PROPOSED REGULATION ON THE PRESENTATION OF ACCOUNTS AND FINAL DISCHARGE OF THE INSOLVENCY REPRESENTATIVE

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INTRODUCTION

The present Regulation purports to provide detailed guidance on how insolvency practitioners must render accounts of their performance while in office. It intends to elaborate on the general duty included in article 49 of the Insolvency Law. As a general duty, it concerns the activity of insolvency representatives in all types of proceedings.

Insolvency representatives must exercise their duty with diligence and loyalty, and be held accountable for any breach of their general obligations. The Law foresees a number of instruments to exert control over the performance of the professional while in office. This Regulation elaborates on the duty to justify the adequacy of their overall performance before vacating office. It will be the last chance for the debtor and creditors to analyse, with hindsight, what has been done during the proceedings. This will be done through a two-step procedure: first, the insolvency representative shall submit the accounts, with a sufficient explanation and the supporting documents; second, the insolvency representative will request a formal discharge of his/her obligations. This Regulation designs a procedure that marks clearly the boundaries of the obligation and is quick and efficient. Although a control by the Court is envisaged, absent the breach of formal duties, the inaction of the parties will entail the discharge of the professional. The effect of the discharge is the formal, court-declared vacation from office and the completion of the tasks. It does not pre-empt the rights of stakeholders to fail a suit against the insolvency professional for damage caused.

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CONTENT

Article 1. Application for a discharge from office

The application by the insolvency representative liquidator for discharge must:

a) be made in prescribed form in accordance with the template of this Regulation as Annex I; and
b) in case of liquidation, be accompanied by a copy of the notice of final dividend paid to creditors and a copy of the final statement of receipts and disbursements, both in prescribed form, and a dividend sheet.

Article 2. Presentation of the accounts and request for discharge

1. The insolvency representative shall first present its accounts to the committee of creditors, in case there is one.

2. If requested, the insolvency representative will elaborate on parts of the accounts. The insolvency representative may be convened to provide an oral explanation of its accounts and on any acts performed while on duty.

3. Any comments provided by the committee of creditors will be deposited in the Insolvency Court together with the accounts and the request for the discharge.

Article 3. Requirements for the discharge

1. At the time of discharge, the insolvency representative must satisfy the court that:

a) the statements made in connection with the discharge are true;

b) the statement of receipts and disbursements is an accurate and correct statement of the administration of the procedure, including, in case of liquidation*,* the final statements;

c) in case of liquidation, all the property of the debtor for which the liquidator was accountable has been sold, realized or disposed of in the manner described in the final statement of receipts and disbursements;

d) every insolvency claim was properly examined and that

   i. to the best of the insolvency representative's knowledge, the list of creditors, in case of reorganization, or the dividend sheet presented to the court, in liquidation, contain a true and correct list of the claims of creditors entitled to vote or to share in the estate, and

   ii. in case of liquidation, all payments shown on the dividend sheet have been duly made

(e) the insolvency representative has not received, does not expect to receive, and has not been promised, any remuneration or consideration other than as shown in the final statement of receipts and disbursements; and

2. Despite the requirements set in the previous paragraph, the Court will approve the accounts and determine the discharge of the insolvency representative if, within the period of time determined in article 49 of the Insolvency Law, neither the debtor nor any creditor has challenged the accounts.

Article 4. Opposition to the rendering of accounts

1. The opposition to the accounts and/or the discharge of the insolvency representative will need to be filed in written form, and make express reference to the representative´s failure to comply with any of the requirements described in the first paragraph of the previous article.

2. The insolvency representative will be given 10 days to respond to the opposition, providing any explanation and proof as deemed necessary.

Article 5. The effects of discharge

1. Following the discharge of the insolvency representative, all duties deriving from the office of insolvency proceedings shall be deemed finalised.

2. The discharge of the insolvency representative does not pre-empt the right of stakeholders to act in Court to hold him/her accountable for any damage caused negligently or through wilful misconduct.