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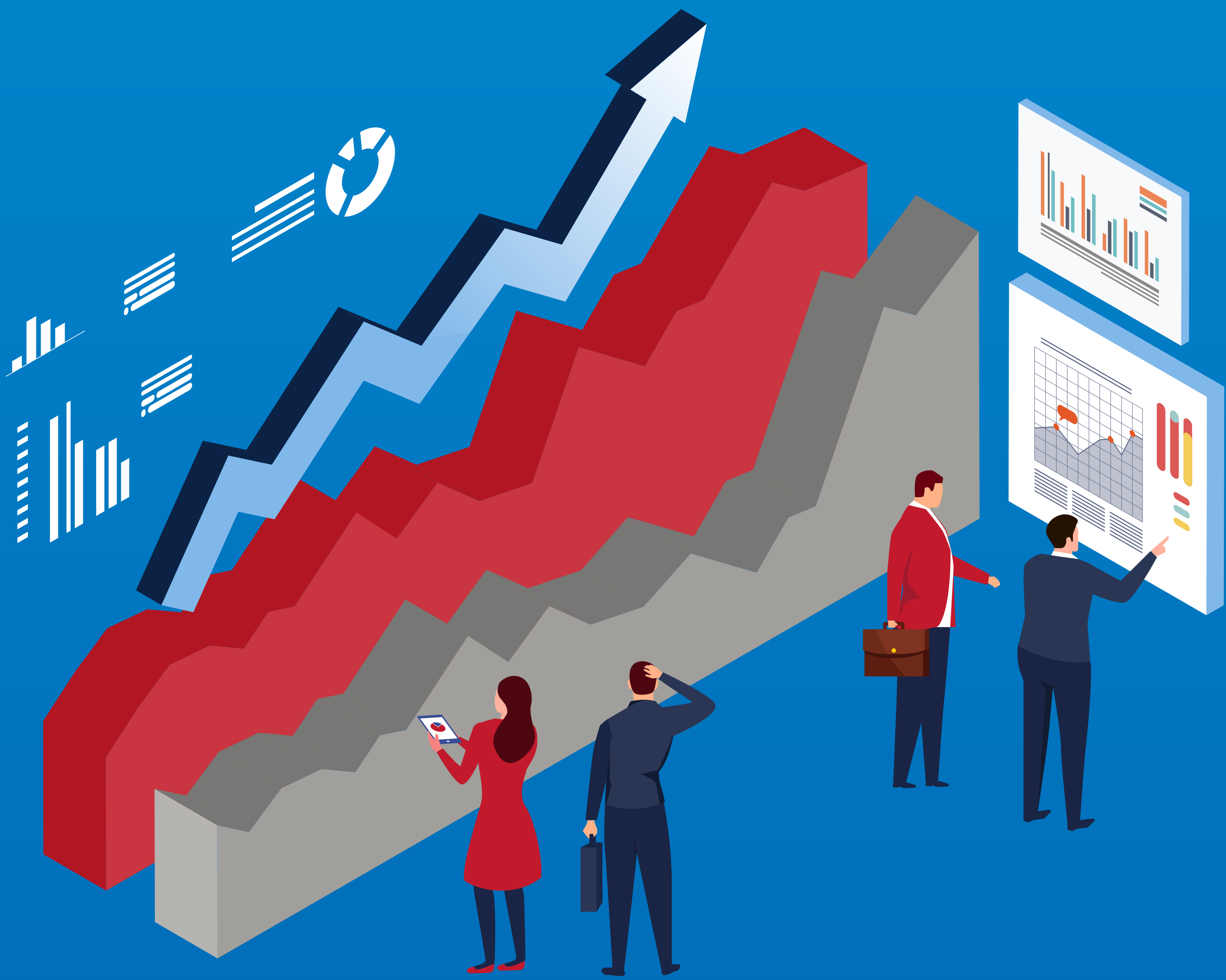

Matheson Directors' Guidance Series

The Summary Approval Procedure

Emma Doherty and Fergus Bolster

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Introduction

The Companies Act 2014 (the "**Act**") introduced a new universal summary approval procedure ("**SAP**"), which is in essence a validation procedure for what would otherwise be restricted activities. Prior to the commencement of the Act, where these restricted activities were allowed at all, either a court order was required, or an approval procedure had to be followed. However, the approval procedures differed, depending on the restricted activity, often leading to confusion. Now, the SAP may be used to validate all such restricted activities (albeit with minor variations depending on the particular activity at issue). Company directors play a key role in this process and need to be aware of their obligations in that regard. This document summarises some key points for directors in the context of the validation procedure.

Restricted activities

The Act identifies seven restricted activities which the SAP can be used to validate:

1. Financial assistance for acquisition of shares;
2. Reduction in company capital;
3. Variation of company capital on reorganisation;
4. Prohibition on pre-acquisition profits or losses being treated in holding company's financial statements as profits available for distribution;
5. Prohibition of loans etc, to directors and connected persons;
6. Domestic mergers; and
7. Procedure for and commencement of members' voluntary winding up.

For completeness, it should be noted that in the case of three of the restricted activities, companies have the alternative option of applying to the High Court rather than availing of the SAP. The relevant activities are:

- reduction in company capital;
- variation of company capital on reorganisation; and
- mergers.

Requirements

While the exact procedure to be followed will depend on the particular restricted activity, the core common steps to the SAP are as follows:

1. Directors' Solvency Declaration

A solvency declaration must be made by all or a majority of the directors of the company at a board meeting confirming in writing that they have made a full inquiry into the affairs of the company and that, having done so, they have formed the opinion that the company will be able to pay its debts as they fall due for a period of 12 months after the restricted activity is carried out. The precise terms of the declaration will vary depending on the nature of the restricted activity concerned; but in all cases it includes confirmation by the directors that, in forming such opinion, they have conducted an investigation into the affairs of the company.

2. Shareholder Resolution

Within 30 days of the directors' declaration, the shareholder(s) of the company pass a special resolution authorising the restricted activity (except in the case of mergers, where every member of each of the merging companies will have to vote in favour of a resolution in order for the SAP to apply).

3. Public Filing

A copy of the directors' declaration must be publicly filed with the Irish Companies Registration Office **("CRO")** not later than 21 days after the date on which the carrying on of the restricted activity is commenced.

Additional requirements in respect of particular restricted activities

Auditor's Report

Certain of the restricted activities have extra requirements. In certain cases, namely those involving a reduction in company capital, variation of company capital, treatment of pre-acquisition profits and commencement of a member's voluntary liquidation, an auditor's report will also be required confirming that the declaration as to solvency provided is "not unreasonable".

Directors' Merger Confirmation Document

There is also an additional requirement on directors in the case of a merger. A document prepared by the directors confirming that the common draft terms of merger will enable each of the prescribed effects provisions to operate without difficulty must be provided in order for the declaration to take effect. The prescribed effects provisions essentially provide for the consequences which must follow from a merger, including: (i) all of the assets and liabilities of the transferor company being transferred to the successor company; (ii) the dissolution of the transferor company; and (iii) the successor company being substituted in all legal proceedings pending by or against the transferor company.

Timing

Generally speaking, once the solvency declaration and resolution have been put in place, the company can engage in the restricted activity immediately (provided the resolution passed is unanimous). However, a copy of the declaration must be delivered to the CRO as required by the Act.

The restricted activity itself must take place within 12 months after the passing of the required shareholder resolution. However, where the restricted activity relates to the treatment of pre-acquisition profits, the restricted activity must take place within 60 days of the resolution being passed (with the timeline for implementation being reduced to just 30 days where a unanimous written resolution is used).

Companies entitled to use the SAP

While the SAP is available to all company types, there are certain restrictions on the use of the SAP by Public Limited Companies **("PLCs")**. PLCs may only use the SAP to commence a members' voluntary liquidation, release pre-acquisition profits or to validate a loan to a director or a connected person.

Consequences of a breach for the directors

A director should note that the Act allows for personal liability of a director in circumstances where a declaration is made in support of a SAP concerning a particular restricted activity without the director having reasonable grounds for the opinion as to solvency expressed therein. In practical terms, this will only be relevant where the company is not solvent in the 12 months after the date of making the declaration.

If the company is subsequently wound up in the 12 months after the date of the making of the declaration, and its debts were not discharged or provided for in full within that period, a presumption arises that the director made the declaration without reasonable grounds for the opinion provided.

Summary

The SAP is an efficient means by which companies can engage in otherwise restricted activities. However, professional advice should be taken by directors to ensure that the appropriate procedure and prescribed timelines are followed in respect of the particular restricted activity in question.

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Contacts

For more information, please contact Emma Doherty, Fergus Bolster or another member of the Matheson Corporate Department.

Emma Doherty

E emma.doherty@matheson.com

Fergus Bolster

E fergus.bolster@matheson.com