agreement with the company concerned.

(4) Paragraph (3) does not prohibit the receiving of any fee, disbursement or expense payable by the company for the provision of services by the relevant insolvency practitioner as liquidator or judicial manager to the company.

(5) The relevant insolvency practitioner must retain control and oversight over the conduct of the relevant action in relation to which a Funding Agreement was entered into.

(6) The relevant insolvency practitioner must not take instructions from the funder on the conduct of the relevant action.

(7) When bringing or continuing any relevant action before the Court, a relevant insolvency practitioner must disclose to the Court, and to every other party to the relevant action —

(*a*) the existence of any Funding Agreement related to the costs of those proceedings; and

(*b*) the identity and address of any funder involved in funding the costs of those proceedings.

(8) The disclosure under paragraph (7) must be made —

(*a*) at the date of commencement of the proceedings relating to the relevant action where the Funding Agreement is entered into before the date of commencement of those proceedings; or

(*b*) as soon as practicable after the Funding Agreement is entered into where the Funding Agreement is entered into on or after the date of commencement of those proceedings.

Power of Court to order relief

6.—(1) The Court may, on application by a member or creditor of the company, order the relevant insolvency practitioner to disclose the existence of a Funding Agreement and its terms and conditions, subject to such conditions as the Court thinks fit.

(2) A member or creditor of the company may make an application to the Court for an order for relief on the ground that a Funding Agreement was entered into in breach of these Regulations.

(3) On an application under paragraph (2), where the Court is satisfied that the breach of these Regulations has resulted in prejudice to the company or the members or creditors of the company, the Court may —

(*a*) make an order declaring that the Funding Agreement is void, and make such consequential orders or directions as the Court thinks fit taking into account the identity of the person whose fault resulted in the breach concerned; or

(*b*) make any other order for giving relief as the Court thinks just.

(4) In deciding whether to make an order mentioned in paragraph (3)(*a*) or (*b*), the Court must take into account all the relevant circumstances, including the following:

(*a*) whether the statement mentioned in regulation 4(4)(*c*) or (*d*) was false or misleading to a material extent;

(*b*) whether any actual or potential conflict of interest was notified in accordance with regulation 4(5) or was not notified at all;

(*c*) the seriousness of any actual or potential conflict of interest concerned;

(*d*) whether the approval mentioned in regulation 4(6) was obtained before the Funding Agreement was entered into;

(*e*) whether the informed consent mentioned in regulation 4(8)(*b*) was obtained before an approval under regulation 4(6) was sought or obtained;

(*f*) whether regulation 4(9) was complied with when an approval under regulation 4(6) was sought.

Made on 21 July 2020.

LOH KHUM YEAN
Permanent Secretary,
Ministry of Law,
Singapore.

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