

With increased public awareness that a notice of intention to appoint administrators (NOI) has been filed, we are finding that third parties – usually the company’s creditors, suppliers and employees – are disrupting the administration process in a way that can cause significant risk to a company’s ability to continue trading, the overall value of its business and its ability to be rescued as a going concern.

Other than a qualifying floating charge holder (QFCH) and key stakeholders, historically third parties would generally only become aware that the company had entered administration on the day of or shortly after administrators had been appointed.

However, with developments in how insolvency searches are undertaken, knowledge that an NOI has been filed is much more freely and easily available. Nowadays, it is not uncommon to see reports in the press that an NOI has been filed almost immediately after it has been filed with the court.

This knowledge can disrupt a potential administration appointment (see examples in the table below).



Managing Potential Risk and Disruption

It is possible for an NOI to be filed at court, served on the QFCH and for the notice of appointment (NOA) to be filed on the same day. Naturally, this requires some planning, along with a cooperative QFCH, but it is possible and potentially heads off many of the risks (or potential risks) that can undermine the administration process highlighted in this alert.

In some cases, a moratorium is required, for example, if there is a threat of a winding up petition or any other enforcement action that would damage the company or impact the appointment of administrators or if the company needs the additional breathing space, but in many cases an NOI is only required because there is a QFCH.

Often, a QFCH will be aware of the intention to appoint administrators and will support the process. Some will consent to the appointment, meaning that the NOA can be filed swiftly, while others support the process but prefer not to provide actual consent, in which case the appointment happens after the required five business days’ notice to the QFCH has elapsed.

However, in situations where a NOI is only required because the required statutory steps need to be fulfilled rather than because the company needs the protection of a moratorium, it is worth considering whether the process can be compressed.

Provided that all paperwork has been prepared, all parties are available to sign and swear the relevant documents, the QFCH consents to the appointment and will return a signed consent quickly and all lawyers, advisors and the proposed administrators have organised everything ahead of filing the NOI, it is possible for the NOI to be filed at court, endorsed, served on the QFCH, the QFCH consent returned and for the NOA to be filed and endorsed on the same business day.

Even if the timing slips slightly, filing the NOA the next day or even the day after may well make a difference to a smooth transition, particularly if there is intended to be a pre-pack sale.

Listed Companies

Where the intention is to place a listed company into administration the filing of a NOI triggers a requirement to make an announcement on the Regulatory News Service (RNS) on the London Stock Exchange. Although this process has not been altered, the consequences of the RNS can have the same disruptive effect set out below. A “concertina” style appointment might, therefore, also assist in cases where a company that intends to file an NOI is listed.

Risks to Achieving Rescue

The below table sets out examples where early awareness of an NOI may cause disruption to the appointment potentially destroying the value in the business, derailing a sales process or (in a worst case) ultimately leading to the company entering liquidation.

Risk Areas	Historically	Currently
Employees	<p>The below explains what typically happens during the moratorium period when third parties are unaware of an NOI.</p> <p>Employees ordinarily find out about the appointment of administrators once they are appointed.</p> <p>At that point an announcement is usually made by the administrators and the employees will be told whether the business will continue to trade, whether there will be redundancies or if the business has been sold, that their jobs have been transferred.</p> <p>Prior to appointment, the proposed administrators will have aligned everything to time with their appointment, keeping the business and proposed strategy on track.</p>	<p>The below explains what might now happens during the moratorium period if third parties are aware of an NOI.</p> <p>Employees often find out that an NOI has been filed via social media following press reports that an NOI has been filed, although it only takes one employee to find out about the NOI for news to pass quickly to other employees through social media channels.</p> <p>Once employees know about an NOI, they can be quite disruptive to the process, particularly where a trade union is involved.</p> <p>Employees are a key resource if a sale of the business is contemplated. Therefore, addressing their concerns and generally trying to keep them happy so that a sale of the business can happen can divert valuable management resource that might otherwise be used to work towards achieving the proposed purpose of the administration.</p> <p>Management is likely to be distracted dealing with employee queries and if employees are nervous about their position, some may start looking for work elsewhere, particularly those on short-term, flexible or zero hours contracts.</p> <p>Social media can also play a role with employees sharing their views via their social media networks potentially creating reputational damage (see further below).</p> <p>Some may also refuse to work, during what could be an important trading period while a sale of the business is contemplated.</p>
Suppliers	<p>Aside from the directors being mindful of their directors' duties, suppliers will continue to supply the company during the moratorium period and value in the business will be maintained pending the NOA being filed.</p>	<p>Nervousness about getting paid and concern about the company entering administration may cause suppliers to stop deliveries, request shorter payment terms, or require payment of old invoices to continue delivery or payment on delivery.</p> <p>If key suppliers "pull the plug" or hold the company to ransom to continue supplying, this puts additional pressure on cash flow, which is likely to already be tight, potentially impacting the company's ability to continue trading and can be value destructive if a sale of the business is contemplated.</p>
Customers	<p>Aside from the directors being mindful of their directors' duties and ability to fulfil orders, the company will continue to trade and value in the business will be maintained pending the NOA being filed.</p>	<p>Customers can lose confidence in the business and its ability to fulfil orders, leading them to look to alternative suppliers.</p> <p>Losing key customers prior to appointment is likely to impact the options available and potentially be value disruptive.</p>

Risk Areas	Historically	Currently
Reputation	The below explains what typically happens during the moratorium period when third parties are unaware of an NOI.	The below explains what might now happens during the moratorium period if third parties are aware of an NOI.
Unsecured Creditors	The goodwill and value in the business name will be maintained during the moratorium.	The company's reputation may be damaged, which could hinder the ability to sell the business as a going concern or obtain rescue financing. Press reports can be wrong or misleading, giving rise to uncertainty about the future of the business and potentially damaging its value.
Directors	Aside from the directors being mindful of their directors' duties, creditors will be paid depending on the financial position of the company and will be dealt with as unsecured creditors on appointment.	Subject to the impact of the moratorium, creditors may seek to enforce or renegotiate contacts terms or simply stop providing credit. Creditors with ROT claims may take an aggressive stance, which may mean management is diverted to deal with these issues and additional legal costs are incurred to protect the business.
Options	Usually, the appointment process is supported by management who will assist and support the proposed administrators in making the appointment and providing all relevant information and documents to them. Their cooperation and support will help achieve the ultimate strategy for the business. If the proposed administrators intend to sell the business and assets to existing management, they will also be focused on agreeing the terms of that sale.	The directors' ability to focus and support the administrators may be diverted/distracted if they have to use their time and resources maintaining supplier, customer and employee relationships once the knowledge of an NOI is in the public domain.
Options	The proposed administrators will look to achieve one of the three objectives of administration.	If the value of the business is eroded as a consequence of all or any of the above, the ability to achieve one or all of the objectives of the administration is likely to be hampered and in a worst case the company may have to be placed into liquidation.

Directors Duties

In any case, balancing directors' duties must always factor into the timing of the filing of the NOI. If the reason for holding off filing an NOI is ultimately to preserve value in the business and support rescue, then on balance holding off filing seems a reasonable and proper conclusion to come to, but in cases where a moratorium is required the balance probably tips the other way. Ultimately, the question of directors' duties will need to be considered in light of the particular circumstances of the company.

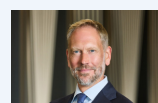
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