

ENTERPRISE ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 10: Insolvency

Appointment by company or directors

660. Paragraphs 22-34 set out the out-of-court entry route into administration for companies or the directors of companies. A company or its directors will only be able to appoint an administrator if:
- the company has not been in administration (instigated by the company or directors) (see paragraph 23(2)) nor subject to a moratorium in respect of a failed CVA under Schedule A1 to the Insolvency Act 1986 in the previous 12 months (see paragraph 24(3));
 - the company is or is likely to become unable to pay its debts (see paragraph 27(2)(a));
 - there is no outstanding winding-up petition or application for administration in respect of the company (see paragraph 25(a));
 - the company is not in liquidation (see paragraph 8(1)(a) and (b)); and
 - there is no administrator or administrative receiver in office (see paragraphs 6 and 25(c)).
661. The ‘notice of intention to appoint’ will also identify the proposed administrator (paragraph 26(3)). Once the ‘notice of intention to appoint’ is sent to the floating charge holder and filed at court, an interim moratorium commences (paragraph 44(2)).
662. During the notice period, a floating charge holder entitled to appoint an administrator may either agree to the proposed appointment or appoint their choice of administrator (paragraph 14). The company or directors must give floating charge holders at least five business days’ notice in writing of their intention to appoint an administrator in this way (paragraph 26). The ‘notice of intention to appoint’ must also be filed with the court and accompanied by a statutory declaration, stating that the application meets the criteria set out in paragraph 27(2).
663. If the floating charge holder consents to the company’s or directors’ nominee or does not respond to the notice within five business days, the company/directors must make the appointment no more than ten business days after filing their ‘notice of intention to appoint’ (paragraph 28(2)). If the ‘notice of appointment’ is not filed within this period, the interim moratorium will cease to have effect and an administrator cannot be appointed. If there is no floating charge holder, the company/directors file the ‘notice of appointment’ at court together with a statutory declaration stating that the application meets the criteria set out in paragraph 27.

*These notes refer to the Enterprise Act 2002 (c.40)
which received Royal Assent on 7 November 2002*

664. In both cases, this must be accompanied by a statement from the administrator consenting to act and stating that, in their opinion, the purpose of administration is reasonably likely to be achieved. Following this, the administrator is automatically appointed and takes office once the 'notice of appointment' and accompanying documents are filed at court. The company or directors must then notify the administrator of their appointment.
665. If, for whatever reason, the administrator's appointment is discovered to be invalid, the court may order the person who made the appointment to indemnify the administrator against liability (paragraph 34).