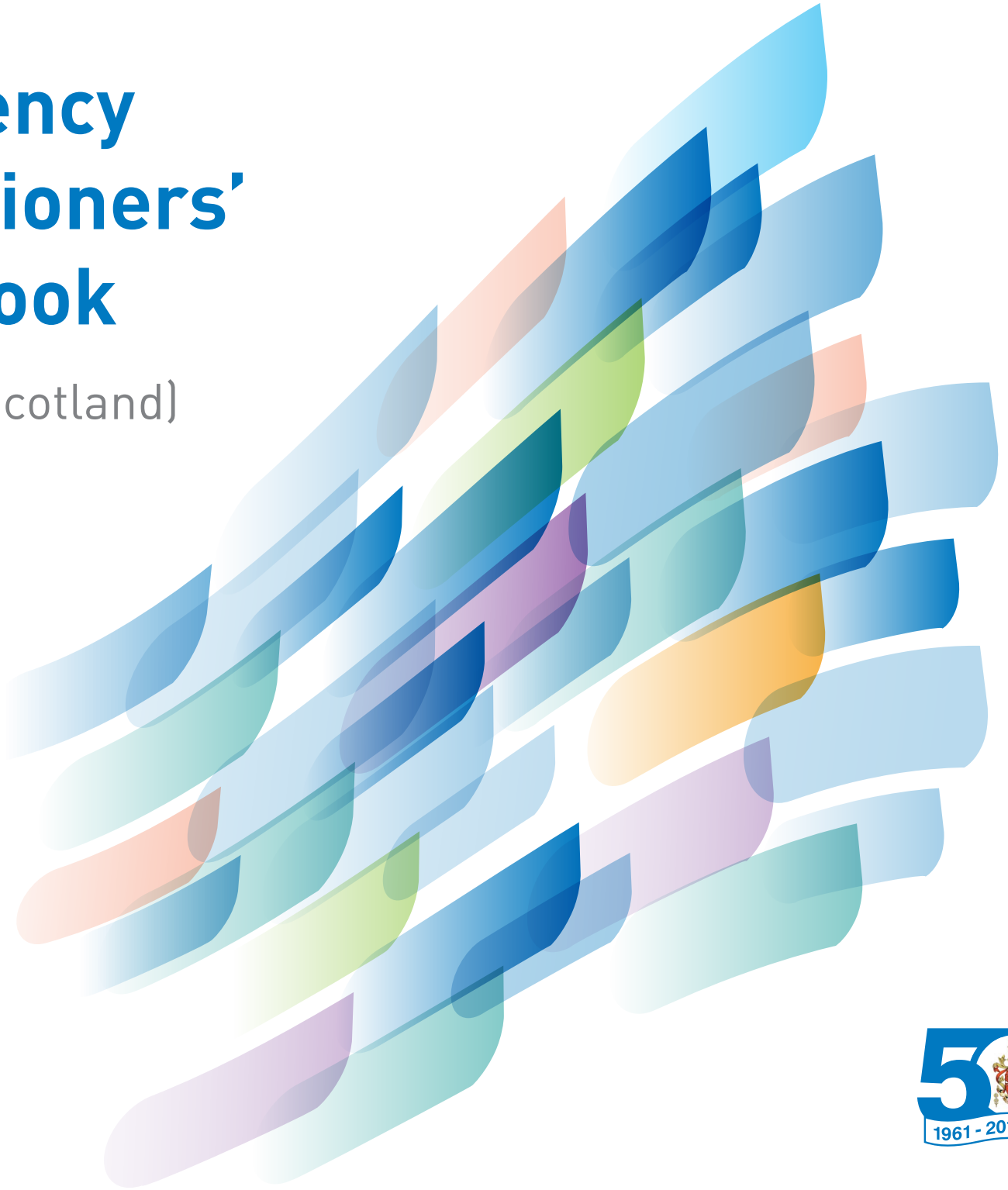
Insolvency Practitioners' Handbook

Edition 1 (Scotland)
2011



Insolvency Practitioners Association
1961 - 2011

Welcome to the first edition of the IPA Insolvency Handbook. We are particularly pleased to be able to launch this new book in our 50th anniversary year.

The IPA started its life as a group of insolvency specialists back in 1961. The practitioners who came together then to form the origins of the Association shared a desire to see the profession recognised in its own right, and a common will to support each other. This handbook continues that tradition, by bringing together in one useful volume most of the key guidance and codes that practitioners (and those studying for insolvency exams) need to have at their fingertips.

We have a particular interest in supporting our students, who are of course potential future members of the Association. Our Certificates of Proficiency in Insolvency (CPI) and Personal Insolvency (CPPI) are sat by more people than any other equivalent insolvency exams in the UK, and more would-be IPs sit the Joint Insolvency Examinations (JIE) through the IPA than through any of the other registration bodies. The IPA can be rightly proud of its record of encouraging and supporting those who represent the future of the profession.

As well as being an examiner and membership body for those involved in insolvency and related professional activities, the IPA is of course a Recognised Professional Body (RPB) for the purposes of authorising IPs to act as such under the Insolvency Act 1986. As the only one of the RPBs solely involved in insolvency, we have been at the forefront in:

- creating insolvency qualifications;
- developing professional guidance;
- encouraging high standards in practice;
- widening access to insolvency knowledge;
- extending the regulatory reach into related activities;
- and leading debates on current issues such as regulation.

We hope this publication will prove to be an invaluable reference for students and licensed practitioners alike.

David A Kerr MIPA
Chief Executive

50 years of the IPA

Previous page

Next page

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This publication is intended for use by members and students of the Insolvency Practitioners Association. In the event that members require further guidance or assistance, they can contact our Ethical Helpline on: 020 7397 6407.

SECTION 1
THE ETHICS CODE
SECTION 2
STATEMENTS OF INSOLVENCY PRACTICE (SCOTLAND)
SECTION 3
INSOLVENCY BULLETINS (SCOTLAND)
SECTION 4
INSOLVENCY GUIDANCE PAPERS
SECTION 5
PERSONAL DEBTORS (SCOTLAND)
SECTION 6
OTHER PROFESSION REGULATIONS AND GUIDANCE
CONTACTS

Previous page

Next page

Section 1

The Ethics Code

CONTENTS

1.1 INSOLVENCY CODE OF ETHICS BACKGROUND AND OVERVIEW

A. INTRODUCTION

1. This document relates to the Insolvency Code of Ethics ("the Code"). This document has been prepared in order to assist the reader in understanding the Code and the background to it. This document is to be read in conjunction with the Code. This document does not form part of the Code. Its contents are not to be used for any interpretative purposes including during disciplinary proceedings. Neither are the contents of this document intended to be a comprehensive description of the Code. Accordingly where a section or part of the Code does not seem to require any comment, none is given.

B. BACKGROUND

2. For some years the bodies recognised under the relevant legislation in England and Wales, Scotland and Ireland to grant licences to *insolvency practitioners* ("the RPBs") have agreed upon and produced a joint ethical code for *insolvency practitioners*, the most recent version being that adopted in January 2004 ("the Insolvency Ethical Guide"). In 2006, the professional accounting bodies in England and Wales, Scotland and Ireland altered their principal codes of ethics to align them to a model adopted by the International Federation of Accounting Bodies ("the IFAC Code"). It was subsequently agreed that the Insolvency Ethical Guide should be reviewed and redrafted to align it more closely to the IFAC Code.

3. A draft of the Code was produced by the Joint Insolvency Committee[1] ("the JIC") in March 2007 for public consultation. The consultation period ended on 2 July 2007. Thereafter the JIC had regular meetings to discuss the responses to the consultation and produced a substantially revised draft of the Code.

4. The revised version of the Code has now been adopted by each of the RPBs. Accordingly, all *insolvency practitioners* will continue to follow a standardised Code, regardless of their authorising body. It is recognised, however, that some of the RPBs may wish to adopt the Code with minor modifications in order that it is integrated with any additional guidance provided them.

[1] The JIC was formed in 1999 and aims to facilitate discussion between the RPBs in order to ensure that, as far as possible, there is a consistency of approach between them. Each of the RPBs is represented on the JIC.

Previous page

Next page

5. The Code is presented as a new document because the extent of the changes makes it impractical to issue a version highlighting the changes made to the earlier Insolvency Ethical Guide. However, it is not considered that the application of the Code in *practice* will be substantially different from the application of the Insolvency Ethical Guide.

C. OVERVIEW

Introduction

6. The Code is intended to assist *insolvency practitioners* meet the obligations expected of them by providing professional and ethical guidance. The purpose of the Code is to provide a high standard of professional and ethical guidance amongst *insolvency practitioners*.

7. Paragraphs 1 to 3 of the Code outline the purpose of the Code and its scope. The Code is to be applied to all professional work relating to an *insolvency appointment* including any professional work that may lead to such an appointment. An *Insolvency Practitioner* should ensure that the principles outlined in the Code are applied not only by himself but all members of the insolvency team.

8. Paragraph 3 requires that *insolvency practitioners* should be guided not merely by the terms but also by the spirit of the Code. In this regard, it is important to note that the examples set out in the Code are intended to be illustrative only. It is impossible to define every situation to which the principles set out in the Code will be relevant.

Fundamental principles

9. The earlier Insolvency Ethical Guide provided *insolvency practitioners* with five fundamental principles to which they must adhere, together with a list of common situations which *insolvency practitioners* may face.

10. The Code also includes five fundamental principles which have been revised from the Insolvency Ethical Guide. Each of the fundamental principles set out in the Code is based upon and follows closely the fundamental principles contained in the IFAC Code.

11. The JIC does not consider that the application of the fundamental principles of integrity, objectivity, professional competence and due care and professional behaviour will be materially different from the application of the fundamental principles contained in Insolvency Ethical Guide.

12. The fundamental principle of confidentiality did not appear in the Insolvency Ethical Guide. Some concern was expressed during the consultation period that the inclusion of this fundamental principle may be inconsistent with an *Insolvency Practitioner*'s duty or obligation, in certain circumstances, to disclose confidential information. The JIC does not consider this to be the case. As drafted, the fundamental principle of confidentiality makes it clear that where an *Insolvency Practitioner* has a legal or professional right or duty to disclose he may do so.

13. Following comments received during the consultation period amendments were made to the drafting of the fundamental principle of professional behaviour. This principle now contains an additional requirement not explicitly set out in the IFAC Code that *insolvency practitioners* conduct themselves with courtesy and consideration towards all whom they come into contact with when performing their work. This requirement was contained in the Insolvency Ethical Guide. Following the comments received during the consultation period, it was considered important that this requirement remained explicitly set out in the description of the fundamental principle of professional behaviour.

Framework approach

14. The Code sets out a framework that *insolvency practitioners* can use to identify actual or potential threats to the fundamental principles and determine what safeguards, if any, may be available to meet such threats.

15. The framework approach requires *insolvency practitioners* to identify, evaluate and respond in an appropriate manner to any threats to compliance with the fundamental principles.

16. The Code also provides detail concerning the threats that *insolvency practitioners* may face in the conduct of their work. The earlier Insolvency Ethical Guide identified and discussed two main types of threat: self interest and self review. The Code also identifies and discusses advocacy, familiarity and intimidation threats.

Previous page

Next page

17. Information is also included on potential safeguards. In particular examples are given of safeguards that may be introduced into the *practice* to create a work environment in which threats are identified and the introduction of appropriate safeguards is encouraged.

Insolvency appointments

18. Paragraphs 20 to 30 of the Code consider the particular application of the framework approach in relation to the decision by an *Insolvency Practitioner* to accept an *insolvency appointment*.

19. This part of the Code describes some of the safeguards that *insolvency practitioners* will need to consider implementing prior to accepting an appointment where there is a threat to the fundamental principles. The examples are not intended to be exhaustive. Neither will the examples given be applicable to all situations. As paragraph 28 makes clear, an *Insolvency Practitioner* may encounter situations where no safeguards can reduce a threat to an acceptable level. In such circumstances, an *Insolvency Practitioner* should conclude that it is not appropriate to accept an *insolvency appointment*.

20. Paragraphs 31 and 32 of the Code require an *Insolvency Practitioner* to take reasonable steps to identify any circumstances that pose a conflict of interest and give some examples of the types of situation in which such a conflict could arise.

21. Paragraphs 33 and 34 of the Code discuss some of the particular issues that can arise where two or more *practices* merge.

22. Paragraphs 37 to 39 of the Code expand upon the fundamental principle of professional competence and due care. An *Insolvency Practitioner* should only accept an *insolvency appointment* when the *Insolvency Practitioner* has sufficient expertise. This part of the Code also stresses the importance of maintaining professional competence by a continuing awareness of relevant technical and professional developments.

Previous page

Next page

Professional and personal relationship

23. Paragraphs 40 to 48 of the Code discuss some of the particular threats to the fundamental principle of objectivity that can arise from certain professional and personal relationships.

24. This section requires an *Insolvency Practitioner* to identify any threats to the principle of objectivity that may arise from a professional and personal relationship, to evaluate the significance of the threat in relation to the conduct of the *insolvency appointment* being considered and consider whether any safeguards will be appropriate to reduce the threat to an acceptable level.

25. Where there are no or no reasonable safeguards that can be introduced to eliminate a threat arising from a professional or personal relationship, or to reduce it to an acceptable level the relationship in question will constitute a "significant professional relationship" or a "significant personal relationship". Where this is case the *Insolvency Practitioner* should conclude that it is not appropriate to take the *insolvency appointment*.

26. Some concern was expressed during the consultation period as to the use of the term "significant professional relationship". The term "material professional relationship" was used in the Insolvency Ethical November 2008 Guide. The JIC does not consider that there is any substantial difference between the two terms.

27. Some concern was also expressed during the consultation period that the requirement for safeguards to be adopted to identify relationships between *individuals* within the *practice* and third parties that may gives rise to a threat to the fundamental principles would be impractical in the case of large *practices*. Paragraph 43 now makes it clear that only such safeguards that are proportionate and reasonable in relation to the *insolvency appointment* being considered are necessary.

Paragraphs 49 to 73 of the Code

28. Paragraphs 49 to 73 of the Code discuss a number of areas in which an *Insolvency Practitioner* will commonly encounter threats to the fundamental principles. Each section gives some examples of the types of safeguard that may be available to reduce the particular threats to an acceptable level.

29. Paragraphs 49 to 52 of the Code discuss some of the particular threats that may arise where an *Insolvency Practitioner* realises assets. This section stresses the importance for an *Insolvency Practitioner* to take care to ensure (where to do so does not conflict with any legal or professional obligation) that his decision making processes are transparent, understandable and readily identifiable to all third parties who may be affected by any sale or proposed sale.

30. Paragraphs 53 to 56 of the Code describe some of the threats to the fundamental principles that can arise when an *Insolvency Practitioner* intends to seek specialist advice and services. Such threats can arise where the *Insolvency Practitioner* obtains services from a regular source or where services are provided from within the *practice* or by a party with whom the *practice* or an *individual within the practice* has a business or personal relationship. This section describes some of the safeguards that may be available to reduce these threats to an acceptable level.

31. Paragraphs 57 to 62 of the Code concern the acceptance of fees and other types of remuneration (including referral fees and commissions) both prior to and after accepting an *insolvency appointment*.

32. Paragraph 63 of the Code prohibits the payment or offer of any commission for or the furnishing of any valuable consideration towards, the introduction of *insolvency appointments*. Paragraphs 64 to 69 discuss some of the particular threats that can arise where an *Insolvency Practitioner* seeks an appointment or work that may lead to an appointment through advertising or other forms of marketing. Paragraphs 70 to 73 concern the offer and acceptance of gifts and hospitality.

Record keeping

33. Paragraphs 74 to 75 of the Code stress the importance of record keeping in relation to the work carried out by an *Insolvency Practitioner*.

The application of the framework to specific circumstances

34. Paragraphs 76 to 88 of the Code contain specific circumstances and relationships that will create threats to the fundamental principles. The examples describe the threats and the safeguards that may in some circumstances be appropriate to eliminate the threats or reduce them to an acceptable level in each case. In other circumstances, the examples contain a complete prohibition on the acceptance of an *insolvency appointment*. The examples are divided into three parts: examples which do not relate to a previous or existing *insolvency appointment*; examples that do relate to a previous or existing *insolvency appointment*; and some examples under Scots law.

Previous page

Next page

1.2 ETHICS CODE FOR MEMBERS

1. As a professional membership body promoting high standards of *practice* in relation to work undertaken by its members, the *insolvency practitioners* Association ("IPA") requires its members to adhere to certain principles in all aspects of their professional work.

2. Furthermore, one of the bases for recognition (by the Secretary of State for Business, Enterprise and Regulatory Reform) of the IPA as a body entitled to authorise its members to act as *insolvency practitioners*, is that the IPA:

   - will arrange for appropriate ethical guidance to be made available to its members;
   - will ensure through its ethical code or guide that its members, when accepting appointments as office holders, are and are seen to be independent from influences which could affect their objectivity; and
   - will firmly but fairly apply its relevant professional and ethical codes or guides in relation to the activities of its members.

3. The Code of Ethics set out below ("the Code") was produced by the Joint Insolvency Committee and has been adopted in substantially similar terms by all of the bodies recognised under the relevant legislation in England and Wales, Scotland and Ireland to grant licences to *insolvency practitioners*. The Code is stated to apply to all *insolvency practitioners*. However, those members who are not *insolvency practitioners* are required to adhere to the Code and in particular the spirit of the Code with such modifications as are appropriate in all the circumstances.

4. The Code will replace all previous Codes of Ethics issued by the Council. For the purposes of Article 66 of the Articles of Association of the IPA misconduct shall include any breach by a member of the Code.

LIST OF CONTENTS

Previous page

Next page

Definitions

Authorising body	A body declared to be a recognised professional body or a competent authority under any legislation governing the administration of insolvency in the United Kingdom.
Close or immediate family	A spouse (or equivalent), dependant, parent, child or sibling.
Entity	Any natural or legal person or any group of such persons, including a partnership.
He/she	In this Code, he is to be read as including she.
Individual within the practice	The Insolvency Practitioner, any principals in the practice and any employees within the practice.
Insolvency appointment	A formal appointment: (a) which, under the terms of legislation must be undertaken by an *Insolvency Practitioner*; or (b) as a nominee or supervisor of a voluntary arrangement.
Insolvency Practitioner	An *individual* who is authorised or recognised to act as an *Insolvency Practitioner* in the United Kingdom by an authorising body. For the purpose of the application of this Code only, the term *Insolvency Practitioner* also includes an *individual* who acts as a nominee or supervisor of a voluntary arrangement.
Insolvency team	Any person under the control or direction of an *Insolvency Practitioner*.
Practice	The organisation in which the *Insolvency Practitioner* practises.
Principal	In respect of a *practice*: (a) which is a company: a director; (b) which is a partnership: a partner; (c) which is a limited liability partnership: a member; (d) which is comprised of a sole practitioner: that person; Alternatively any person within the *practice* who is held out as being a director, partner or member.

Previous page

Next page

GENERAL APPLICATION OF THE CODE

Introduction

1. This Code is intended to assist *insolvency practitioners* meet the obligations expected of them by providing professional and ethical guidance.

2. This Code applies to all *insolvency practitioners*. *Insolvency practitioners* should take steps to ensure that the Code is applied in all professional work relating to an *insolvency appointment*, and to any professional work that may lead to such an *insolvency appointment*. Although an *insolvency appointment* will be of the *Insolvency Practitioner* personally rather than his *practice* he should ensure that the standards set out in this Code are applied to all members of the insolvency team.

3. It is this Code, and the spirit that underlies it, that governs the conduct of *insolvency practitioners*. Failure to observe this Code may not, of itself, constitute professional misconduct, but will be taken into account in assessing the conduct of an *Insolvency Practitioner*.

Fundamental principles

4. An *Insolvency Practitioner* is required to comply with the following fundamental principles:

(a) Integrity

An *Insolvency Practitioner* should be straightforward and honest in all professional and business relationships.

(b) Objectivity

An *Insolvency Practitioner* should not allow bias, conflict of interest or undue influence of others to override professional or business judgements.

(c) Professional competence and due care

An *Insolvency Practitioner* has a continuing duty to maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in *practice*, legislation and techniques. An *Insolvency Practitioner* should act diligently and in accordance with applicable technical and professional standards when providing professional services.

Previous page

Next page

(d) Confidentiality

An *Insolvency Practitioner* should respect the confidentiality of information acquired as a result of professional and business relationships and should not disclose any such information to third parties without proper and specific authority unless there is a legal or professional right or duty to disclose. Confidential information acquired as a result of professional and business relationships should not be used for the personal advantage of the *Insolvency Practitioner* or third parties.

(e) Professional behaviour

An *Insolvency Practitioner* should comply with relevant laws and regulations and should avoid any action that discredits the profession. *Insolvency practitioners* should conduct themselves with courtesy and consideration towards all with whom they come into contact when performing their work.

Framework approach

5. The framework approach is a method which *insolvency practitioners* can use to identify actual or potential threats to the fundamental principles and determine whether there are any safeguards that might be available to offset them. The framework approach requires an *Insolvency Practitioner* to:

   (a) take reasonable steps to identify any threats to compliance with the fundamental principles;

   (b) evaluate any such threats; and

   (c) respond in an appropriate manner to those threats.

6. Throughout this Code there are examples of threats and possible safeguards. These examples are illustrative and should not be considered as exhaustive lists of all relevant threats or safeguards. It is impossible to define every situation that creates a threat to compliance with the fundamental principles or to specify the safeguards that may be available.

Identification of threats to the fundamental principles

7. An *Insolvency Practitioner* should take reasonable steps to identify the existence of any threats to compliance with the fundamental principles which arise during the course of his professional work.

8. An *Insolvency Practitioner* should take particular care to identify the existence of threats which exist prior to or at the time of taking an *insolvency appointment* or which, at that stage, it may reasonably be expected might arise during the course of such an *insolvency appointment*. Paragraphs 20 to 48 below contain particular factors an *Insolvency Practitioner* should take into account when deciding whether to accept an *insolvency appointment*.

9. In identifying the existence of any threats, an *Insolvency Practitioner* should have regard to relationships whereby the *practice* is held out as being part of a national or an international association.

10. Many threats fall into one or more of five categories:
    (a) **Self-interest threats:** which may occur as a result of the financial or other interests of a practice or an *Insolvency Practitioner* or of a close or immediate family member of an individual within the practice;
    (b) **Self-review threats:** which may occur when a previous judgement made by an individual within the practice needs to be re-evaluated by the *Insolvency Practitioner*;
    (c) **Advocacy threats:** which may occur when an individual within the practice promotes a position or opinion to the point that subsequent objectivity may be compromised;
    (d) **Familiarity threats:** which may occur when, because of a close relationship, an individual within the practice becomes too sympathetic or antagonistic to the interests of others; and
    (e) **Intimidation threats:** which may occur when an *Insolvency Practitioner* may be deterred from acting objectively by threats, actual or perceived.

11. The following paragraphs give examples of the possible threats that an *Insolvency Practitioner* may face.

12. Examples of circumstances that may create self-interest threats for an *Insolvency Practitioner* include:
    (a) An individual within the practice having an interest in a creditor or potential creditor with a claim which requires subjective adjudication.
    (b) Concern about the possibility of damaging a business relationship.
    (c) Concerns about potential future employment.

13. Examples of circumstances that may create self-review threats include:
    (a) The acceptance of an *insolvency appointment* in respect of an *entity* where an individual within the practice has recently been employed by or seconded to that *entity*.
    (b) An *Insolvency Practitioner* or the practice has carried out professional work of any description, including sequential *insolvency appointments*, for that *entity*.

    Such self-review threats may diminish over the passage of time.

14. Examples of circumstances that may create advocacy threats include:
    (a) Acting in an advisory capacity for a creditor of an *entity*.
    (b) Acting as an advocate for a client in litigation or dispute with an *entity*.

15. Examples of circumstances that may create familiarity threats include:
    (a) An individual within the practice having a close relationship with any individual having a financial interest in the insolvent *entity*.
    (b) An *individual within the practice* having a close relationship with a potential purchaser of an insolvent's assets and/or business.

    In this regard a close relationship includes both a close professional relationship and a close personal relationship.

16. Examples of circumstances that may create intimidation threats include:
    (a) The threat of dismissal or replacement being used to :
        (i) Apply pressure not to follow regulations, this Code, any other applicable code, technical or professional standards.
        (ii) Exert influence over an *insolvency appointment* where the *Insolvency Practitioner* is an employee rather than a principal of the practice.
    (b) Being threatened with litigation.
    (c) The threat of a complaint being made to the *Insolvency Practitioner*'s authorising body.

Evaluation of threats

17. An *Insolvency Practitioner* should take reasonable steps to evaluate any threats to compliance with the fundamental principles that he has identified.

18. In particular, an *Insolvency Practitioner* should consider what a reasonable and informed third party, having knowledge of all relevant information, including the significance of the threat, would conclude to be acceptable.

Possible safeguards

19. Having identified and evaluated a threat to the fundamental principles an *Insolvency Practitioner* should consider whether there are any safeguards that may be available to reduce the threat to an acceptable level.

Insolvency Code of Ethics

The relevant safeguards will vary depending on the circumstances. Generally safeguards fall into two broad categories. Firstly, safeguards created by the profession, legislation or regulation. Secondly, safeguards in the work environment. In the insolvency context safeguards in the work environment can include safeguards specific to an *insolvency appointment*. These are considered in paragraphs 20 to 39 below. In addition, safeguards can be introduced across the practice. These safeguards seek to create a work environment in which threats are identified and the introduction of appropriate safeguards is encouraged. Some examples include:

(a) Leadership that stresses the importance of compliance with the fundamental principles.

(b) Policies and procedures to implement and monitor quality control of engagements.

(c) Documented policies regarding the identification of threats to compliance with the fundamental principles, the evaluation of the significance of these threats and the identification and the application of safeguards to eliminate or reduce the threats, other than those that are trivial, to an acceptable level.

(d) Documented internal policies and procedures requiring compliance with the fundamental principles.

(e) Policies and procedures to consider the fundamental principles of this Code before the acceptance of an *insolvency appointment*.

(f) Policies and procedures regarding the identification of interests or relationships between individuals within the practice and third parties.

Previous page

Next page

(g) Policies and procedures to prohibit individuals who are not members of the insolvency team from inappropriately influencing the outcome of an *insolvency appointment*.

(h) Timely communication of a practice's policies and procedures, including any changes to them, to all individuals within the practice, and appropriate training and education on such policies and procedures.

(i) Designating a member of senior management to be responsible for overseeing the adequate functioning of the safeguarding system.

(j) A disciplinary mechanism to promote compliance with policies and procedures.

(k) Published policies and procedures to encourage and empower *individuals* within the *practice* to communicate to senior levels within the *practice* and/or the *Insolvency Practitioner* any issue relating to compliance with the fundamental principles that concerns them.

SPECIFIC APPLICATION OF THE CODE

Insolvency appointments

20. The *practice* of insolvency is principally governed by statute and secondary legislation and in many cases is subject ultimately to the control of the Court. Where circumstances are dealt with by statute or secondary legislation, an *Insolvency Practitioner* must comply with such provisions. An *Insolvency Practitioner* must also comply with any relevant judicial authority relating to his conduct and any directions given by the Court.

21. An *Insolvency Practitioner* should act in a manner appropriate to his position as an officer of the Court (where applicable) and in accordance with any quasi-judicial, fiduciary or other duties that he may be under.

22. Before agreeing to accept any *insolvency appointment* (including a joint appointment), an *Insolvency Practitioner* should consider whether acceptance would create any threats to compliance with the fundamental principles. Of particular importance will be any threats to the fundamental principle of objectivity created by conflicts of interest or by any significant professional or personal relationships. These are considered in more detail below.

23. In considering whether objectivity or integrity may be threatened, an *Insolvency Practitioner* should identify and evaluate any professional or personal relationship (see paragraphs 40 to 48 below) which may affect

compliance with the fundamental principles. The appropriate response to the threats arising from any such relationships should then be considered, together with the introduction of any possible safeguards.

24. Generally, it will be inappropriate for an *Insolvency Practitioner* to accept an *insolvency appointment* where a threat to the fundamental principles exists or may reasonably be expected might arise during the course of the *insolvency appointment* unless:

    (a) disclosure is made, prior to the *insolvency appointment*, of the existence of such a threat to the Court or to the creditors on whose behalf the *Insolvency Practitioner* would be appointed to act and no objection is made to the *Insolvency Practitioner* being appointed; and

    (b) safeguards are or will be available to eliminate or reduce that threat to an acceptable level. If the threat is other than trivial, safeguards should be considered and applied as necessary to reduce them to an acceptable level, where possible.

25. The following safeguards may be considered:

    (a) Involving and/or consulting another *Insolvency Practitioner* from within the practice to review the work done.

    (b) Consulting an independent third party, such as a committee of creditors, an authorising body or another *Insolvency Practitioner*.

    (c) Involving another *Insolvency Practitioner* to perform part of the work, which may include another *Insolvency Practitioner* taking a joint appointment where the conflict arises during the course of the *insolvency appointment*.

    (d) Obtaining legal advice from a solicitor or barrister with appropriate experience and expertise.

    (e) Changing the members of the insolvency team.

    (f) The use of separate *insolvency practitioners* and/or staff.

    (g) Procedures to prevent access to information by the use of information barriers (e.g. strict physical separation of such teams, confidential and secure data filing).

    (h) Clear guidelines for individuals within the practice on issues of security and confidentiality.

    (i) The use of confidentiality agreements signed by individuals within the practice.

Previous page

Next page

(j) Regular review of the application of safeguards by a senior individual within the practice not involved with the *insolvency appointment*.

(k) Terminating the financial or business relationship that gives rise to the threat.

(l) Seeking directions from the court.

26. As regards joint appointments, where an *Insolvency Practitioner* is specifically precluded by this Code from accepting an *insolvency appointment* as an *individual*, a joint appointment will not be an appropriate safeguard and will not make accepting the *insolvency appointment* appropriate.

27. In deciding whether to take an *insolvency appointment* in circumstances where a threat to the fundamental principles has been identified, the *Insolvency Practitioner* should consider whether the interests of those on whose behalf he would be appointed to act would best be served by the appointment of another *Insolvency Practitioner* who did not face the same threat and, if so, whether any such appropriately qualified and experienced other *Insolvency Practitioner* is likely to be available to be appointed.

28. An *Insolvency Practitioner* will encounter situations where no safeguards can reduce a threat to an acceptable level. Where this is the case, an *Insolvency Practitioner* should conclude that it is not appropriate to accept an *insolvency appointment*.

29. Following acceptance, any threats should continue to be kept under appropriate review and an *Insolvency Practitioner* should be mindful that other threats may come to light or arise. There may be occasions when the *Insolvency Practitioner* is no longer in compliance with this Code because of changed circumstances or something which has been inadvertently overlooked. This would generally not be an issue provided the *Insolvency Practitioner* has appropriate quality control policies and procedures in place to deal with such matters and, once discovered, the matter is corrected promptly and any necessary safeguards are applied. In deciding whether to continue an *insolvency appointment* the *Insolvency Practitioner* may take into account the wishes of the creditors, who after full disclosure has been made have the right to retain or replace the *Insolvency Practitioner*.

30. In all cases an *Insolvency Practitioner* will need to exercise his judgment to determine how best to deal with an identified threat. In exercising his

judgment, an *Insolvency Practitioner* should consider what a reasonable and informed third party, having knowledge of all relevant information, including the significance of the threat and the safeguards applied, would conclude to be acceptable. This consideration will be affected by matters such as the significance of the threat, the nature of the work and the structure of the *practice*.

Conflicts of interest

31. An *Insolvency Practitioner* should take reasonable steps to identify circumstances that could pose a conflict of interest. Such circumstances may give rise to threats to compliance with the fundamental principles. Examples of where a conflict of interest may arise are where:
    (a) An *Insolvency Practitioner* has to deal with claims between the separate and conflicting interests of entities over whom he is appointed.
    (b) There are a succession of or sequential *insolvency appointments* (see paragraphs 76 to 88 below).
    (c) A significant relationship has existed with the *entity* or someone connected with the *entity* (see paragraphs 40 to 48 below)

32. Some of the safeguards listed at paragraph 25 may be applied to reduce the threats created by a conflict of interest to an acceptable level. Where a conflict of interest arises, the preservation of confidentiality will be of paramount importance; therefore, the safeguards used should generally include the use of effective information barriers.

Practice mergers

33. Where *practices* merge, they should subsequently be treated as one for the purposes of assessing threats to the fundamental principles. At the time of the merger, existing *insolvency appointments* should be reviewed and any threats identified. *Principals* and employees of the merged *practice* become subject to common ethical constraints in relation to accepting new *insolvency appointments* to clients of either of the former *practices*. However existing *insolvency appointments* which are rendered in apparent breach of the Code by such a merger need not be determined automatically, provided that a considered review of the situation by the *practice* discloses no obvious and immediate ethical conflict.

34. Where an *individual within the practice* has, in any former *practice*, undertaken work upon the affairs of an *entity* in a capacity that is incompatible with an *insolvency appointment* of the new *practice*, the *individual* should not work or be employed on that assignment.

Transparency

35. Both before and during an *insolvency appointment* an *Insolvency Practitioner* may acquire personal information that is not directly relevant to the insolvency or confidential commercial information relating to the affairs of third parties. The information may be such that others might expect that confidentiality would be maintained.

36. Nevertheless an *Insolvency Practitioner* in the role as office holder has a professional duty to report openly to those with an interest in the outcome of the insolvency. An *Insolvency Practitioner* should always report on his acts and dealings as fully as possible given the circumstances of the case, in a way that is transparent and understandable. An *Insolvency Practitioner* should bear in mind the expectations of others and what a reasonable and informed third party would consider appropriate.

Professional competence and due care

37. Prior to accepting an *insolvency appointment* the *Insolvency Practitioner* should ensure that he is satisfied that the following matters have been considered:
    (a) Obtaining knowledge and understanding of the *entity*, its owners, managers and those responsible for its governance and business activities.
    (b) Acquiring an appropriate understanding of the nature of the *entity*'s business, the complexity of its operations, the specific requirements of the engagement and the purpose, nature and scope of the work to be performed.
    (c) Acquiring knowledge of relevant industries or subject matters.
    (d) Possessing or obtaining experience with relevant regulatory or reporting requirements.
    (e) Assigning sufficient staff with the necessary competencies.
    (f) Using experts where necessary.
    (g) Complying with quality control policies and procedures designed to provide reasonable assurance that specific engagements are accepted only when they can be performed competently.

38. The fundamental principle of professional competence and due care requires that an *Insolvency Practitioner* should only accept an *insolvency appointment* when the *Insolvency Practitioner* has sufficient expertise. For example, a self interest threat to the fundamental principle of professional competence and due care is created if the *Insolvency Practitioner* or the insolvency team does not possess or cannot acquire the competencies necessary to carry out the *insolvency appointment*. Expertise will include appropriate training, technical knowledge, knowledge of the *entity* and the business with which the *entity* is concerned.

39. Maintaining and acquiring professional competence requires a continuing awareness and understanding of relevant technical and professional developments, including:

    (a) Developments in insolvency legislation.

    (b) Statements of Insolvency Practice.

    (c) The regulations of their authorising body, including any continuing professional development requirements.

    (d) Guidance issued by their authorising body or the Insolvency Service.

    (e) Technical issues being discussed within the profession.

Professional and personal relationships

40. The environment in which *insolvency practitioners* work and the relationships formed in their professional and personal lives can lead to threats to the fundamental principle of objectivity.

Identifying relationships

41. In particular, the principle of objectivity may be threatened if any *individual within the practice*, the close or *immediate family* of an *individual within the practice* or the *practice* itself, has or has had a professional or personal relationship which relates to the *insolvency appointment* being considered.

42. Professional or personal relationships may include (but are not restricted to) relationships with:-

    (a) the *entity*;

    (b) any director or shadow director or former director or shadow director of the *entity*;

(c) shareholders of the *entity*;

(d) any principal or employee of the *entity*;

(e) business partners of the *entity*;

(f) companies or entities controlled by the *entity*;

(g) companies which are under common control;

(h) creditors (including debenture holders) of the *entity*;

(i) debtors of the *entity*;

(j) close or immediate family of the *entity* (if an individual) or its officers (if a corporate body);

(k) others with commercial relationships with the practice

43. Safeguards within the *practice* should include policies and procedures to identify relationships between *individuals* within the *practice* and third parties in a way that is proportionate and reasonable in relation to the *insolvency appointment* being considered.

Is the relationship significant to the conduct of the insolvency appointment?

44. Where a professional or personal relationship of the type described in paragraph 41 has been identified the *Insolvency Practitioner* should evaluate the impact of the relationship in the context of the *insolvency appointment* being sought or considered. Issues to consider in evaluating whether a relationship creates a threat to the fundamental principles may include the following:

(a) The nature of the previous duties undertaken by a practice during an earlier relationship with the *entity*.

(b) The impact of the work conducted by the practice on the financial state and/or the financial stability of the *entity* in respect of which the *insolvency appointment* is being considered.

(c) Whether the fee received for the work by the practice is or was significant to the practice itself or is or was substantial.

(d) How recently any professional work was carried out. It is likely that greater threats will arise (or may be seen to arise) where work has been carried out within the previous three years. However, there may still be instances where, in respect of non-audit work, any threat is at an

acceptable level. Conversely, there may be situations whereby the nature of the work carried out was such that a considerably longer period should elapse before any threat can be reduced to an acceptable level.

(e) Whether the *insolvency appointment* being considered involves consideration of any work previously undertaken by the practice for that *entity*.

(f) The nature of any personal relationship and the proximity of the *Insolvency Practitioner* to the individual with whom the relationship exists and, where appropriate, the proximity of that individual to the *entity* in relation to which the *insolvency appointment* relates.

(g) Whether any reporting obligations will arise in respect of the relevant individual with whom the relationship exists (e.g. an obligation to report on the conduct of directors and shadow directors of a company to which the *insolvency appointment* relates).

(h) The nature of any previous duties undertaken by an individual within the practice during any earlier relationship with the *entity*.

(i) The extent of the insolvency team's familiarity with the *individuals* connected with the *entity*.

45. Having identified and evaluated a relationship that may create a threat to the fundamental principles, the *Insolvency Practitioner* should consider his response including the introduction of any possible safeguards to reduce the threat to an acceptable level.

46. Some of the safeguards which may be considered to reduce the threat created by a professional or personal relationship to an acceptable level are considered in paragraph 25. Other safeguards may include:

(a) Withdrawing from the insolvency team.

(b) Terminating (where possible) the financial or business relationship giving rise to the threat.

(c) Disclosure of the relationship and any financial benefit received by the *practice* (whether directly or indirectly) to the *entity* or to those on whose behalf the *Insolvency Practitioner* would be appointed to act.

47. An *Insolvency Practitioner* may encounter situations in which no or no reasonable safeguards can be introduced to eliminate a threat arising from a professional or personal relationship, or to reduce it to an acceptable level.

In such situations, the relationship in question will constitute a significant professional relationship ("Significant Professional Relationship") or a significant personal relationship ("Significant Personal Relationship"). Where this is case the *Insolvency Practitioner* should conclude that it is not appropriate to take the *insolvency appointment*.

48. Consideration should always be given to the perception of others when deciding whether to accept an *insolvency appointment*. Whilst an *Insolvency Practitioner* may regard a relationship as not being significant to the *insolvency appointment*, the perception of others may differ and this may in some circumstances be sufficient to make the relationship significant.

Dealing with the assets of an entity

49. Actual or perceived threats (for example self interest threats) to the fundamental principles may arise when during an *insolvency appointment*, an *Insolvency Practitioner* realises assets.

50. Save in circumstances which clearly do not impair the *Insolvency Practitioner*'s objectivity, *insolvency practitioners* appointed to any *insolvency appointment* in relation to an *entity*, should not themselves acquire, directly or indirectly, any of the assets of an *entity*, nor knowingly permit any *individual within the practice*, or any close or *immediate family member* of the *Insolvency Practitioner* or of an *individual within the practice*, directly or indirectly, to do so.

51. Where the assets and business of an insolvent company are sold by an *Insolvency Practitioner* shortly after appointment on pre-agreed terms, this could lead to an actual or perceived threat to objectivity. The sale may also be seen as a threat to objectivity by creditors or others not involved in the prior agreement. The threat to objectivity may be eliminated or reduced to an acceptable level by safeguards such as obtaining an independent valuation of the assets or business being sold, or the consideration of other potential purchasers.

52. It is also particularly important for an *Insolvency Practitioner* to take care to ensure (where to do so does not conflict with any legal or professional obligation) that his decision making processes are transparent, understandable and readily identifiable to all third parties who may be affected by the sale or proposed sale.

Obtaining specialist advice and services

53. When an *Insolvency Practitioner* intends to rely on the advice or work of another, the *Insolvency Practitioner* should evaluate whether such reliance is warranted. The *Insolvency Practitioner* should consider factors such as reputation, expertise, resources available and applicable professional and ethical standards. Any payment to the third party should reflect the value of the work undertaken.

54. Threats to the fundamental principles (for example familiarity threats and self interest threats) can arise if services are provided by a regular source independent of the *practice*.

55. Safeguards should be introduced to reduce such threats to an acceptable level. These safeguards should ensure that a proper business relationship is maintained between the parties and that such relationships are reviewed periodically to ensure that best value and service is being obtained in relation to each *insolvency appointment*. Additional safeguards may include clear guidelines and policies within the *practice* on such relationships. An *Insolvency Practitioner* should also consider disclosure of the existence of such business relationships to the general body of creditors or the creditor's committee if one exists.

56. Threats to the fundamental principles can also arise where services are provided from within the *practice* or by a party with whom the *practice*, or an *individual within the practice*, has a business or personal relationship. An *Insolvency Practitioner* should take particular care in such circumstances to ensure that the best value and service is being provided.

Fees and other types of remuneration

Prior to accepting an *insolvency appointment*

57. Where an engagement may lead to an *insolvency appointment*, an *Insolvency Practitioner* should make any party to the work aware of the terms of the work and, in particular, the basis on which any fees are charged and which services are covered by those fees.

58. Where an engagement may lead to an *insolvency appointment*, *insolvency practitioners* should not accept referral fees or commissions unless they have established safeguards to reduce the threats created by such fees or commissions to an acceptable level.

Previous page

Next page

59. Safeguards may include disclosure in advance of any arrangements. If after receiving any such payments, an *Insolvency Practitioner* accepts an *insolvency appointment*, the amount and source of any fees or commissions received should be disclosed to creditors.

After accepting an insolvency appointment

60. During an *insolvency appointment*, accepting referral fees or commissions represents a significant threat to objectivity. Such fees or commissions should not therefore be accepted other than where to do so is for the benefit of the insolvent estate.

61. If such fees or commissions are accepted they should only be accepted for the benefit of the estate; not for the benefit of the *Insolvency Practitioner* or the *practice*.

62. Further, where such fees or commissions are accepted an *Insolvency Practitioner* should consider making disclosure to creditors.

Obtaining insolvency appointments

63. The special nature of *insolvency appointments* makes the payment or offer of any commission for or the furnishing of any valuable consideration towards, the introduction of *insolvency appointments* inappropriate. This does not, however, preclude an arrangement between an *Insolvency Practitioner* and an employee whereby the employee's remuneration is based in whole or in part on introductions obtained for the *Insolvency Practitioner* through the efforts of the employee.

64. When an *Insolvency Practitioner* seeks an *insolvency appointment* or work that may lead to an *insolvency appointment* through advertising or other forms of marketing, there may be threats to compliance with the fundamental principles.

65. When considering whether to accept an *insolvency appointment* an *Insolvency Practitioner* should satisfy himself that any advertising or other form of marketing pursuant to which the *insolvency appointment* may have been obtained is or has been:

    (a) Fair and not misleading.

    (b) Avoids unsubstantiated or disparaging statements.

(c) Complies with relevant codes of *practice* and guidance in relation to advertising.

66. Advertisements and other forms of marketing should be clearly distinguishable as such and be legal, decent, honest and truthful.

67. If reference is made in advertisements or other forms of marketing to fees or to the cost of the services to be provided, the basis of calculation and the range of services that the reference is intended to cover should be provided. Care should be taken to ensure that such references do not mislead as to the precise range of services and the time commitment that the reference is intended to cover.

68. An *Insolvency Practitioner* should never promote or seek to promote his services, or the services of another *Insolvency Practitioner*, in such a way, or to such an extent as to amount to harassment.

69. Where an *Insolvency Practitioner* or the *practice* advertises for work via a third party, the *Insolvency Practitioner* is responsible for ensuring that the third party follows the above guidance.

Gifts and hospitality

70. An *Insolvency Practitioner*, or a close or *immediate family member*, may be offered gifts and hospitality. In relation to an *insolvency appointment*, such an offer will give rise to threats to compliance with the fundamental principles. For example, self-interest threats may arise if a gift is accepted and intimidation threats may arise from the possibility of such offers being made public.

71. The significance of such threats will depend on the nature, value and intent behind the offer. In deciding whether to accept any offer of a gift or hospitality the *Insolvency Practitioner* should have regard to what a reasonable and informed third party having knowledge of all relevant information would consider to be appropriate. Where such a reasonable and informed third party would consider the gift to be made in the normal course of business without the specific intent to influence decision making or obtain information the *Insolvency Practitioner* may generally conclude that there is no significant threat to compliance with the fundamental principles.

72. Where appropriate, safeguards should be considered and applied as necessary to eliminate any threats to the fundamental principles or reduce them to an acceptable level. If an *Insolvency Practitioner* encounters a situation in which no or no reasonable safeguards can be introduced to reduce a threat arising from offers of gifts or hospitality to an acceptable level he should conclude that it is not appropriate to accept the offer.

73. An *Insolvency Practitioner* should also not offer or provide gifts or hospitality where this would give rise to an unacceptable threat to compliance with the fundamental principles.

Record keeping

74. It will always be for the *Insolvency Practitioner* to justify his actions. An *Insolvency Practitioner* will be expected to be able to demonstrate the steps that he took and the conclusions that he reached in identifying, evaluating and responding to any threats, both leading up to and during an *insolvency appointment*, by reference to written contemporaneous records.

75. The records an *Insolvency Practitioner* maintains, in relation to the steps that he took and the conclusions that he reached, should be sufficient to enable a reasonable and informed third party to reach a view on the appropriateness of his actions.

THE APPLICATION OF THE FRAMEWORK TO SPECIFIC SITUATIONS

Introduction

76. The following examples describe specific circumstances and relationships that will create threats to compliance with the fundamental principles. The examples may assist an *Insolvency Practitioner* and the members of the insolvency team to assess the implications of similar, but different, circumstances and relationships.

77. The examples are divided into three parts. Part 1 contains examples which do not relate to a previous or existing *insolvency appointment*. Part 2 contains examples that do relate to a previous or existing *insolvency appointment*. Part 3 contains some examples under Scottish law. The examples are not intended to be exhaustive.

Examples that do not relate to a previous or existing insolvency appointment

78. The following situations involve a professional relationship which does not consist of a previous *insolvency appointment*:

79. **Insolvency appointment following audit related work**

Relationship: The *practice* or an *individual within the practice* has previously carried out audit related work within the previous 3 years.

Response: A Significant Professional Relationship will arise: an *Insolvency Practitioner* should conclude that it is not appropriate to take the *insolvency appointment*.

Where audit related work was carried out more than three years before the proposed date of the appointment of the *Insolvency Practitioner* a threat to compliance with the fundamental principles may still arise. The *Insolvency Practitioner* should evaluate any such threat and consider whether the threat can be eliminated or reduced to an acceptable level by the existence or introduction of safeguards.

This restriction does not apply where the *insolvency appointment* is in a members' voluntary liquidation; an *Insolvency Practitioner* may normally take an appointment as liquidator. However, the *Insolvency Practitioner* should consider whether there are any other circumstances that give rise to an unacceptable threat to compliance with the fundamental principles. Further, the *Insolvency Practitioner* should satisfy himself that the directors' declaration of solvency is likely to be substantiated by events.

80. **Appointment as investigating accountant at the instigation of a creditor**

Previous relationship: The *practice* or an *individual within the practice* was instructed by, or at the instigation of, a creditor or other party having a financial interest in an *entity*, to investigate, monitor or advise on its affairs.

Response: A Significant Professional Relationship would not normally arise in these circumstances provided that:-

(a) there has not been a direct involvement by an individual within the practice in the management of the *entity*; and

(b) the practice had its principal client relationship with the creditor or other party, rather than with the company or proprietor of the business; and

(c) the *entity* was aware of this.

An *Insolvency Practitioner* should however consider all the circumstances before accepting an *insolvency appointment*, including the effect of any discussions or lack of discussions about the financial affairs of the company with its directors, and whether such circumstances give rise to an unacceptable threat to compliance with the fundamental principles.

Where such an investigation was conducted at the request of, or at the instigation of, a secured creditor who then requests an *Insolvency Practitioner* to accept an *insolvency appointment* as an administrator or administrative receiver, the *Insolvency Practitioner* should satisfy himself that the company, acting by its board of directors, does not object to him taking such an *insolvency appointment*. If the secured creditor does not give prior warning of the *insolvency appointment* to the company or if such warning is given and the company objects but the secured creditor still wishes to appoint the *Insolvency Practitioner*, he should consider whether the circumstances give rise to an unacceptable threat to compliance with the fundamental principles.

Examples relating to previous or existing *insolvency appointments*

81. The following situations involve a prior professional relationship that involves a previous or existing *insolvency appointment*:-

82. **Insolvency appointment following an appointment as administrative or other receiver**

Previous appointment: An *individual within the practice* has been administrative or other receiver.

Proposed appointment: Any *insolvency appointment*.

Response: An *Insolvency Practitioner* should not accept any *insolvency appointment*.

This restriction does not, however, apply where the *individual within the practice* was appointed a receiver by the Court. In such circumstances,

the *Insolvency Practitioner* should however consider whether any other circumstances which give rise to an unacceptable threat to compliance with the fundamental principles.

83. **Administration or liquidation following appointment as supervisor of a voluntary arrangement**

Previous appointment: An *individual within the practice* has been supervisor of a company voluntary arrangement.

Proposed appointment: Administrator or liquidator.

Response: An *Insolvency Practitioner* may normally accept an appointment as administrator or liquidator. However the *Insolvency Practitioner* should consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

84. **Liquidation following appointment as administrator**

Previous appointment: An *individual within the practice* has been administrator.

Proposed appointment: Liquidator.

Response: An *Insolvency Practitioner* may normally accept an appointment as liquidator provided he has complied with the relevant legislative requirements. However, the *Insolvency Practitioner* should also consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

85. **Conversion of members' voluntary liquidation into creditors' voluntary liquidation**

Previous appointment: An *individual within the practice* has been the liquidator of a company in a members' voluntary liquidation.

Proposed appointment: Liquidator in a creditors' voluntary liquidation, where it has been necessary to convene a creditors' meeting.

Response: Where there has been a Significant Professional Relationship, an *Insolvency Practitioner* may continue or accept an appointment (subject to creditors' approval) only if he concludes that the company will eventually be able to pay its debts in full, together with interest.

Previous page

Next page

However, the *Insolvency Practitioner* should consider whether there are any other circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

86. **Bankruptcy following appointment as supervisor of an individual voluntary arrangement**

Previous appointment: An *individual within the practice* has been supervisor of an *individual* voluntary arrangement.

Proposed appointment: Trustee in bankruptcy.

Response: An *Insolvency Practitioner* may normally accept an appointment as trustee in bankruptcy. However, the *Insolvency Practitioner* should consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

Examples in respect of cases conducted under Scottish Law

87. **Sequestration following appointment as trustee under a trust deed for creditors**

Previous appointment: An *individual within the practice* has been trustee under a trust deed for creditors.

Proposed appointment: Interim trustee or trustee in sequestration.

Response: An *Insolvency Practitioner* may normally accept an appointment as an interim trustee or trustee in sequestration. However, the *Insolvency Practitioner* should consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

88. **Sequestration where the Accountant in Bankruptcy is trustee following appointment as trustee under a trust deed for creditors**

Previous appointment: An *individual within the practice* has been trustee under a trust deed for creditors.

Proposed appointment: Agent for the Accountant in Bankruptcy in sequestration.

Response: An *Insolvency Practitioner* may normally accept an appointment as agent for the Accountant in Bankruptcy. However, the *Insolvency Practitioner* should consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

1.3 INSOLVENCY CODE OF ETHICS TRANSPARENCY AND CONFIDENTIALITY: A GUIDANCE NOTE

A. INTRODUCTION

1. This document relates to the Insolvency Code of Ethics ("the Code"). This document is to be read in conjunction with the Code.

2. This document has been prepared in order to supplement the principles contained within the Code. To the extent that there is any conflict between the contents of this document and the provisions of the Code, the provisions of the Code will take precedence.

3. The purpose of this document is to:

   1) Emphasise the importance of the requirement that members should take care to ensure, where to do so does not conflict with any legal or professional obligation, that their acts, dealings and decision making processes are transparent, understandable and readily identifiable (as to which see Section B below); and

   2) Offer some further guidance in relation to the fundamental principle of confidentiality (as to which see Section C below).

B. THE IMPORTANCE OF TRANSPARENCY

4. Paragraph 36 of the Code provides that an *Insolvency Practitioner* in his role as an office holder:

   "...has a professional duty to report openly to those with an interest in the outcome of the insolvency. An *Insolvency Practitioner* should always report on his acts and dealings as fully as possible given the circumstances of the case, in a way that is transparent and understandable. An Insolvency Practitioner should bear in mind the expectations of others and what a reasonable and informed third party would consider appropriate."

5. The Council regards this provision of the Code to be of fundamental importance. It is imperative that all members ensure that, except where to do so would conflict with any legal or professional obligation, their acts, dealings and decision making processes are transparent, understandable and readily identifiable. All members should endeavour to deal with third parties fairly in relation to the provision of information.

Previous page

Next page

6. In particular, members in their capacity as office holders should maintain appropriate communication with creditors and such other persons who may be interested in the outcome of the insolvency in order to keep them informed of progress.

7. In this regard, office holders should take care to ensure that any reports prepared for creditors or other persons interested in the outcome of the insolvency are clear and understandable. Where appropriate, a full explanation should be given of any significant decisions or material events that have taken place in the insolvency and the reasons for them.

8. Where a report or information is provided in relation to the approval of any matter (for example the office holder's fees) the office holder should be particularly mindful to provide sufficient supporting information to enable those responsible for the approval to form a judgement as to whether approval is appropriate having regard to all the circumstances of the case.

9. The requirement for members to act transparently is particularly important where the assets and business of an insolvent company are sold shortly after appointment on pre-agreed terms. It is in the nature of such sales that creditors at large are not given the opportunity to consider the sale of the business or assets before it takes place. It is therefore particularly important that creditors are provided with a detailed explanation and justification of why a pre-agreed sale was undertaken, so that they can be satisfied that the office holder has acted with due regard to the interests of those affected.

10. Similar principles to those described above apply in relation to correspondence by members with third parties. Such correspondence should be clear, and understandable. Where the correspondence relates to a decision taken by the member in his capacity as an office holder or otherwise it should normally provide a full explanation of the relevant decision together with the reasons for it.

11. There may be circumstances in which it is not possible for a member to provide information relating to a particular matter because of a conflicting legal or professional obligation. Examples of such situations include where the relevant information is commercially sensitive or where there is a legal obligation not to disclose. In such circumstances, the member should still consider whether some details of the relevant matter can be provided that

do not conflict with the legal or professional obligation. This is particularly so where the relevant matter may be of significance to creditors or other persons interested in the outcome of the insolvency. Where the member is in doubt as to whether disclosure is appropriate in all the circumstances it may be appropriate for him to seek legal advice.

C. CONFIDENTIALITY

12. Paragraph 4 of the Code sets out five fundamental principles which an *Insolvency Practitioner* is required to comply with. The fundamental principle of confidentiality requires that:

    "An *Insolvency Practitioner* should respect the confidentiality of information acquired as a result of professional and business relationships and should not disclose any such information to third parties without proper and specific authority unless there is a legal or professional right or duty to disclose. Confidential information acquired as a result of professional and business relationships should not be used for the personal advantage of the *Insolvency Practitioner* or third parties."

13. In order for a party to be held liable for breach of confidence it must be usually be shown that: (1) the material communicated to him had the necessary quality of confidence; (2) it was communicated or became known to him in circumstances entailing an obligation of confidence; and (3) there was an unauthorised use of that material. For material to be protected as confidential its availability to the public must be restricted.

14. A member may acquire information which he is obliged to keep confidential. In particular, a member should be alert to the possibility of inadvertent disclosure of such confidential information, particularly in relation to any person with whom the member has had a long or close professional or personal relationship. Confidential information acquired by a member in the course of an assignment must not be used otherwise than for the proper performance of his professional duties.

15. The fundamental principle of confidentiality did not appear in the previous Insolvency Ethical Guide. Some concern was expressed during the consultation period that the inclusion of this fundamental principle may be inconsistent with an insolvency practitioner's duty or obligation, in certain circumstances, to disclose confidential information. This is not considered to be the case.

As drafted, the fundamental principle of confidentiality makes it clear that where an insolvency practitioner has a legal or professional right or duty to disclose he may do so.

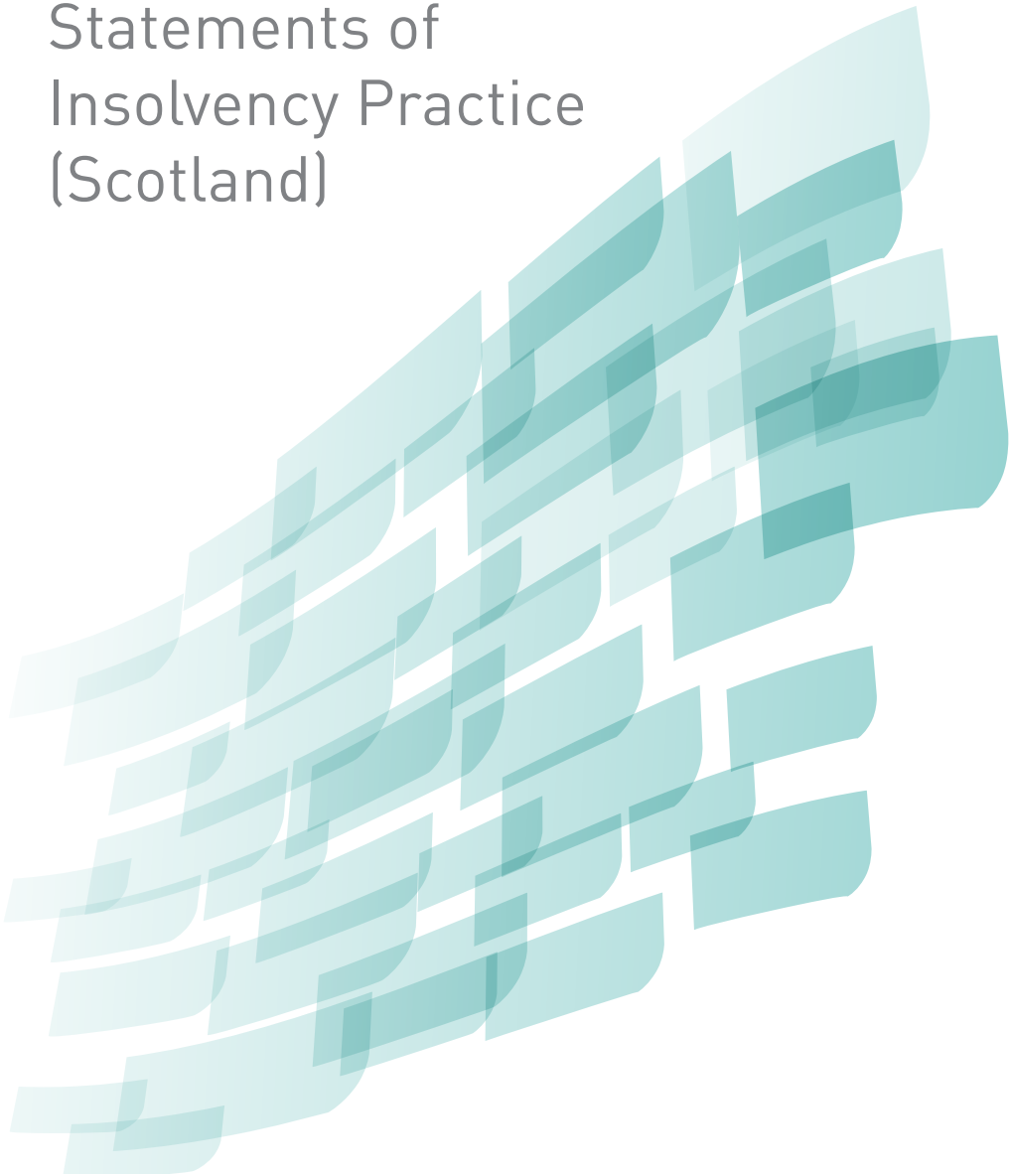
16. When considering the application of the principle of confidentiality it is also important that members recognise that the circumstances in which obligations of confidence will arise are likely to be different where they have been appointed as an office holder to those where the member acts as an adviser. Where a member has been appointed as an office holder a client/professional relationship will not arise between the office holder and the entity in respect of which he has been appointed. Indeed, following the appointment of an office holder the rights of confidentiality formerly held by the entity will often vest in or fall under the control of the office holder (at least in the insolvency of a corporate body).

17. As emphasised in Section B above, where obligations of confidentiality do not exist and where to do so does not conflict with any other legal or professional obligation members will be required to ensure that their acts, dealings and decision making processes are transparent.

18. Members should be especially careful not to enter into new obligations of confidence that might have an impact on transparent communication with interested parties, other than for proper commercial reasons. A particular risk of this arises with non-disclosure agreements included in contracts for the sale of the business or assets of an entity in the circumstances outlined in paragraph 9 above.

Section 2

Statements of Insolvency Practice (Scotland)



CONTENTS

2.1 STATEMENT OF INSOLVENCY PRACTICE 1
AN INTRODUCTION TO STATEMENTS OF INSOLVENCY PRACTICE

PURPOSE AND PRINCIPLES

1. The purpose of Statements of Insolvency Practice (SIPs) is to promote and maintain high standards by setting out required practice and harmonising the approach of insolvency practitioners to particular aspects of insolvency practice. They apply in parallel to the prevailing statutory framework.

2. SIPs should be read in conjunction with the wider fundamental principles embodied in the Insolvency Code of Ethics and should be applied in accordance with the spirit of that Code. A literal interpretation of a SIP may not be appropriate where it would be contrary to the fundamental principles of the Code.

3. The fundamental principles are:

Integrity

An Insolvency Practitioner should be straightforward and honest in all professional and business relationships.

Objectivity

An Insolvency Practitioner should not allow bias, conflict of interest or undue influence of others to override professional or business judgements.

Professional competence and due care

An Insolvency Practitioner has a continuing duty to maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice, legislation and techniques. An Insolvency Practitioner should act diligently and in accordance with applicable technical and professional standards when providing professional services.

Confidentiality

An Insolvency Practitioner should respect the confidentiality of information acquired as a result of professional and business relationships and should

not disclose any such information to third parties without proper and specific authority unless there is a legal or professional right or duty to disclose. Confidential information acquired as a result of professional and business relationships should not be used for the personal advantage of the Insolvency Practitioner or third parties.

Professional behaviour

An Insolvency Practitioner should comply with relevant laws and regulations and should avoid any action that discredits the profession. Insolvency Practitioners should conduct themselves with courtesy and consideration towards all with whom they come into contact when performing their work.

4. In addition, Insolvency Practitioners should ensure that their acts, dealings and decision making processes are transparent, understandable and readily identifiable, where to do so does not conflict with any legal or professional obligation.

REGULATORY STATUS

5 . SIPs set principles and key compliance standards with which Insolvency Practitioners are **required** to comply. Failure to observe the principles and/or maintain the standards set out in a SIP is a matter that may be considered by a practitioner's regulatory authority for the purposes of disciplinary or regulatory action in accordance with that authority's membership and disciplinary rules.

6. Insolvency Practitioners should evidence their compliance with SIPs and should, therefore, document their strategies and decision making processes appropriately.

7. SIPs set out required practice, but they are not statements of the law or the obligations imposed by insolvency legislation itself. Where an Insolvency Practitioner is in doubt about any obligation imposed upon them by a SIP, they should obtain appropriate guidance.

8. SIPs are issued to Insolvency Practitioners under procedures agreed between the insolvency regulatory authorities, acting through the Joint Insolvency Committee. They apply to practitioners authorised by each of the bodies listed below:

Recognised Professional Bodies:

- The Association of Chartered Certified Accountants
- The Insolvency Practitioners Association
- The Institute of Chartered Accountants in England and Wales
- The Institute of Chartered Accountants in Ireland
- The Institute of Chartered Accountants of Scotland
- The Law Society
- The Law Society of Northern Ireland
- The Law Society of Scotland

Competent Authorities:

- The Insolvency Service for the Secretary of State
- The Insolvency Service Northern Ireland for the Department

9. No liability attaches to any body or person that prepares, issues or distributes SIPs. The obligation to comply with SIPs rests solely upon the Insolvency Practitioner, as does any liability arising from any failure to do so.

Effective Date: 2 May 2011

2.2 STATEMENT OF INSOLVENCY PRACTICE 2 INVESTIGATIONS BY OFFICE HOLDERS IN ADMINISTRATIONS AND INSOLVENT LIQUIDATIONS

INTRODUCTION

1. In any corporate insolvency there may be concerns regarding the way in which the business was conducted, how trading was controlled, whether proper decisions were made at the time, and whether assets have been sold at an under-value or otherwise dissipated. The way in which directors have acted may also be criticised by third parties. Also, an office holder has a duty to investigate what assets there are (including potential claims against third parties including the directors) and what recoveries can be made.

2. Each of the above matters gives rise to the need for an office holder to carry out appropriate investigations, in order to address the specific duties of the office holder and to allay if possible the legitimate concerns of creditors and other interested parties.

3. This statement deals specifically with the circumstances of an administration or insolvent liquidation.

PRINCIPLES

4. This statement has been produced in recognition of the principles that:
   - An office holder should carry out investigations that are proportionate to the circumstances of each case.
   - An office holder should report clearly on the steps taken in relation to investigations, and the outcomes.

KEY COMPLIANCE STANDARDS

Seeking information

5. The information available to an office holder upon appointment will vary from case to case depending on the extent of the office holder's prior involvement with the company, the publicity surrounding the insolvency, the quality and completeness of the company's books and records, and whether there has been a meeting of creditors. The office holder should locate the company's books and records (in whatever form), and ensure that they are secured, and listed as appropriate.

6. In every case, the office holder should invite creditors to provide information on any concerns regarding the way in which the company's business has been conducted, and on potential recoveries for the estate, both:

   - at any meeting of creditors at which the office holder's appointment is made or confirmed, or, in other cases, at any later meeting convened by the office holder; and
   - in the first communication sent to creditors by the office holder.

7. A similar invitation should also be extended to the members of any creditors' committee, upon or soon after the formation of the committee, and to any predecessor in office.

8. An office holder should always have in mind the need to ascertain, and if necessary investigate, what assets can be realised. Enquiries should encompass whether prior transactions by the company, or the conduct of any person involved with the company, could give rise to an action for recovery under the relevant legislation.

Initial assessment

9. Notwithstanding any shortage of funds, an office holder should consider the information acquired in the course of appraising and realising the business and assets of a company, together with any information provided by creditors or gained from other sources, and decide whether any further information is required or appropriate. The office holder should make enquiries of the directors and senior employees, by sending questionnaires and/or interviewing them, as appropriate.

10. In every case, an office holder should make an initial assessment of whether there could be any matters that might lead to recoveries for the estate and what further investigations may be appropriate.

11. An office holder should determine the extent of the investigations in the circumstances of each case, taking account of the public interest, potential recoveries, the funds likely to be available to fund an investigation, and the costs involved.

Further steps to be taken

12. An office holder may conclude that there are matters (for example, the conduct of management, prior transactions susceptible to challenge, or the consequences of possible criminal offences) that require early investigation, either as a matter of public policy or because there are real prospects of recoveries for the estate. It is for the office holder to decide whether investigation and subsequent legal action should proceed as quickly as possible, without consultation with, or sanction by, creditors or a creditors' committee (but subject to any statutory requirement to obtain sanction).

13. In other cases, the office holder may decide that further investigation and legal action should be carried out only after consultation or with sanction, in particular where the office holder concludes that the outcome is uncertain and the costs that would be incurred would materially affect the funds available for distribution. In such cases, the office holder may consult with major creditors (if that is appropriate) or convene a meeting of the creditors' committee or the creditors to discuss any proposals for investigation and/or action. Alternatively, approval can be sought by written resolution.

14. Any proposals should include sufficient information (subject to considerations of privilege and confidentiality) to enable an informed decision to be made by those consulted, and are likely to include the costs that could be incurred and the possible range of returns to creditors.

15. There may be circumstances where there are clearly insufficient funds to carry out a detailed investigation or to take action for recovery of assets, and an office holder should consider whether it is appropriate to seek funding from creditors or other interested parties.

Reporting to creditors

16. Creditors should be given information regarding investigations, any action being taken, and whether funding is being provided by third parties; disclosure would be subject to considerations of privilege and confidentiality and whether investigations and litigation might be compromised.

17. The times at which information is provided to creditors will vary from case to case, but as a minimum an office holder should:

- include within the first annual or progress report a statement dealing with the office holder's initial assessment, whether any further investigations or action were considered, and the outcome; and
- include within subsequent reports a statement dealing with investigations and actions concluded during the period, and those that are continuing.

Other reporting requirements

18. An office holder should be mindful of the impact of the outcome of investigations on reports on the conduct of directors and others, and possible offences, to the relevant authorities.

Record keeping

19. An office holder should document, at the time, initial assessments, investigations and conclusions, including any conclusion that further investigation or action is not required or feasible, and also any decision to restrict the content of reports to creditors.

Effective Date: 2 May 2011

Previous page

Next page

2.3 STATEMENT OF INSOLVENCY PRACTICE 3A (SCOTLAND) 2009 TRUST DEEDS

1. INTRODUCTION

1.1 *[Not reproduced. Superseded by SIP1 with effect from 02 May 2011.]*

1.2 The Statement has been prepared for the sole use of insolvency practitioners in dealing with trust deeds in Scotland.

1.3 The objective of this statement is to provide practical guidance in relation to issues commonly arising on which current legislative provisions are either silent or ambiguous. The statement which follows assumes that practitioners are familiar with the trust deed procedure and legislative framework.

1.4 The revised SIP 3A (Scotland) 2009 applies only to trust deeds signed on or after 1 April 2008 and is not retrospective. Guidance for trust deeds signed prior to 1 April 2008, should be taken from the earlier versions of SIP 3A (Scotland).

1.5 The Protected Trust Deed (Scotland) Regulations 2008 are referred to in the SIP as "the Regulations".

1.6 The SIP sets out the principles and procedures which should apply where it is intended that a trust deed achieve protected status and subsequently does so. The SIP also sets out the principles and procedures which should apply where it is intended that a trust deed achieve protected status but it does not. In these circumstances the trustee should consider the options with the debtor. If the trust deed continues unprotected then the trustee should exercise his judgement and consider which procedures apply. Finally, the SIP sets out what procedures are open to the debtor and trustee where the trust deed fails after protection is achieved.

1.7 The insolvency practitioner should exercise his judgement and consider the extent to which these principles and procedures should apply in the limited number of cases where there is no intention that the trust deed becomes protected.

2. NATURE OF TRUST DEEDS

2.1 The trust deed is a voluntary act by a debtor for the benefit of creditors albeit that the debtor retains a radical right in the assets transferred. It is a deed granted by the debtor in favour of a trustee or trustees under which the estate is conveyed, to be administered for the benefit of creditors and to effect the payment of debts in whole or in part. The creditors may agree or accede to this procedure, or alternatively may object to the procedure. A trust deed may become protected under the statutory provisions, in which case creditors are bound by the terms laid down in the statutory provisions.

2.2 Where assets which would vest in a trustee in sequestration are excluded from the trust deed, that trust deed will not satisfy the requirements for protection. If the insolvency practitioner is aware that there is no prospect of the trust deed, when signed, becoming protected, he should advise the debtor in writing of the implications of not gaining protected status and wherever possible, of alternative solutions.

2.3 Practitioners are reminded that it is not competent to have a conjoined trust deed, which complies with the Act, signed by more than one party and purporting to deal with the combined estates of more than one person. If all the estates are insolvent individual trust deeds are required for each separate legal person, so that for example with a partnership of three people each individual and the partnership would sign a trust deed, totalling four deeds.

3. ETHICAL CONSIDERATIONS AND ACCEPTANCE

3.1 In dealing with a trust deed the insolvency practitioner should bear in mind an overriding duty to ensure a fair balance between the interests of the debtor, the creditors and any other parties involved. In considering whether to accept appointment as trustee the practitioner should have regard to the ethical guidelines of the authorising body. The practitioner should not accept appointment if objectivity and independence are likely to be impaired or be seen to be impaired.

3.2 Insolvency practitioners may advertise their professional services provided the advertisements comply with the law; with the Advertising Standards Authority rules and their authorising body's Ethics Code.

3.3 Insolvency practitioners are reminded that no payment can be made to third parties for the introduction of insolvency work. Such payments breach the Ethics Code.

3.4 In accordance with statutory requirements a payment can be made to an agent of the trustee for work done prior to signing the trust deed in order to ascertain the financial position of the debtor; however, the insolvency practitioner still has a responsibility to verify all information received.

Such a payment can be an expense of the trust deed provided that there is a specific provision in the trust deed to that effect, the work is appropriate and necessary for the preparation of the trust deed and full details i.e. name and address of the agent, whether associated to the trustee or the trustee's firm in terms of either S74 of the Bankruptcy (Scotland) Act 1985 or S435 of the Insolvency Act 1986, amount of fee and work undertaken, are disclosed to creditors at the earliest possible opportunity.

There should be no extra cost incurred in having a third party carry out the work instead of the insolvency practitioner. The practitioner must ensure that any payment made is reasonable having regard to the work done and the rates charged.

3.5 In addition to the statutory requirements to provide documentation to creditors and the Accountant in Bankruptcy the trustee should provide details in the first circular to all known creditors and to the Accountant in Bankruptcy of the following matters:-

1. Where a payment to an agent of the insolvency practitioner has been made or is due to be made for work done prior to the signing of the trust deed, the name and address of the party carrying out the work and the amount of the payment.

2. The likely cost to the estate of the trustee's fee for the period of the trust deed together with a statement of the assumptions made in producing the estimate. Trustees are reminded that all fees must be approved.

3.6 Insolvency practitioners' attention is drawn specifically to the terms of Regulation 18.

4. E C REGULATION

4.1 In order to determine whether and in what respects the EC Regulation on Insolvency Proceedings applies to it and to supply the information required under Part B of Appendix 2 of the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008 (Register of Insolvencies), the Trust Deed must contain the following information:-

(i) the location of the debtor's "centre of main interests";

(ii) the location of any other "establishment" of the debtor (or that he or she has none);

(iii) the nature and location of, and court in which any other "insolvency proceedings" have been opened (or that none have been opened); and,

(iv) whether the Trust Deed constitutes "main" or "territorial" proceedings.

5. INITIAL CONTACT WITH THE DEBTOR

5.1 The insolvency practitioner, (whom failing, a suitably experienced member of staff) prior to the signing of the trust deed, should always offer to meet the debtor personally. However the practitioner, or suitably experienced member of staff, may conduct the initial interview on the telephone. If the interviewer forms the opinion that either the debtor does not fully understand the matters described in sections 5.2 – 5.13 of this SIP or that the debtor has not adequately disclosed his financial circumstances, the practitioner should insist that a meeting in person be conducted. If the debtor is carrying on a business the practitioner, or a suitably experienced member of staff, must visit the business premises as part of the information gathering and planning exercise.

5.2 Whether the debtor is interviewed in person or by telephone, the practitioner must satisfy himself that appropriate client identification and money laundering procedures have been completed.

5.3 It is recommended that the debtor be interviewed using a similar style of questionnaire as is used in sequestration proceedings under the Bankruptcy (Scotland) Act 1985 as amended. The questionnaire and appendices should then be signed and dated by the debtor.

Previous page

Next page

5.4 The debtor should be advised that it is an offence to make false representations or to conceal assets or to commit any other fraud for the purposes of obtaining creditor approval to the trust deed.

5.5 The debtor should be advised at the initial interview of the insolvency practitioner's requirement to maintain independence. The practitioner should make it clear to the debtor that his duties as trustee, once the trust deed is signed, cannot be influenced by the wishes of the debtor. It should be remembered that although a trustee under the trust deed acts primarily for the benefit of creditors, he has a residual obligation to act in the interests of the debtor.

5.6 A full file note of the initial meeting or telephone interview should be prepared and retained on the case file and copied to the debtor. Any subsequent meetings or telephone interviews dealing with substantive issues should be prepared and retained on the case file and copied to the debtor.

5.7 The insolvency practitioner should carry out an independent assessment of the financial circumstances of the debtor and should consider carefully whether a trust deed is the most appropriate means for dealing with the debtor's problems. Such consideration should be recorded by the practitioner and explained to the debtor in a letter immediately after the initial meeting or telephone interview. A full Statement of Affairs and Statement of Income and Expenditure must be prepared by the insolvency practitioner or, if prepared by a third party, checked by the practitioner. These statements must be agreed by the debtor who should be asked to sign them as evidence of such agreement.

5.8 The debtor must be advised, in writing of the consequences of signing a trust deed and, that apparent insolvency is constituted by the signing of the trust deed. The debtor should also be advised of the effects of a trust deed not becoming protected, in particular that a creditor could petition for sequestration. The practitioner must obtain, in writing, confirmation from the debtor that in the light of the advice the debtor has received, that the debtor has considered the position carefully prior to signing the trust deed.

5.9 The practitioner should be satisfied that a debtor has had adequate time to think about the consequences and alternatives before signing a trust deed. Practitioners are reminded that once signed, a trust deed is a binding obligation between debtor and trustee.

Previous page

Next page

5.10 Where the insolvency practitioner is consulted by two individuals who are either married, in a civil partnership, cohabiting or otherwise have a relationship which could give rise to a conflict of interest, the practitioner should ensure that each is assessed individually and then offer advice based on that individual's own circumstances. If the practitioner considers there is a conflict of interest in the practitioner advising both parties, the practitioner should consider whether it is appropriate to accept both appointments.

Heritable property

5.11 At the interview the insolvency practitioner must ensure that the debtor is clearly advised that all heritable property, including the debtor's home, is covered by the trust deed and that any equity therein at the start of the trust deed, or arising during the period of the trust deed, may require to be realised for the benefit of the creditors.

5.12 Where the terms of the trust deed for creditors are based entirely on equity in the debtor's property, the practitioner should quantify the equity per section 6.6 before the debtor signs the trust deed.

Existing debt payment arrangements

5.13 The practitioner should establish whether or not the debtor has been making regular payments to debt advisors or their equivalent. If so, it must be explained to the debtor that once the trust deed is signed the debtor must not continue to make payments to that party in respect of an arrangement entered into before the trust deed was signed.

6. DEALING WITH ASSETS AND CONTRIBUTIONS

General guidance

6.1 The trustee should follow the Accountant in Bankruptcy guidance notes on sequestrations when dealing with assets. The trustee should ensure that a comprehensive schedule of assets in which the debtor has an interest has been prepared together with explanatory notes. The trustee should take steps to satisfy himself as to the value of the assets.

6.2 The trustee should be aware that in order to achieve protected status, the trust deed must convey all of the debtor's estate to the trustee with

Previous page
Next page

the exception of property which would be excluded from vesting in a sequestration.

6.3 Under the Regulations, the Accountant in Bankruptcy may give directions to the trustee under a protected trust deed as to how the trustee should conduct the administration of the trust deed but it remains the duty of the trustee to ensure that he complies with all statutory obligations in priority to any such directions. The trustee is reminded that such direction by the Accountant in Bankruptcy can be requested and/or appealed by the trustee.

Heritable property

6.4 The insolvency practitioner should obtain evidence of the ownership of any heritable property. If the debtor advises that he or she owns the property, either in whole or in part, a property search should be obtained to confirm the position. If the property is rented, evidence should be provided e.g. by means of production of a rent book or written confirmation from the landlord.

6.5 In the event that the debtor owns the heritable property, in whole or in part, the practitioner should obtain a professional valuation except that where there is already a valuation from a reputable valuer, which the practitioner is satisfied remains current, the practitioner may accept such a valuation in lieu of obtaining a fresh valuation.

6.6 The trustee's attention is drawn to the provisions in the Accountant in Bankruptcy's guidance notes relating to heritable property. If not established pre-signing, equity in property, including the matrimonial home, must be established as soon as practicable, and in any event prior to the trust deed being presented to creditors, by obtaining a professional valuation, the surrender value of any assigned policy and confirmation of the secured liability. Where possible the trustee should seek to reach agreement regarding how the equity in a property will be realised, as soon as possible in the circumstances, and should realise the highest amount for the equity which the trustee thinks is obtainable in the circumstances of the case. The trustee should record on the file his reasons for reaching this agreement.

6.7 The trustee should note that the trustee can only accept income contributions from the debtor during the period prior to the debtor's discharge. These contributions must not be applied to heritable property. Where however it

does not prove possible for a third party to buy the property, in accordance with the Accountant in Bankruptcy's guidance notes, the trustee should give consideration to accepting payment from a debtor's surplus income beyond the agreed term of the contribution payments allowing the subsequent payments to be treated as payments for the heritage.

6.8 The trustee should consider seeking legal advice when dealing with an unequal split of a jointly owned property.

6.9 If the trustee disposes of or abandons his interest in a property, where no formal disposition has been prepared, he should issue a formal letter confirming this.

Trading

6.10 If there is a business, the trustee should consider the manner in which he will deal with that business. The trustee should consider whether trading should continue and if so, on what terms. If the trustee decides to continue trading, such a decision should be supported by cash flow and trading forecasts. The trustee must be able to demonstrate the matters considered and that his action is in the best interests of creditors.

6.11 The trustee will be responsible for any ongoing trading activity of the existing business, and will require to introduce appropriate controls. The trustee should be aware that he may have personal liability for loss if he elects to continue trading activities after the trust deed has been signed and as a result diminishes the value of the estate available to creditors.

7. MEETING OF CREDITORS

7.1 There is no mandatory or statutory requirement to call a meeting of creditors. If however the trustee considers it is in the interest of the general body of creditors such a meeting can be called.

7.2 The trustee should record in the Sederunt Book all requests by creditors to hold a creditors meeting. If the trustee considers that a meeting would be in the general interests of all creditors a meeting should be convened. If a meeting is not convened the trustee must record in writing in the Sederunt Book the reason for the decision.

8. ACCOUNTING, REPORTING AND REMUNERATION

8.1 As a minimum requirement, accounts should be prepared to each anniversary of the signing of the trust deed and be sent to the debtor, each creditor and the Accountant in Bankruptcy promptly.

8.2 Fees must be taken in accordance with the provisions of the trust deed. Where there is a committee of creditors the accounts should be submitted to the members of the committee for approval together with a claim for remuneration supported by evidence of the hours spent and a résumé of the tasks undertaken.

8.3 The trustee must ensure that in the first circular to creditors full disclosure is made of any fee paid or due to be paid to a third party for work done prior to the signing of the trust deed. Any payment to an agent of the insolvency practitioner must be disclosed as an outlay in the trust deed and cannot be claimed as remuneration of the trustee. Practitioners are reminded of the terms of SIP9 in relation to payments to their firms, or to any associate, and that such payments should be treated in the same way as remuneration payments to the trustee and subject to the same approval requirements.

8.4 A copy of the accounts should be sent to creditors with a brief report on progress and stating the amount if any of previously notified fees which have been taken during the year.

8.5 The trustee is reminded that the notification of the trustee's estimated fee as referred to in paragraph 3.5 above does not amount to approval of the fee, and that all fees must be properly approved in the course of the trust deed and in advance of being drawn down.

8.6 Where the creditors were initially informed that the debtor had undertaken to pay regular contributions from income and payment of an amount equivalent to contributions for a period of three months in a year have not been received, the creditors must be informed of this in the next annual report. The creditors should also be advised of the reasons for non payment and what further action the trustee has taken in respect of the missed contributions.

8.7 Where the trustee's fees have not been fixed by the Accountant in Bankruptcy the circular should advise creditors of their right to have the

accounts audited and the fees fixed by the Accountant in Bankruptcy. The trustee should delay taking credit for the trustee's fee until a minimum of 14 days have elapsed since the issue of the circular.

8.8 Where it becomes clear to the trustee that the total fee payable will exceed the estimate provided in accordance with paragraph 3.5 above by 25% or more the trustee must advise the creditors and the debtor of this in the next annual report, providing a revised estimate, of the fee and, the dividend for unsecured creditors and providing an explanation for the variation.

8.9 Copies of all circulars must be sent to the debtor.

8.10 At the conclusion of the trust deed, a final statement of intromissions must be sent to creditors and to the debtor, and in the case of a protected trust deed to the Accountant in Bankruptcy.

8.11 During a trust deed, accepting referral fees or commissions represents a significant threat to objectivity. Such fees or commissions should only be accepted for the benefit of the trust deed estate, not for the benefit of the insolvency practitioner or his practice.

9. OTHER TRUST DEEDS

9.1 As well as individual trust deeds, practitioners should be aware that partnerships, trusts and corporate and unincorporated bodies may enter into trust deeds.

Partnership trust deeds

9.2 Although there should be little difference in the approach of trustees, it must be borne in mind that a partnership trust deed is not a joint and several version of an individual trust deed entered into by a sole trader.

9.3 The deed is entered into by a firm and by the partners in the said firm. As such, the estate conveyed is that of the firm, not of the partners as individual debtors, and does not extend to the partners' personal assets. Similarly, only the firm's liabilities are included.

9.4 The granting of a partnership trust deed allows a trustee to take swift control of the firm's assets, thus giving the opportunity to preserve the business and perhaps achieve a going-concern solution.

9.5 It is open, in appropriate circumstances, for some or all of the partners in the firm to sign individual trust deeds. If the insolvency practitioner considers there is a possible conflict of interest, the practitioner should consider whether it is appropriate to accept appointment on all or any of the individual partners.

10. ENDING OF TRUST DEED

Protected trust deed achieving its purpose

10.1 The debtor should be discharged if he has met his obligations under the trust deed and specifically if all assets have been realised and contributions paid. Once the trustee has established that the debtor should be discharged, and any unexpired inhibition has been recalled, he should send notification of the discharge to both the debtor and the Accountant in Bankruptcy.

10.2 The procedure to bring a protected trust deed to a close is detailed in the Regulations. Not more than 28 days after the final distribution of the estate among the creditors, the trustee must seek his discharge from the creditors in the manner set out in the Regulations. Where a majority of creditors have consented or are deemed to have consented, the trustee is discharged. Immediately thereafter the trustee must send to the Accountant in Bankruptcy, for registration in the register of insolvencies, a statement which indicates how the estate was realised and distributed.

The trust deed itself may contain provisions on bringing the trust deed to a close, in which case these should be followed in so far as they do not conflict with statutory procedure

Protected trust deed not achieving its purpose

10.4 When considering whether a debtor should be discharged, notwithstanding the original terms of the trust deed have not been obtempered, the trustee should take into consideration all and any exceptional circumstances which have led to the debtor being unable to fulfil his obligation.

10.5 If the trustee considers that the trust deed is not achieving its purpose the trustee must consider appropriate alternatives given the circumstances of the case and bearing in mind the interests of creditors.

10.6 In the event that the trustee decides not to grant the debtor's discharge in terms of Regulation 19(5), he must confirm this and the reasons for his decision to the debtor in writing, advising the debtor of the implications of discharge not being granted. He should also notify the creditors in writing of his decision.

Trust deed

10.7 In a trust deed which has not become protected, there is no statutory procedure for bringing the trust deed to a close. It is normal practice for a receipt for the final dividend to incorporate a discharge of the trustee and a discharge of the debtor. Creditors who have not acceded to the trust deed have no requirement to grant a discharge to the debtor.

Effective date: 7 December 2009

Previous page

Next page

2.4 STATEMENT OF INSOLVENCY PRACTICE 3B (SCOTLAND) COMPANY VOLUNTARY ARRANGEMENTS

1. INTRODUCTION

1.1 *[Not reproduced. Superseded by SIP1 with effect from 02 May 2011.]*

1.2 The Insolvency Act 1986 (IA 1986) and The Insolvency (Scotland) Rules 1986 (as amended) set out a procedure which enables the directors, the administrator or the liquidator of a company to make a proposal for a voluntary arrangement (CVA) with its creditors.

The arrangement must take the form of a composition in satisfaction of the company's debts or a scheme of arrangement of its affairs.

1.3 Members should refer to the relevant legislation which, for a CVA, is contained in sections 1 - 7B (inclusive) of the IA 1986 Schedule A1 to the IA 1986 and Rules 1.1 - 1.45 (inclusive) of the Rules, as amended.

Members should also refer to The EC Regulation on Insolvency Proceedings (Council Regulation [EC] No. 1346/2000) ("the EC Regulation").

The objective of this statement is to set out best practice in relation to the work carried out by members in connection with CVAs.

1.4 The statement has been prepared primarily to address the circumstances where a proposal for a CVA is made by the directors of a company but it should also be applied as appropriate where the proposal is made by an administrator or liquidator.

1.5 In many cases the member's role will change during the conduct of the case, for example from adviser to nominee to supervisor. These roles will involve different responsibilities: for example, when acting as advisor the member's role will be to consider the best course of action for the company in the light of its particular circumstances; when he becomes nominee his duty will be to the creditors and the court; and when acting as supervisor his responsibilities will be governed by the terms of the arrangement. The member should be mindful of possible conflicts of duty arising from these changes of role. He should ensure that his case records distinguish between these functions and that his remuneration in respect of each function is separately identified.

Previous page

Next page

2. BASIS OF THE ARRANGEMENT

2.1 The terms of the CVA will be contained in the proposal, with or without modifications which is approved by the creditors. A comprehensive and accurately drafted proposal is therefore fundamental to the arrangement. In view of the importance of the proposal the member should, where the circumstances are complex, consider whether it should be prepared or approved by a lawyer. The contents of the proposal are given further consideration in section 5 and the Appendix.

2.2 In dealing with a CVA the member should bear in mind his overriding duty to ensure a fair balance between the interests of the company, the creditors and any other parties involved. In considering whether to accept appointment as either nominee or supervisor the member should have regard to the ethical guidelines of his authorising body.

3. INITIAL CONTACT WITH THE DIRECTORS

3.1 At the initial interview the member should explain to the directors the different roles he will perform during the conduct of the case and the different duties and responsibilities that they entail. He should point out to the directors the need for the nominee and supervisor to maintain independence.

3.2 The member should explain his role as nominee in relation to the directors' proposal and of his duty to perform an independent, objective review and assessment of the proposal for the purposes of reporting his opinion to the court and generally balancing the interests of the company and the creditors. This duty of independence and objectivity arises irrespective of the extent of the member's involvement in drafting the directors' proposals. The member should make it clear to the directors that his duties as nominee cannot be fettered by any instructions of the directors or any third party.

3.3 Where consideration is being given to obtaining a moratorium under section 1A IA 1986 the member should explain to the directors the additional duties which fall on the nominee and the responsibilities which fall on the directors during the moratorium.

3.4 The member should keep a contemporaneous and full file note of all matters discussed with the directors, including the matters referred to in

paragraphs 3.1 to 3.3. A copy of the file note should be sent or reproduced in full in a letter to the directors.

3.5 The member should also send a letter of engagement to the directors setting out in writing their respective duties and responsibilities in relation to the proposal in order to minimise the scope for misunderstandings.

3.6 The member should give consideration to the most appropriate entry route into a CVA having regard to the degree of protection which may be required in the circumstances of the case.

4. STATEMENT OF AFFAIRS AND OBTAINING ADDITIONAL INFORMATION

4.1 The statement of affairs should detail the nature and amount of all the company's assets and liabilities, including the liabilities set out in paragraph 4.2(a)(i) - (vii) below. A misstatement of the amount of the assets and liabilities can constitute a 'material irregularity' (within the meaning of section 6, and paragraph 38 of Schedule A1, IA 1986) being a ground on which an approved CVA may be challenged by an aggrieved creditor, the nominee, the administrator or the liquidator. In addition, a director commits an offence if he makes any false representations or commits any other fraud for the purpose of obtaining the approval of the creditors to the proposed arrangement. The directors should be informed of these dangers.

4.2 The member's approach should, inter alia, cover the points listed below:

a) Creditors

The member should require the directors to provide details of all known or possible liabilities including:

i) claims which are fully or partly secured: the status of the accounts and the existence of any arrears should be established;

ii) preferential claims;

iii) guarantee liabilities;

iv) claims for breach of contract, including claims in respect of faulty and incomplete work and hire purchase and leasing agreements;

v) creditors who are persons connected with the company ('connected persons') (as defined in section 249 IA 1986);

vi] guarantors of the company's debts, including connected persons;

vii) debts for an unliquidated amount or any debt whose value is unascertained, including particularly:

contingent liabilities;

the potential for liabilities arising under property leases (of both present and past tenancies).

He should also:

viii) identify any creditors who have commenced diligence or any other legal process;

ix) identify any creditors with special rights which may require special consideration in the proposal (for example insured claims)

x) consider the possibility of early informal discussions with the key creditors, including government departments, to establish their views;

xi) obtain independent confirmation from any bank or other financial institution of their intention to continue to provide financial support to the company where this is necessary for the purpose of the arrangement;

xii) establish whether connected persons may consider withdrawing or deferring their claims.

b) Assets

The member should take steps to satisfy himself that the value of the assets is appropriately reflected in the statement of affairs. Where the value of an asset is material to the outcome of the arrangement consideration should be given to obtaining corroborative evidence as to its value. The member should also ensure that a comprehensive schedule of non-trading assets in which the company has an interest has been prepared together with explanatory notes. If there is a business, the member should consider, in conjunction with the directors, the manner in which that business is to be dealt with.

If the business is to be continued by the company, a 'business plan' should be produced to justify this decision stating the assumptions on which it is based, and in appropriate detail having regard to the circumstances and size of the undertaking. The member should satisfy himself that the plan has a reasonable chance of success.

c) Antecedent Transactions

The member should enquire as to:

i) possible gratuitous alienations (section 242 IA 1986 or common law);

ii) payments which may be unfair preferences (section 243 IA 1986) or fraudulent preferences at common law;

iii) floating charges which would be invalid in the event of administration or liquidation (section 245 IA 1986);

iv) charges which would be void against a liquidator, administrator or creditor in the event of liquidation or administration (section 395 CA 1985);

v) liabilities which may be extortionate credit transactions, both those outstanding and paid (section 244 IA 1986).

d) General

The member should also consider:

i) whether the person(s) making the proposal is/are credible and making a full disclosure. The member should explain the consequences of making false representations;

ii) whether (any of) the directors have been involved in any previous business failure, either individual or corporate, and if so the details of that failure and the person's responsibility for it; and,

iii) the timetable for the CVA.

The extent of the member's enquiries into these issues is likely to vary according to the particular circumstances of the case but should be such as will enable the member to properly discharge his duty to report to the court as nominee (see section 6 below).

5. CONSIDERATION OF THE PROPOSAL

5.1 Throughout his consideration of the above factors the member should be forming his opinion of the appropriate method of dealing with the company's affairs. Although this will be partly a subjective review of the factors already referred to, the member should take into account:

a) the directors' attitude;

b) the likelihood of the company adhering to the terms of the proposal;

Previous page

Next page

c) the extent of the control over the assets exercised by the company as opposed to the supervisor of the proposal, bearing in mind that in a CVA the assets do not automatically vest in the supervisor by operation of the law;

d) the removal/absence of the restrictions otherwise imposed by formal winding up.

5.2 In considering the proposal the member should bear in mind the following questions:

- Is it feasible?
- Is it fair to the creditors?
- Is it an acceptable alternative to formal insolvency?
- Is it fit to be considered by the creditors?
- Is it fair to the company?
- Where the company has previously put forward a proposal which has been rejected by the creditors, are there good reasons why the creditors should be asked to consider the current proposal?

In view of the importance of the contents of the proposal the member should, prior to submitting his report and supporting comments to the court, satisfy himself that the proposal, (with any modifications), is structured and drafted in such a way that the terms of the CVA can be clearly understood and that the arrangement is likely to proceed to a successful conclusion.

5.3 The member should ensure that the proposal addresses all those matters prescribed by the Rules. The member should also consider the inclusion of appropriate other provisions in order to facilitate the practical implementation of the arrangement (see Appendix) but should bear in mind that the terms of a proposal cannot extend or fetter the jurisdiction of the court. The proposal should specify clearly whether the arrangement is to be a composition in satisfaction of the company's debts or whether it is to be a scheme of arrangement. It should also set out what action is to be taken in the event of deviation from, or failure of, the arrangement. The use of the standard terms issued by the Association of Business Recovery Professionals will assist in ensuring that these matters are adequately dealt with.

5.4 The following information should also be provided, either in the proposal or in the nominee's comments:

- The source of any referrals to the nominee or his firm in relation to the proposed CVA.
- Any payments made, or proposed to be made, to the source of such referrals.
- Any payments made, or proposed to be made, to the nominee or his firm by the company whether in connection with the proposed CVA or otherwise.
- An estimate of the total fee to be paid to the supervisor together with a statement of the assumptions made in producing the estimate.

5.5 The proposal must include a statement whether the EC Regulation applies and, if so, whether the proceedings are main or territorial proceedings.

6. THE NOMINEE'S STATEMENT/REPORT AND COMMENTS

6.1 The nominee is required to state whether, in his opinion:

- the proposed arrangement has a reasonable prospect of being approved and implemented, and
- a meeting of creditors and the company should be held to consider the proposal.

In cases where the directors intend to obtain a moratorium under section 1A IA 1986 this statement must form part of the statement which the nominee is required to submit to the directors and which they in turn are required to file in court. In all other cases it must be included in the nominee's report to the court.

Where a moratorium is in force under section 1A IA 1986 the nominee is required as part of his monitoring duties to keep under review the question of whether the proposal has a reasonable prospect of being approved and implemented, and must withdraw his consent to act if he forms the view that it no longer does.

Previous page

Next page

6.2 In the English case of Re A Debtor (No 140 IO of 1995), Greystoke v Hamilton-Smith and Others ([1996]2 BCLC 429; [1997] BPIR24) the court set out three tests which the nominee should apply before concluding that a meeting should or should not be summoned and held that he should satisfy himself on all three counts. They are:

a) that the company's true position as to assets and liabilities is not materially different from that which it is represented to the creditors to be;

b) that the directors' proposal has a real prospect of being implemented in the way it is to be represented it will be; and,

c) that there is no already-manifest yet unavoidable prospective unfairness.

6.3 Test (b) is effectively the same as that which is now required by statute. If the nominee cannot satisfy himself that the other two conditions are met but still recommends that a meeting should be held, he should explain in his comments the basis on which he is making that recommendation and qualify his comments so that the fact that conditions are not met is conspicuously brought to the attention of the court.

6.4 Where the nominee reports in the affirmative on the matters referred to in paragraph 6.1 he is required to set out his comments on the proposal and to annex them to his statement or report. The matters upon which the nominee will wish to comment will vary from case to case but they should normally include:-

a) the extent to which the nominee has investigated the company's circumstances;

b) the basis upon which assets have been valued;

c) the extent to which the nominee considers that reliance can be placed upon the directors' estimate of the liabilities to be included in the CVA;

d) information on the attitude adopted by the directors with particular reference to instances of failure to co-operate with the nominee;

e) the result of any discussions between the nominee and secured creditors or other interested parties upon whose co-operation the performance of the CVA will depend;

Previous page

Next page

f) information on the attitude of any major unsecured creditor which may affect the approval of the arrangement by creditors;

g) details of any previous history of failures in which any of the directors has been involved, insofar as they are known to the nominee;

h) an estimate of the result for the creditors if the CVA is approved, explaining why it is more beneficial for creditors than any alternative insolvency proceeding;

i) the likely effect of the proposal's rejection by the creditors;

j) details of any claims which have come to his attention which might be capable of being pursued by a liquidator or administrator if one were appointed;

k) where the conditions set out in paragraph 6.2 above have not been met, the basis on which the nominee is recommending that a meeting be held.

6.5 If not already dealt with in the proposal, the nominee's comments should include the information referred to in paragraph 5.4 above.

6.6 If the company has, within the previous twelve months, put forward a proposal that has been rejected, the nominee's comments should include a statement to that effect, and an explanation of why it is considered appropriate for the creditors to consider and vote on the current proposal.

6.7 If the nominee reports that the proposed arrangement does not have a reasonable prospect of being approved and implemented or that meetings should not be held he must give his reasons for that opinion.

7. THE MEETINGS OF CREDITORS AND OF MEMBERS

7.1 Notice of the meeting of creditors must be given to all creditors of whose claim the person summoning the meeting is aware, in strict accordance with the Rules. The minimum notice period of fourteen days excludes the day the notice is deemed to have been served and the day of the meeting. Refer to Rule 7.22 to determine the date of service.

7.2 It should be noted that although an approved arrangement will be binding on creditors who did not receive notice of the meeting, such creditors have the right, on becoming aware that the meeting has taken place, to apply to the court on the grounds that the arrangement unfairly prejudices their interests or that there has been a material irregularity in relation to the meeting. It is unacceptable for notice to be deliberately withheld from a creditor.

7.3 Before the creditors' meeting the nominee should take the following steps:

a) record all proxies received in advance of the meeting, and details of claims;

b) complete the meeting record as far as possible detailing the names and voting value of creditors;

c) discuss with the directors any modifications suggested by creditors prior to the meeting;

d) review the proposal in the light of creditors' responses and possible changes in circumstances;

e) prepare a report for presentation at the meeting, summarising the proposal, outlining the likely effects of acceptance and rejection and giving details of any changes in circumstances which have arisen since the proposal was sent to creditors;

f) consider voting rights and requisite majority.

7.4 The chairman must decide the amount for which creditors are to be allowed to vote and must have regard to the provisions of the Rules. Proxies and statements of claim to be used at the meeting may be lodged at any time, even during the course of the meeting.

7.5 After the chairman has presented his report to the creditors' meeting he should allow creditors an opportunity to make comments, ask questions or propose modifications to the proposal.

7.6 Although it is not a statutory requirement for directors to consent to modifications, it is recommended that the nominee should find out and report to the meeting their views on any proposed modifications which they may be required to implement if approved.

7.7 If modifications are proposed by a creditor the chairman should give careful consideration to the manner in which he will use specific instructions given to him by creditors to vote for either the acceptance or the rejection of the original proposal. If the words in the proxy form allowing the exercise of discretion in the absence of specific instructions have not been deleted so as to entitle the proxy holder to vote only as directed, the proxy holder is entitled to vote or abstain on any modification at his discretion.

7.8 However, the chairman should consider most carefully the impact of the exercise of his discretion upon the expressed intentions of any creditor who has completed a proxy requiring a vote on any particular resolution. He should bear in mind that, if a creditor is aggrieved that a vote on proposed modifications has been taken and a decision reached which might have been different if creditors represented by proxy had been present at the meeting or had been given the opportunity of amending their proxy, the aggrieved creditor may challenge the decision by an application to the court (section 6 IA 1986). Accordingly, the chairman should consider an adjournment or suspension of the meeting to give him an opportunity to explain the circumstances to the creditor or creditors from whom he holds a proxy and to obtain their further instructions.

7.9 If a majority for approval of the CVA is not obtained at the creditors' meeting, the chairman may adjourn the meeting and must adjourn it if it is so resolved. The maximum period for adjournment allowed by the Rules is 14 days from the original meeting date, but within this period there can be more than one adjournment. If the meetings are to consider a proposal by the directors notice of the adjournment must be given to the court. The chairman should also consider the need to inform creditors of the adjournment and, where substantial modifications are proposed, of those modifications.

7.10 If the decision taken by the creditors' meeting differs from that taken by the company, the chairman of the meeting should draw creditors' attention to the provisions of section 4A IA 1986, which gives any member of the company the right to apply to the court within 28 days and allows the court to order the decision of the company meeting to prevail over that of the creditors.

7.11 The chairman's report of the meetings held under section 3 IA 1986 must include a statement whether, in the opinion of the supervisor, the EC Regulation applies to the voluntary arrangement and if so, whether the proceedings are main or territorial proceedings.

Previous page

Next page

8. IMPLEMENTATION FOLLOWING THE MEETING OF CREDITORS

8.1 The supervisor's main duty is to ensure that the CVA proceeds in accordance with the terms of the agreed proposal. In order to do this he should maintain regular contact with the directors, obtaining reports as may be appropriate to the case. If the supervisor or directors consider that the terms of the arrangement may not be achieved then the supervisor should take steps to discuss the situation with the directors. If actual events suggest a deviation from the terms of the arrangement, the supervisor should take appropriate action. Such action should correspond to further detailed provisions of the proposal. If he is authorised to exercise discretion in any area and that discretion is exercised, the member should explain the circumstances to creditors and members at the next available opportunity.

8.2 If it becomes clear to the supervisor that the fee payable to him will exceed the estimate provided in accordance with paragraph 5.4 above or this paragraph he must, in his next report to creditors:

- notify the creditors of that fact, and
- explain why the estimate has been exceeded, and
- provide a revised estimate.

9. CONCLUSION/TERMINATION OF THE ARRANGEMENT

9.1 Where the arrangement has been fully implemented the supervisor should conclude his administration as expeditiously as possible.

9.2 In circumstances of likely failure or default, it will be necessary to consider how matters should proceed. The term 'failure of the scheme' or 'failure of the arrangement' is not an expression found in the Act or Rules and it is essential, as stated in paragraph 5.3 above, that the proposal should have set out in specific terms the circumstances in which it shall be deemed to have failed and state what action the supervisor is required to take in the event of failure. Where failure has occurred the supervisor should notify the creditors accordingly and advise them what action he has taken or proposes to take. The standard terms and conditions produced by The Association of Business Recovery Professionals contain comprehensive provisions for dealing with breach of the arrangement.

9.3 In the event of failure particular care must be taken to ascertain who is entitled to the remaining assets and in the event of the presentation of a winding up petition, whether disposal of the assets would be void under section 127 of the IA 1986. In the English case of Shierson and Another v Tomlinson and Another (Re N T Gallagher & Son Limited) ([2992] 2 BCLC 133; [2002] BPIR 565) the Court of Appeal held that:

- where a CVA provides for monies or other assets to be paid to or transferred or held for the benefit of CVA creditors, this will create a trust of those monies or assets for those creditors;
- the effect of the liquidation of the company on a trust created by the CVA will depend on the provisions of the CVA relating thereto;
- if the CVA provides what is to happen on liquidation (or a failure of the CVA), effect must be given thereto;
- if the CVA does not so provide, the trust will continue notwithstanding the liquidation or failure and must take effect according to its terms.

It should be noted that this is an English case and has not been tested in the Scottish Courts.

9.4 Where a supervening winding up order is made against the company, the member should arrange for the prompt hand over of assets, funds, books and records to the interim liquidator.

10. IMPLEMENTATION

This SIP applies to all cases in which the proposal is dated on or after the effective date.

Effective Date: 1 April 2007

APPENDIX

VOLUNTARY ARRANGEMENTS: CONTENTS OF THE PROPOSAL

The proposal must include a statement whether the EC Regulation applies and, if so, whether the proceedings are main or territorial proceedings.

In drafting the proposal it is helpful to follow the order in which the contents are listed in the Rules.

The proposal should include sections covering the following:

a) the nature of the arrangement: i.e. whether it is a composition in full and final settlement of debts, or a scheme of arrangement;

b) the background to the arrangement, including details of the circumstances in which the company has become insolvent and including any relevant personal circumstances of the directors;

c) the statement of affairs, which should include full details of assets and liabilities;

d) a realistic comparison of the estimated outcomes of the CVA and of winding up;

e) the actual financial proposal to be put to the creditors. This section should include:

   i) details of assets to be realised for the benefit of creditors and details of those which are to be excluded from the proposal, together with the reasons for the exclusion and whether alternatives are to be suggested;

   ii) proposals regarding after acquired assets and windfall gains;

   iii) proposals regarding future profit/income over a specific period;

   iv) whether third party funds are to be injected;

f) the intentions with regard to any business operated by the company stating in particular whether the business is to be continued, and if so, the extent, if any, to which the supervisor shall exercise any degree of control over the business. If the supervisor is not to exercise any degree of control, this should be specifically stated in the proposal. The purpose or aim of continued trading should be stated: have new opportunities been created that will generate profits to pay creditors; is the trade being wound down to generate

Previous page

Next page

funds from asset realisations or is the business being marketed (and, if so, how) as a going concern? Consideration should be given to including a summary cash flow projection;

g) the powers, duties and responsibilities of the supervisor. This will need to deal with the question of admission or rejection of claims, the manner in which funds are to be distributed to creditors and the basis on which the supervisor is to report to creditors;

h) miscellaneous matters which under the Act or Rules need to be included.

Other matters which the member should consider in order to facilitate the practical implementation of the proposal:

i) whether a committee of creditors is to be appointed and if so what will be its powers, duties and responsibilities;

j) what will happen to surplus funds arising, for example, from more beneficial trading than was originally envisaged, when the CVA is concluded;

k) confirmation that when the terms of the CVA have been successfully completed the creditors will no longer be entitled to pursue the company for the balance of their claim: that the CVA is in full and final settlement of their liabilities;

l) what will happen to unclaimed dividends or unpresented cheques when the CVA is concluded;

m) how to deal with creditors who have not made claims;

n) the power of the supervisor to summon meetings of the CVA creditors for the purpose of obtaining their views and in particular for obtaining their approval to any modifications to the CVA;

o) the requisite majorities required to pass resolutions at meetings of creditors and members summoned during the course of the CVA;

p) in view of the fact that the assets do not automatically vest in the supervisor it may be advisable for the proposal to provide for such vesting or for the supervisor to be granted a charge over assets, or to be given some other suitable form of security or for a declaration of trust or power of attorney to be executed;

q) the attitude to be adopted with regard to contingent creditors;

r) the situation with regard to overseas creditors;

s) the circumstances in which the supervisor is to present a petition for a winding up order;

t) the situation with regard to tax liabilities arising on disposal of the company's assets, or the future income of or gifts to the company from a third party, that are applied towards the payment of creditors' claims;

u) the inclusion of power for the supervisor or any creditors' committee to be able to determine that a CVA has no future and petition for winding up and authority to retain and use funds from the CVA for such cost.

When considering these issues the member should have regard to any relevant decisions of the court which have clarified points of law where the statutory provisions are either silent or ambiguous.

Many of these matters are dealt with in the standard terms and conditions produced by The Association of Business Recovery Professionals.

2.5 STATEMENT OF INSOLVENCY PRACTICE 4 (SCOTLAND) DISQUALIFICATION OF DIRECTORS

1. INTRODUCTION

1.1 This Statement of Insolvency Practice is to be read in conjunction with the Explanatory Foreword.

1.2 This statement has been prepared for the guidance of insolvency practitioners on their statutory obligations under the Company Directors Disqualification Act 1986 and related legislation. It applies to Scotland only.

1.3 The law relating to the obligations of insolvency office holders in relation to disqualification matters is contained in the Company Directors Disqualification Act 1986 ('The Act') and associated statutory instruments, of which the most significant for practitioners is The Insolvent Companies (Reports on Conduct of Directors) (Scotland) Rules 1996 ('the Rules'). In addition to companies which may be wound up under the provisions of the Insolvency Act 1986, the Act applies to building societies and incorporated friendly societies. In this statement references to companies should be read as references to any body to which the Act applies. The DTI issue guidance notes, which are updated from time to time, elaborating on the requirements, to which practitioners should refer.

1.4 By virtue of Article 16 of the Insolvent Partnerships Order 1994 certain sections of the Act also apply to insolvent partnerships where they are wound up as unregistered companies under Part V of the Insolvency Act 1986. (However, it should be noted that the Insolvent Partnerships Order 1994 does not apply to Scottish partnerships.)

2. SUBMISSION OF REPORTS AND RETURNS

2.1 Insolvency practitioners who are appointed to a company as receiver, administrator, or liquidator in an insolvent liquidation are required to submit information on the conduct of the directors of the company to the Disqualification Unit of the Department of Trade and Industry. The information must be submitted on the appropriate statutory form (Form D1 (Scot) or Form D2 (Scot), known colloquially as 'D Forms') appended to the Rules, or in a form which is substantially similar, together with the supporting documentation as described in 4.5, as appropriate.

2.2 Form D1 (Scot) (subsequently referred to as a 'report') is used to report conduct which may render the director unfit to be concerned in the management of a company. Form D2 (Scot) (subsequently referred to as a 'return') may be either an 'interim return' or a 'final return', the appropriate designation being made on the front page of the form. An Statement of Insolvency Practice 4 (Scotland) interim return is used where the practitioner expects to be able to submit either a report or a final return at a later date. A final return is used where the practitioner has not become aware of any matters which would require him to submit a report.

2.3 The practitioner is required to submit a report forthwith to the Secretary of State where it appears that the conduct of a director makes him unfit to be concerned in the management of a company. If such a report has not been submitted before the expiry of six months from the 'relevant date' or, if he vacates office earlier than one week before the expiry of the six-month period, within 14 days of vacating office, he must submit a return (either interim or final). The 'relevant date' is:

- in a creditors' voluntary liquidation, the date of the winding-up resolution;
- in a court liquidation, the date of the winding-up order made by the court;
- in a members' voluntary liquidation, the date when the liquidator formed the view that the company was insolvent;
- the date of the appointment of a receiver; or
- the date of the administration order.

Except in the case of joint appointments, where there is more than one office holder either concurrently or consecutively, a report or return is required from each one appointed within the relevant period. The Secretary of State does not require more than one report or return from joint office holders.

2.4 The submission of a report or final return within the six months period will discharge the practitioner's statutory obligation (except that he may be required to provide information or otherwise assist the Secretary of State). Where this is not possible, and an interim return is submitted, the practitioner is required to indicate on the return the date by which he expects to be able to submit a report or final return. When fixing this date the practitioner should bear in mind that any proceedings against a director

Previous page

Next page

must be commenced within two years of the company's becoming insolvent (see paragraph 2.6 below) and that the Disqualification Unit needs time to evaluate cases and prepare papers, where action is to be taken. For this reason the Unit hopes to receive reports within nine months whenever it is not possible for them to be submitted within the six-month period. If for any reason the practitioner finds that he is not able to submit his report or final return by the date specified in the interim return, he should notify the Disqualification Unit accordingly as soon as possible.

2.5 Practitioners should bear in mind that the effective operation of the disqualification procedures depends on practitioners fulfilling their obligations in a timely manner and maintaining proper communication with the Disqualification Unit in cases of difficulty. Practitioners should Statement of Insolvency Practice 4 (Scotland) not routinely await deadlines before submitting reports or returns where they can be submitted earlier, and should not routinely submit interim returns where a report or final return can be submitted within the initial six month period.

2.6 For the purposes of the two year time limits for bringing proceedings a company becomes insolvent when:

- it goes into liquidation (as defined in section 247(2) of the Insolvency Act 1986);
- an administration order is made; or
- a receiver is appointed.

Where there are successive events in respect of the same company the two-year limit runs from the date of the first event .

3. EXTENT OF WORK

3.1 The practitioner is expected to base his report, or decision that only a return is necessary, on information coming to light in the ordinary course of his work and is not required to carry out investigations specifically for the purpose of fulfilling his duties under the Act. The Statement of Insolvency Practice entitled 'A Liquidator's Investigation into the Affairs of an Insolvent Company' describes the extent of the investigation work that is expected in a liquidation.

Previous page

Next page

3.2 Since the submission of a report may lead to proceedings in which he may be called to act as a witness, the practitioner should take care to ensure that the basis of his opinion that a report should be submitted is properly documented. Where a practitioner has formed a preliminary view that the conduct of a director renders him unfit to be concerned in the management of a company he should normally, if he has not already interviewed him in the course of his duties, consider the advisability of seeking a meeting with the director concerned, with a view to confirming his understanding of the facts upon which he based his preliminary view that the submission of a report was appropriate.

4. CONTENT OF REPORTS

4.1 Schedule 1 to the Act lists matters to which the courts shall have regard when considering a disqualification case, and practitioners should have regard to the matters listed there when considering whether a report is appropriate. However, these matters are not exhaustive and the practitioner should include in his report other matters, which he believes to be relevant. The Disqualification Unit attaches particular importance to the following:

4.2
- attempted concealment of assets or cases where assets have disappeared or a deficiency is unexplained;
- appropriation of assets to other companies for no consideration, at an undervalue, or on the basis of unreasonable charges for services;
- preferences;
- personal benefits obtained by directors;
- overvaluing assets in accounts for the purpose of obtaining loans or other financial accommodation, or to mislead creditors;
- loans to directors in making share purchases;
- dishonoured cheques;
- use of delaying tactics;
- non payment of Crown debts to finance trading;
- phoenix operations;
- misconduct in relation to operation of a factoring account;
- taking of deposits for goods or services ultimately not supplied; and
- cases where criminal convictions have resulted.

4.3 Details of the conduct giving rise to the decision to submit a report should be included, and specific examples of alleged failings should be given wherever possible. It is recognised that in some cases substantive information may not be available, but the report, in the light of other information already held by the Disqualification Unit, may reveal a course or pattern of unfit conduct. Accordingly in these cases the practitioner should report on the basis of such evidence as does exist. This may help the Disqualification Unit in deciding whether to recommend to the Secretary of State that it is in the public interest for an action to be brought in the event of the director being involved in other insolvencies.

4.4 The following matters should be dealt with within the body of the report:

- the position on any civil recovery actions;
- the adequacy of the accounting records;
- evidence available in support of insolvent trading;
- professional advice taken by the directors, and specific correspondence which sheds light on directors' conduct, for example with banks, solicitors, accountants or creditors.

Where the practitioner has been unable to quantify, or otherwise comment on the amounts involved in the alleged conduct due to cost or other considerations then an explanation to that effect should be included in the report.

4.5 The following items should be appended to evry report, where information is available:

- a copy of the statement of affairs: where none has been submitted the report should include an estimate of the financial position of the company by listing known assets and liabilities;
- notes issued for purposes of the creditors' meeting (liquidations only), any original notes signed by directors from which the final issued note was prepared and any record of the proceedings at the meeting;
- section 67 report to creditors (receivership);
- copy accounts as available - last statutory accounts and any other draft, management, or interim accounts;

Previous page

Next page

- a summary of asset realisations, unrealised assets yet to be dealt with and claims notified;
- dividend prospects;
- aged creditor analysis - if readily available from the company's records.

4.6 When fulfilling his reporting duties, a practitioner should have regard to the laws of defamation and should ensure that he has followed the procedures set out in paragraph 3.2 above. A defamation action, even if it has no prospect of success, can be time-consuming to deal with. He should bear in mind that if disqualification proceedings are brought the report will form the basis of the Unit Report and eventual Petition or Summary Application and may be subject to disclosure to the respondent director in the proceedings.

4.7 Dictation of the report to, or its discussion with, members of the practitioner's staff is protected by qualified privilege. Practitioners should stress to staff the need to maintain strict confidentiality and not to discuss the contents of reports with people not involved in their preparation. Certain forms of communication within the practitioner's own office (such as e-mail) may also amount to 'publication' which might lead a director to consider a defamation claim.

4.8 The Disqualification Unit encourages approaches from practitioners who require assistance or clarification regarding their investigations or the completion of a report or return. However, such contact is informal and does not diminish the practitioner's responsibility for preparing the return or report in accordance with his own judgement.

4.9 In certain circumstances, the Court is entitled to have regard to the conduct of a director in relation to companies other than the company to which the practitioner had been appointed. Accordingly, if the practitioner has information about the conduct of a director in relation to other companies which, in his opinion, might support the view that the director's conduct had rendered him unfit in the sense required by the Act, reference to that conduct, identifying the company concerned and the relevant material supporting that view, should be included.

5. FURTHER ASSISTANCE

5.1 The Disqualification Unit aims to let practitioners know within two months of the submission of a report whether the case has been targeted for further investigation and, if not, the reason why. If a case is selected the Unit will give the practitioner the name of the case officer dealing with it, who will act as a contact point once the case is allocated (typically within two months of selection). Upon receipt of this notification, practitioners must ensure that all the company books, records and papers, together with all their working files, are maintained and preserved for inspection by the Unit's staff.

5.2 Having completed its enquiries, the Unit will prepare a report supported by productions which shall be sent to the practitioner for his consideration. The practitioner will be asked to confirm:

- that the matters contained within the report are factually correct, to the best of his knowledge;
- that the persons under consideration for disqualification are considered unfit by the practitioner and/or his case manager and he/they will be prepared to attest to the same in court, if required;
- that each of the allegations have been made out against each of the individual directors; and
- that each of the allegations are satisfactorily supported by sufficient evidence.

5.3 Where proceedings are instituted, the evidence will be by Petition or Summary Application supported by productions. The practitioner and/or his case manager will be the most suitable witness(es) as to facts.

5.4 The practitioner is not an expert witness. It is for the Disqualification Unit to draw inferences as to a director's conduct from the practitioner's evidence as to the facts.

5.5 The case of Re Pinemoor Limited ([1997] BCC 708) contained judicial comment on the purpose of the practitioner's evidence. The judge noted that the purpose of the practitioner's evidence is, first, to place before the court the facts which the practitioner had established as a result of holding his office; and, secondly, to draw to the attention both of the court and of

the respondent those matters upon which the Secretary of State relied in support of his allegation of unfitness. He went on to observe that in the course of that exercise it was not unusual for the Secretary of State, through his witnesses, to invite the court to draw inferences of secondary fact from the primary facts established by the practitioner's evidence. He added that it would be preferable if in disqualification proceedings the witnesses were careful to distinguish between the facts which they were able to establish by direct evidence, the inferences which they invited the court to draw from those facts, and the matters which were said to amount to unfitness on the part of the respondent.

5.6 The contents of the practitioner's evidence should be confined to matters of fact and simple conclusions drawn therefrom. The practitioner should ensure that he only refers to matters within his knowledge and belief. Where the Petition or Summary Application includes matters which have come to light as a result of the Unit's investigations, the practitioner should satisfy himself that the matters stated therein are within his own knowledge and are consistent with the other matters stated. It is important that the practitioner should deal with all evidence which he considers to be relevant to the court's consideration of the director's conduct, and should not omit matters which might favour the director. If he is dissatisfied with any aspect of the Unit's report he should discuss his concerns with the Unit as soon as possible.

5.7 There is no requirement for the evidence to be given by the office holder himself if there is another member of his staff with the appropriate knowledge to do so, who may be called upon to give oral evidence in the proceedings.

5.8 Practitioners should bear in mind that under section 7(4) of the Act the Secretary of State has power to require office holders, or former office holders, to furnish him with such information, and produce and permit inspection of such records, as he may reasonably require. In receivership cases, where the practitioner is proposing to return the company's records to the directors, he should notify the Disqualification Unit accordingly.

5.9 Practitioners should confine any evidence given by them in Court Proceedings for disqualification of a director to matters of fact. It is not appropriate for a practitioner to express an opinion in such Court Proceedings on whether the directors concerned are unfit to hold office as directors. It is also inappropriate for a practitioner to express an opinion on

whether any allegations against directors are satisfactorily supported by sufficient evidence. These are matters for the court to decide after hearing the evidence.

6. COSTS

6.1 The submission of reports or returns is one of many statutory duties that automatically fall upon the practitioner accepting an appointment in one of the categories to which the requirement applies. As such it does not attract any specific entitlement to remuneration.

6.2 However, payment will be made to the practitioner for work done by him and his staff for perusal of the Unit's report. He may, in exceptional circumstances, be paid for work done by way of further investigation over and above the normal standard of reporting set out in paragraph 4 above. The likely extent of the work and level of costs should be discussed with the Disqualification Unit before the work is undertaken in accordance with "Dear IP" notices. Solicitors acting for the Unit can be contacted to provide assistance to the practitioner on points of difficulty or concern which he may have in relation to the Unit's report. All work after the commencement of disqualification proceedings will be authorised in advance and paid for at the agreed rate.

6.3 The Unit will not pay for any additional work required to address any omissions from the report of the matters referred to in paragraph 4 above.

Effective Date: 1 September 1999

Previous page

Next page

2.6 STATEMENT OF INSOLVENCY PRACTICE 5 [SCOTLAND] NON PREFERENTIAL CLAIMS BY EMPLOYEES DISMISSED WITHOUT PROPER NOTICE BY INSOLVENT EMPLOYERS

Re-issued in October 2000 as Insolvency Bulletin 5

2.7 STATEMENT OF INSOLVENCY PRACTICE 6 [SCOTLAND] TREATMENT OF DIRECTOR'S CLAIMS AS "EMPLOYEES" IN INSOLVENCY

Re-issued in October 2000 as Insolvency Bulletin 6.

2.8 STATEMENT OF INSOLVENCY PRACTICE 7 PRESENTATION OF FINANCIAL INFORMATION IN INSOLVENCY PROCEEDINGS

INTRODUCTION

An office holder is required to report regularly to creditors and other interested parties[1], and those reports should be clear and informative. Reports should be produced with the interests of the reader in mind and the office holder should consider what the reader might reasonably regard as appropriate or significant in the circumstances of each case.

Because payments made by an office holder should be appropriate and reasonable in all the circumstances of the case, an office holder should report in a way that will assist creditors and other interested parties properly to exercise their rights under the insolvency legislation.

PRINCIPLES

1. Information provided by an office holder, including information about receipts and payments, should be presented in a manner which is transparent, consistent and useful to creditors and other interested parties, whilst being proportionate to the circumstances of the case.

2. The information provided within receipts and payments accounts and any accompanying documents should be sufficient to enable creditors and other interested parties to understand the nature and amounts of the receipts and payments.

3. Requests for additional information, including on expenses, should be viewed upon their individual merits and treated by an office holder in a fair and reasonable way. The provision of additional information should be proportionate to the circumstances of the case.

[1] "other interested parties" means those parties with rights pursuant to the prevailing insolvency legislation to information about the office holders' receipts and payments. This may include the creditors' committee, the members (shareholders) of a company, or in personal insolvency, the debtor.

KEY COMPLIANCE STANDARDS

Form and general presentation of accounts

4. In addition to any statutory requirement to provide an account in a specified form, receipts and payments accounts should provide figures both for the period under review and on a cumulative basis.

5. Information provided in accordance with this statement may be in a separate document issued with the receipts and payments account or given by way of note.

6. Receipts and payments accounts should show categories of items under headings appropriate for the case, where practicable following headings used in any prior statements of affairs or estimated outcome statements. Alternatively, an analysis should be provided to enable comparison with the "estimated to realise" figures in any prior document.

7. A "statement of expenses incurred" should adopt, as far as possible, the principles of this statement but need only provide information for the period under review.

Further information on the form and presentation of receipts and payments accounts is set out below.

Payments to Insolvency office holders and their associates

8. The following should be disclosed, either separately in the receipts and payments account or by way of note:
   a) Office holder's remuneration, showing the amounts paid on each basis;
   b) Amounts paid to the office holder out of the estate in respect of pre-appointment costs;
   c) Sums paid to the office holder in respect of the supervision of trading;
   d) All other amounts required to be approved in the same manner as remuneration;
   e) Amounts paid to sub-contractors for work that would otherwise have to be carried out by the office holders or their staff;
   f) Any remuneration or disbursements paid to the office holder other than out of the estate, giving the amounts paid, the name of the payor, its relationship to the insolvent estate and the nature of the payment.

Previous page

Next page

9. These disclosures should always be made whenever reporting on remuneration and/or expenses, whether incurred, accrued or paid.

Reports to creditors and other interested parties

10. Where expenditure has been incurred that is significant in the context of the case, the office holder should report and explain why the expenditure was incurred.

11. Unless there is statutory provision to the contrary, this SIP does not require the repetition of information previously provided.

Requests for additional information

12. Creditors and other interested parties may have the statutory right to seek further information about payments made by the office holder. Such rights extend to the general expenses of administering the estate as well as the office holder's remuneration and disbursements. They may also have the right to apply to the court if they consider these costs to be excessive in all the circumstances. The office holder should provide creditors and other interested parties with sufficient information to enable them to consider whether to exercise those rights.

13. Adequate steps should be taken to bring the rights of creditors and other interested parties to their attention. Information on how to access a suitable explanatory note setting out the rights of creditors should be given, when appropriate in reports that present financial information.

Other presentational matters

14. **Receipts**

    a) Realisations by or on behalf of the office holder should be shown gross, with the costs of realisation shown separately as payments.

    b) Realisations by or on behalf of the office holder of assets subject to charges should be shown as above with the amounts accounted for to the charge holder shown separately as payments.

    c) When assets subject to charges are sold by or on the instructions of the charge holder (or other person with a legal right to do so), the net amount received should be shown in the account (even if "nil") with the gross realisation(s), costs of realisation and the amount retained by the charge holder shown separately by way of note.

Previous page

Next page

15. **Payments**

Payments should be stated by category, distinguishing payments made under duress, in settlement of reservation of title claims, to secured creditors, and to preferential creditors and unsecured creditors as dividends. The dates and amounts of dividends (pence in the £) should also be stated.

16. **Trading under office holder's control**

A separate trading receipts and payments account should be provided, and the balance should be shown as a single item in the main receipts and payments account. The office holder should also provide, by way of note or in the accompanying report, details of:

a) The assets in existence upon appointment (e.g. stock and work in progress) that have been used in trading.

b) Any uncollected debts and unpaid liabilities in respect of trading.

c) Trading assets (e.g. stock and work in progress) still to be realised.

17. **Hive-downs**

a) Funds received from a hive-down company as consideration for the sale of the business or its assets should be shown in the account classified according to the categories of assets transferred and apportioned as provided for in the hive-down agreement. The proceeds of sale of the shares in the hive-down company should be shown separately. Funds received in respect of the hive-down company should not be shown simply as the proceeds of sale of the hive-down company.

b) A trading account for a hive-down company should be prepared adopting the same principles as set out in paragraph 16 above.

18. **Third party funds**

Where any monies are held which do not form part of the estate and are due to be paid to third parties, the amount should be noted. Any agreed fee charged to the person entitled to the monies should be disclosed.

Previous page

Next page

19. **Statement of funds held**

Disclosure should be made of where the balance of the funds is held, distinguishing between funds held on non-interest bearing accounts and interest bearing accounts in the office holder's or the insolvent estate's name, amounts held in the Insolvency Services Account and in Treasury Bills, and other forms of investments.

An office holder may present multiple receipts and payments accounts in more than one currency where bank accounts are maintained in those currencies (with details of the transfers between each currency), but should explain:

a) Why funds have been held in currencies other then sterling;

b) The impact of currency holdings on the estate;

c) An indication of the sterling value as at the date of the account.

20. **Value added tax (VAT)**

The treatment of VAT adopted within an account should be consistent and the implications of that treatment made clear.

Effective Date: 2 May 2011

Previous page

Next page

2.9 STATEMENT OF INSOLVENCY PRACTICE 8 (SCOTLAND) SUMMONING AND HOLDING MEETINGS OF CREDITORS CONVENED PURSUANT TO SECTION 98 OF THE INSOLVENCY ACT 1986

1. INTRODUCTION

1.1 *[Not reproduced. Superseded by SIP 1 with effect from 02 May 2011]*

1.2 This statement has been prepared for the sole use of members in connection with liquidations of companies registered in Scotland. The statement concentrates on creditors' meetings held under section 98 of the Insolvency Act 1986 (IA 1986), and does not purport to cover the practice to be adopted in respect of all creditors' meetings. Throughout this statement the member who has received instructions from the company's directors to advise in relation to the convening of the creditors' meeting will be referred to as the "advising member". An advising member is reminded that he must have regard to the relevant primary and secondary legislation; and that if he intends seeking nomination as liquidator he must be qualified to act as an insolvency practitioner in relation to the company.

1.3 All members and their staff should conduct themselves in a professional manner at all meetings of creditors.

2. INSTRUCTIONS TO CONVENE MEETING

2.1 It is the responsibility of the company's directors to convene the creditors' meeting and to ensure that arrangements are made for the meeting to be held in accordance with current legislation. The advising member must therefore satisfy himself that the directors are aware of their responsibilities. He should also obtain written instructions from the board of directors which clearly define the matters on which he is to advise.

2.2 If the advising member receives instructions which would require him to act in a manner materially contrary to the Statements of Insolvency Practice, he should only accept those instructions after careful consideration of the implications of acceptance in that particular case. Where the directors act contrary to the guidance contained in this statement the advising member may be called upon to show that the directors' actions were undertaken either without his knowledge or against his advice.

2.3 A member who is unable to accept an appointment as liquidator of a company because he or his firm has had a material professional relationship with the company during the preceding three years may act as an advising member.

However, he should only do so after careful consideration of the implications of so acting in the light of his professional body's most recent guide to professional ethics.

2.4 A member who is asked to act as advising member in relation to any company should not agree to act unless he is satisfied that he is competent to provide the level of advice needed by the company in question, or is able to recommend where to obtain the appropriate level of advice if he himself is not able to provide it.

2.5 It is most undesirable that shareholders should pass a resolution for the winding up of a company unless a liquidator is also appointed and accordingly no member should accept instructions to act as advising member unless he has good grounds for believing that such appointment will be made.

3. VENUE AND TIME OF MEETING

3.1 When choosing the venue for the meeting, the advising member should not only fulfil the legal requirement to choose a place which is convenient for persons who are invited to attend, but he should also ensure that the accommodation is adequate for the number of persons likely to attend. Subject thereto, there is no objection to an advising member arranging for the meeting to be held at his own offices.

3.2 The date and time of the meeting must be fixed with the convenience of creditors in mind and having regard to their geographical location. As an example, notices of a meeting should not normally be despatched shortly before the commencement of a known holiday period with the meeting taking place immediately after the holiday.

3.3 It is for advising member to advise the directors whether, in all the circumstances of a particular case, it would be preferable for the members' and the creditors' meeting to be held on the same or different days.

Previous page

Next page

4. NOTICE OF THE MEETING

4.1 The notice convening the meeting should, where possible, be sent simultaneously to all classes of known creditors (including employees and secured creditors). The advising member should take all reasonable steps to ensure that the list of creditors provided by the directors is complete. Thus, for example, he should advise the company to identify and send notices to such creditors as hire purchase companies, landlords and public utilities.

4.2 Although the legal requirement is that notice of the meeting must be sent not less than seven days before the day on which the meeting is to be held, this is often insufficient time to enable creditors to arrange representation. For the convenience of creditors, the advising member should ensure that notices of the meeting are despatched as early as possible having regard to the circumstances of the case. This should be no later than the date when the notices are despatched to shareholders. Note that the reference to seven days means seven clear days, i.e. it excludes the day on which notices are sent and the day on which the meeting is held.

4.3 The notice advertised in the Gazette and local newspapers should appear as soon as possible and should not be deferred until shortly before the meeting. Also the advertised notice should meet the requirements of section 98(2) IA 1986.

4.4 Copies of the notice convening the shareholders' meeting should not be circulated to creditors.

4.5 When dealing with the issues of notices of the meeting, members should have regard to the provisions of Statement of Insolvency Practice 9 (Scotland) and ensure that explanatory notes setting out the manner by which the remuneration of liquidators is fixed, are sent with the notice to creditors.

4.6 Where the name of the company has been changed sufficiently recently for there to be any risk that creditors might not be aware of the new name, it is advisable to include reference to the former name or names both in the notices sent to creditors and in those inserted in the Gazette and local newspapers.

Previous page

Next page

4.7 Section 98 IA 1986 requires that at least seven days' notice of the creditors' meeting shall be given. Occasions may arise when for the general benefit of creditors, a liquidator can be appointed before the day fixed for the creditors' meeting. Where the company is to be placed in liquidation and the creditors' meeting is held later, the advising member should, if possible, ensure that the secretary or a director of the company signs the notices of the creditors' meeting before the resolution to wind up is passed by the shareholders.

5. PROVISION OF INFORMATION PRIOR TO CREDITORS' MEETING

5.1 Where the directors have decided to arrange for an authorised insolvency practitioner to provide information to creditors under section 98(2)(a) IA 1986, the creditors are to be given "such information concerning the company's affairs as they may reasonably require". The information which it is reasonable to request will normally include information contained in the statement of affairs and the list of creditors, when available. In addition, if the member has been appointed Liquidator by the members prior to the meeting of creditors, in terms of Rule 7.26(2) of the Insolvency (Scotland) Rules 1986, he is required to provide details of the amounts due to creditors. Requests for information need not be made in writing. However, oral requests should be treated with caution and information should not be supplied unless the caller can show that he is a creditor or a representative of a creditor. The advising member may decline to comply with a particular request for information if

(a) it is unreasonable to expect him to be in a position to supply such information within the time remaining before the meeting; or

(b) the information requested ought to remain confidential on the grounds that its release would be prejudicial to the company or its creditors.

5.2 If the directors have decided to make a list of creditors available for inspection under section 98(2)(b) IA 1986, the advising member should take steps to ensure that:

(a) the list provides details of the names and addresses of all known creditors but not necessarily the amounts due to them;

(b) the names are arranged in alphabetical order;

(c) it is available at least between the hours of 10 a.m. and 4 p.m. on the two business days before the date of the meeting;

(d) sufficient copies are available for inspection to avoid undue delays to creditors' representatives; and

(e) the place where the list is to be made available is, in all the circumstances, reasonably convenient for creditors.

6. PROXIES

6.1 The forms of proxy accompanying the notice should conform to the Rules and should incorporate the name of the company and the date of the meeting before despatch in order to reduce the possibility of errors by creditors in completing the forms. The proxy must not be sent out with the name or description of any other person inserted on it.

6.2 Faxed Proxies should not be treated as invalid solely on the basis that they have been transmitted by fax.

6.3 Proxies which are lodged out of time should be treated as invalid. Proxies which are incorrectly completed in a material way will be invalid. There is a requirement for proxies to be signed by the principal or by a person authorised by him, in which case the nature of the authority must be stated. Proxies which are unsigned or which do not explain the authority under which they are signed will therefore, be invalid. However, proxies should not be rejected simply because of a minor error in their completion provided:

(i) the form or proxy sent with the notice of the meeting (or a substantially similar form) has been used;

(ii) the identity of the creditor and the proxy holder, the nature of the proxy holder's authority and any instructions given to the proxy holder are clear. The Chairman should satisfy himself that the person signing a form of proxy on behalf of a creditor (where the creditor is not an individual signing in person) has the necessary authority to do so. This may be assumed to be the case

(a) where the creditor is a partnership and the proxy is signed either with the firm name or by one of its partners.

Previous page

Next page

(b) where the creditor is a company where the form is signed by a director or the secretary or

(c) where the creditor is a company where the form is signed by a person whose position in that company is such that he would be presumed to have ostensible authority to sign a form of proxy or

(d) where the creditor is a limited liability partnership (incorporated under The Limited Liability Partnership Act 2000) if the form is signed by a member of that partnership.

This is not an exhaustive list of those persons with authority to sign on behalf of a creditor, and in a doubtful case the Chairman should not accept or reject a proxy without further enquiry into the authority of the person signing it and, if necessary, obtaining legal advice. If necessary, he should consider using his power to adjourn the creditors' meeting to enable him to obtain advice and reach a decision.

6.4 When advising the Chairman of the meeting on the validity of proxies, a member should bear in mind that he has a personal interest if he has been appointed liquidator at the shareholders' meeting and seeks to retain office following the creditors' meeting or intends to seek appointment as liquidator at that meeting. Where circumstances so demand, he should suggest prior to the meeting that the Chairman takes advice on the validity of proxies from an independent source, for example the company's solicitors.

6.5 There is no requirement for proxies which are considered invalid to be returned to the creditors who have lodged them.

6.6 A creditor who is not an individual may arrange for a representative to attend a meeting on its behalf. The Chairman should satisfy himself that the individual attending the meeting is entitled to represent that creditor. The Chairman should permit a director of a company which is a creditor to attend the meeting as its representative, and likewise a partner in a partnership which is a creditor or a member of a limited liability partnership.

The Companies Act 1985 Section 375 provides that a company may by a resolution of its directors appoint a person to act as its representative at meetings, but this section is discretionary and not exhaustive of the possibilities. Any such representative is required to produce a copy of the

Previous page

Next page

resolution from which he derives his authority. If the copy resolution is certified as correct by the company secretary or a director, that should be taken as sufficient evidence of the representative's appointment.

If the Chairman has any doubt whether the person purporting to represent a creditor at the meeting is entitled to do so he should consider using his powers to adjourn the meeting to enable him to verify the authority of the representative and to take such legal advice as may be necessary.

Where H M Customs and Excise is represented at a meeting by a Customs Officer attending in person, the Officer's Commission constitutes sufficient authority for him to act on Customs' behalf.

A duly authorised representative of a creditor is entitled to speak and vote on behalf of the creditor as if the creditor were attending the meeting in person. If the same creditor has appointed a proxy who is present at the meeting as well as the representative, the Chairman should accept the vote of the representative to the exclusion of any vote tendered by the creditor's proxy.

7. CLAIMS

7.1 Creditors may submit claims at any time before voting, even during the course of the meeting itself. The admission or rejection of claims for voting purposes is the responsibility of the Chairman of the meeting. A claim should be accepted as valid for voting purposes, provided it identifies both the creditor and the amount claimed by him with sufficient clarity. A secured creditor should deduct the value of any security in calculating the amount of his claim. The amount for which the Chairman should be advised to admit the claim for voting purposes should normally be the lower of:

(a) the amount stated in the claim; and

(b) the amount considered by the company to be due to the creditor. The advising member may assist the Chairman to decide the amounts for which claims should be admitted but if he intends to seek appointment as liquidator he should bear in mind that his own personal interests might create a conflict, in which case the Chairman should be advised independently.

8. AVAILABILITY OF PROXIES AND CLAIMS FOR INSPECTION

8.1 Any person entitled to attend the meeting may inspect the proxies and claims, either immediately before or during the meeting. Notwithstanding that a form of proxy submitted is ruled by the Chairman to be invalid or a claim is rejected in whole or in part these documents should be made available for inspection.

9. ATTENDANCE AT THE CREDITORS' MEETING

9.1 A liquidator appointed by the shareholders before the creditors' meeting takes place is required to attend the meeting of creditors personally. He must report to the meeting on any exercise of his powers under sections 112, 165 or 166 IA 1986. Such attendance is required even if the shareholders' appointment was made only shortly before the creditors' meeting. He must also attend any adjourned meeting. He is liable to a fine if he fails to comply without reasonable excuse. He should in such a case document at the time the reason for non-attendance and ensure that a suitably experienced colleague attends in his place.

9.2 One of the directors of the company will have been nominated to act as Chairman of the meeting and he must attend. In addition, the advising member should consider whether any other director or employee of the company will be able to provide information which is relevant to the meeting and if so, he should advise that that person be invited to attend the meeting.

9.3 Creditors and their authorised representatives are entitled to attend. In addition, a person who holds himself out as representing a creditor should, in the absence of evidence to the contrary, be allowed admittance and to raise questions, but he may be unable to vote.

9.4 The Chairman of the meeting should be advised that he must decide whether to allow any third parties, such as shareholders, the press or the police, to attend, after taking into account the views of the creditors present.

10. INFORMATION TO BE PROVIDED TO THE MEETING

10.1 The advising member should ensure that a summary or a copy of the directors' sworn statement of affairs is handed to all those attending the meeting. This summary will normally be expected to include a list of the names of the major creditors and of the amounts owing to them. Sufficient copies of the full list of creditors should be available to facilitate its inspection by those attending the meeting. The meeting should be told that the sworn statement of affairs is available for inspection at the meeting.

10.2 Information to be given to the meeting should include:

(a) details of any prior involvement with the company or its directors by the advising member, or if a different person, the proposed liquidator;

(b) a report of the previously held shareholders' meeting, stating the date the notice of the meeting was issued, the date and time that the meeting was held and, if it was held at short notice, the reasons therefore and the fact that the required consents were received. The resolutions passed at the meeting should be reported and if the liquidator has not yet consented to act, that fact should be stated. If the shareholders' meeting was adjourned without a resolution for voluntary winding up being passed, there should be reported;

(i) the date and time to which the meeting had been adjourned; and

(ii) the fact that any resolutions passed at the section 98 meeting will come into effect if and when the winding-up resolution is passed.

(c) the date on which the directors gave instructions for the meeting of creditors to be convened and the date on which the notices were despatched;

(d) the details of the costs paid by the company in connection with the preparation of the statement of affairs. The details should include the amount of the payment and the identity of the person to whom it was made.

Previous page

Next page

If no payments have been made in respect of these costs prior to the meeting, then the liquidator appointed under S100 may make such a payment but if there is a liquidation committee, he must give the committee at least 7 days notice of his intention to make it.

Such a payment shall not be made by the liquidator to himself or to any associate of his, otherwise than with the approval of the liquidation committee, the creditors, or the court.

(e) A report on the company's relevant trading history which should include:

(i) date of incorporation and registered number;

(ii) names of all persons who have acted as directors of the company or as its company secretary at any time during the three years preceding the meeting;

(iii) names of major shareholders together with the details of their shareholdings;

(iv) details of all classes of shares issued;

(v) nature of the business conducted by the company;

(vi) location of the business and the address of the registered office;

(vii) details of parent, subsidiary, and associated companies;

(viii) the directors' reasons for the failure of the company;

(ix) extracts from any formal or, if none, draft accounts produced for periods covering the previous three years or for any earlier period which is relevant to the failure of the company. The extracts should include details of turnover, net result, directors' remuneration, shareholders' funds, dividends paid, reserves carried forward at year end and the date of the auditors' report. Creditors should also be advised if the accounts have been qualified by the auditors.

(x) a deficiency account reconciling the position shown by the most recent balance sheet to the deficiency in the statement of affairs.

Previous page

Next page

(xi) the names and professional qualifications of any valuers whose valuations have been relied upon for the purpose of the statement of affairs, together with the basis or bases of valuation.

(xii) such other information as the advising member considers necessary to give the creditors a proper appreciation of the company's affairs.

(f) if a receiver has been appointed over any assets of the company, the meeting should be provided with a report on the conduct of the receivership to date, including a summary of the receiver's receipts and payments, unless disclosure would be in breach of the receiver's duty to his appointer, for example where market sensitive information was involved. In such circumstances, a receipts and payments account only should be provided, together with an explanation of the circumstances which prevent further information being given. Where any member is an authorised practitioner and is receiver of a company whose shareholders pass a resolution for voluntary winding up, that member should assist the advising member by providing this information;

(g) an explanation of the contents of the statement of affairs.

10.3 There should also be provided to the meeting details of any transactions (other than in the ordinary course of business) between the company, any of its subsidiaries or any other company in which it has or had an interest (together "the company") and any one or more of its directors of an associate of him or them (as defined in section 435 of the Insolvency Act 1986) during the period of one year prior to the resolution of the directors that the company be wound up specifying:

- The assets acquired and the consideration therefore together with the date(s) of the acquisition(s) and the date(s) the consideration for their acquisition was paid;
- The names and qualifications of any person who advised independently on the value of any assets the subject of such transactions;
- The dates on which any resolutions of the company authorising any such transactions were passed.

Previous page

Next page

There shall also be reported to the creditors whether (or not) the advising member or the proposed liquidator or any partner or employee of either of them acted in any capacity either for the company (as defined above) or any other party to any transaction subject to the disclosure requirements set out above.

10.4 The advising member should take all practicable steps to ensure that there are available to hand to those attending the meeting a written summary of the more important statistical information which is contained in a report given orally to the meeting.

10.5 In assisting in the preparation of a report to be presented to the meeting, the advising member may rely upon information contained in the company's accounts and records and also upon information provided by directors and employees. He is not expected to conduct an investigation to ensure that the information is accurate, but should provide the creditors with any material conflicting information of which he is aware.

11. CONDUCT OF THE MEETING

11.1 Although the Chairman of the meeting must be a director of the company and his identity must be made clear at the outset, there is no reason why the meeting should not be conducted by the advising member or some other professional adviser. It should be explained to the meeting that although this is being done on behalf of the directors, the report is their responsibility and is based upon information supplied by them. The Chairman is the arbiter on all procedural matters but may seek advice from the advising member.

11.2 The Chairman should bear in mind that the purpose of the meeting is to ascertain the wishes of the creditors. Technical objections to proxies and representatives attending the meeting should be regarded as subordinate to this principle.

11.3 Creditors and their representatives attending the meeting are required to sign an attendance list. This list should be made available for inspection to anyone attending the meeting. In addition, any creditor or creditor's representative wishing to speak, ask questions, or make a nomination, should be asked to identify himself and the creditor he represents.

Previous page

Next page

11.4 Creditors and their representatives should be given the opportunity to ask questions. Whilst every effort should be made to give a reasonable answer to such questions within the context of the meeting, the Chairman may be advised to refuse a question to be put if, for example:

- The questioner refuses to give the name of the creditor he represents and his own name or that of his firm;
- The questioner does not claim to be or to represent a creditor;

or may decline to answer it if, for example;

- the answer could prejudice the successful outcome of the liquidation or creditors' interests;
- the answer could lead to potential court action if subsequently proved incorrect.

The Chairman should be advised to state the grounds on which he refuses to allow a question. Creditors are entitled to information on the causes of the company's failure but it is not appropriate for a detailed investigation of the company's affairs to be undertaken at a meeting of creditors.

11.5 Nominations for the appointment of a liquidator should be requested before any vote is taken. The holder of a proxy requiring him to vote for the appointment of a particular liquidator is required to nominate that person, and it is therefore possible that the Chairman or any other holder of such proxies may need to make more than one nomination.

11.6 The Chairman must accept all nominations and put them to the meeting, unless he has good grounds for supposing that the person nominated is not qualified or is unwilling to act as an insolvency practitioner in relation to the company.

11.7 The procedure to be followed when voting for the appointment of a liquidator should be explained to the meeting. It is acceptable in the first instance for a vote to be taken on an informal show of hands and if the result is accepted by all interested parties, the Chairman of the meeting may conclude that a resolution has been passed. If a formal vote becomes necessary it should be conducted by stating the names of all those nominated and by the issue of voting papers on which those wishing to vote will be required to show

Previous page

Next page

their name, the name of the creditor they are representing, the amount of the creditor's claim and the name of the nominated person for whom they wish to vote. It is the advising member's responsibility to ensure that voting papers are available.

11.8 When all votes have been counted, the Chairman should announce the result to the meeting, giving details of the total value of votes cast in favour of each nomination. He should also give details of votes which have been rejected, either in whole or in part, and should also state which nomination those creditors supported and the reasons for rejection.

11.9 An absolute majority is required and if the first poll is not conclusive, the nominee receiving the least value of votes is excluded on the next poll where no other nominee has withdrawn. In the event of the withdrawal of at least one nominee, then the nominee with the least value of votes remains in the next poll. The same procedure should be followed in all successive polls.

11.10 If a proxy-holder has been instructed to vote for a particular person as liquidator and that person is eliminated or withdraws, then, if the second set of words in square brackets on the proxy form (Form 4.29) allowing him to vote or abstain at his discretion has not been deleted, the proxy-holder will be able to vote for such other person as he thinks fit. If the second set of words in square brackets has been deleted, the proxy-holder will have to abstain on any further ballot.

11.11 The meeting should be told of its right to appoint a liquidation committee and of the nature of the committee's functions, including its rights in relation to the liquidator's remuneration. The committee must consist of not less than three and not more than five creditors (not being fully secured) who have lodged claims which have not been wholly disallowed for voting purposes or rejected. The voting procedure should be explained. When the constitution of the committee is not contentious, a resolution may be passed on a show of hands and may also appoint a committee en bloc. If there are more than five nominations for appointment to the liquidation committee, it is recommended that voting papers should be issued on which each person voting should enter his own name, the name of the creditor he represents and the amount of the claim. Each such person should be allowed to vote for up to five members of the committee and in doing so may vote for his own appointment (if he is a creditor) or that of the creditor he represents. The provision of voting papers is the

MAIN CONTENTS

SECTION 1
THE ETHICS CODE

SECTION 2
STATEMENTS OF INSOLVENCY PRACTICE (SCOTLAND)

SECTION 3
INSOLVENCY BULLETINS (SCOTLAND)

SECTION 4
INSOLVENCY GUIDANCE PAPERS

SECTION 5
PERSONAL DEBTORS (SCOTLAND)

SECTION 6
OTHER PROFESSION REGULATIONS AND GUIDANCE

CONTACTS

Previous page

Next page

responsibility of the advising member.

11.12 When declaring the result the Chairman should follow the same procedures as those outlined in paragraph 11.8 above. The five creditors receiving the greatest value of votes will form the committee.

11.13 Voting papers should be made available for inspection by any creditor or creditor's representative whose claim has been admitted for voting purposes at any time during the meeting or during normal business hours on the business day following the meeting.

11.14 Apart from the appointment of a liquidator and the establishment of a liquidation committee, the only other resolutions which may be passed by the meeting are:

- (unless it has been resolved to establish a liquidation committee) a resolution specifying that the terms on which the liquidator is to be remunerated will be determined by the Court;
- in the event of two or more persons being appointed to act jointly as liquidators, a resolution specifying whether acts are to be done by both or all of them, or by only one;
- a resolution to adjourn the meeting for not more than three weeks;
- any other resolution which the Chairman thinks it right to allow for special reasons.

11.15 A record of the meeting should be prepared in accordance with Statement of Insolvency Practice 12 (Scotland).

12. PROVISION OF INFORMATION TO LIQUIDATOR

12.1 In instances where the advising member has not been appointed to be the liquidator of the company, he must provide reasonable assistance to the liquidator. This will include handing over such of the company's books and papers as are held by him, together with documents he has received in relation to the meeting of creditors (eg. claims, proxies, statement of affairs, shareholders' resolutions, attendance lists and record of the creditors' meeting). It is expected that this information will be handed over as quickly as possible and, in any event, within seven days of the conclusion of the creditors' meeting. Likewise, all sums received by the advising member

Previous page

Next page

from the company or on its behalf, less any proper disbursements which he has made, duly vouched, should also be handed over.

13. REPORT TO CREDITORS FOLLOWING THE MEETING

13.1 The liquidator shall send to creditors and contributors a report of the proceedings at the meeting, together with a copy or summary of the statement of affairs. The report to creditors should include the name and address of the liquidator and of the creditors appointed to the liquidation committee. Details of other resolutions passed at the meeting should also be supplied. It is not necessary to supply a detailed report on all that transpired at the meeting, but matters of particular relevance should be mentioned. Creditors should be asked to bring the liquidator's attention to any matter of which they consider he should be aware.

14. SOLICITATION TO OBTAIN NOMINATION

14.1 Members are reminded of the provisions of section 164 IA 1986 (corrupt inducement), Rule 4.39 of the Insolvency (Scotland) Rules 1986, (solicitation), and their professional body's most recent guide to professional ethics.

Effective Date: 1 February 2002

Previous page

Next page

2.10 STATEMENT OF INSOLVENCY PRACTICE 9 (SCOTLAND) REMUNERATION OF INSOLVENCY OFFICE HOLDERS

AMENDMENT NOTE

At the meeting of the Joint Insolvency Committee held on 20 June 2011, the Recognised Professional Bodies, the Insolvency Service and the Insolvency Service Northern Ireland agreed that, as an interim measure pending issue of revised SIPs, certain provisions of SIP 9 should be relaxed to allow for changes in practice.

The details are:

In certain circumstances, where an office holder is replaced or where an office holder takes a sequential appointment, further approval is not required for the basis of remuneration. The way in which Category 2 disbursements are approved is, of course, separate and, in the circumstances described, under the current SIP further approval would be needed for these disbursements.

It has been agreed that if an office holder has obtained approval for the basis on which a charge for Category 2 disbursements is made, that basis may continue to be used where further approval of the basis of remuneration is not required.

The position of practitioners

With immediate effect, the Insolvency Practitioners Association and the other licensing bodies will interpret SIP 9 for monitoring purposes as if it had been amended to take account of the above matter.

Members are also reminded that the following SIP should be read in conjunction with SIP 1 (dated 2 May 2011).

19 July 2011

1. INTRODUCTION

1.1 *[Not reproduced. Superseded by SIP 1 with effect from 02 May 2011]*

1.2 The purpose of this statement of insolvency practice is to:

- ensure that members are familiar with the statutory provisions relating to office holders' remuneration;
- set out required practice with regard to the observance of the statutory provisions;
- set out required practice with regard to the provision of information to those responsible for the approval of fees to enable them to exercise their rights under the insolvency legislation;
- set out required practice with regard to the disclosure and drawing of disbursements.

The statement has been produced in recognition of the principle that those with a direct financial interest in the level of office holders' fees should feel confident that the rules relating to the charging of remuneration have been properly complied with, and that those charged with responsibility for approval of fees have access to sufficient information about the basis of fees to be able to make an informed judgement about the level of remuneration in any particular case. The statement applies to Scotland only.

1.3 Members should be aware that the drawing of remuneration otherwise than in accordance with the relevant statutory provisions will render them in breach of the law.

1.4 The statement is divided into the following sections:

- The statutory provisions
- Provision of information when seeking fee approval
- Provision of information after fee approval
- Asset realisations
- Expenses and disbursements
- Payment in full
- Closure of cases

Previous page

Next page

2. THE STATUTORY PROVISIONS

2.1 The statutory provisions relating to the remuneration of office holders are set out in the Insolvency (Scotland) Rules 1986 ("the Rules") (as amended), the Insolvency Act 1986 (as amended) and the Bankruptcy (Scotland) Act 1985 (as amended) ("the Bankruptcy Act"). The relevant provisions are set out in full in appendix A. The main provisions relating to the most common types of insolvency appointment are summarised in the following paragraphs.

2.2 Administration

2.2.1 The Rules applicable in administration depend on whether the proceedings are based on a petition presented before 15 September 2003. If they are, then the Rules as they stood before the changes introduced by the Enterprise Act 2002 and its associated legislation continue to apply. The Rules substituted by the Insolvency (Scotland) Amendment Rules 2003 will apply to cases where the petition is presented after 15 September 2003 and before 6 April 2006. From 6 April 2006 the rules substituted by the Insolvency (Scotland) Amendment Rules 2006 will apply.

2.2.2 The basis for fixing the administrator's remuneration and outlays is set out in Rule 2.16 for cases where the petition was presented before 15 September 2003 and the old Rule 2.39 for cases where the petition was presented after that date and before 6 April 2006. Both these Rules state that the remuneration and outlays shall be determined from time to time by the creditors

- committee, or if there is no creditors
- committee, by the court. For cases where the petition was presented on or after 6 April 2006 the revised Rule 2.39 applies and the remuneration and outlays are determined by the creditors
- committee or if there is no committee, by the creditors.

2.2.3 Where the appointment is made on or after 6 April 2006, under the revised Rule 2.39, if the administrator has made a statement under paragraph 52(1)(b) and there is no creditors committee, or the committee does not make the requisite determination, the administrator's remuneration and outlays may be fixed by the approval of:

- Each secured creditor of the company; or
- If the administrator has made, or proposes to make, a distribution to preferred creditors:
    - Each secured creditor of the company; and
    - Preferential creditors whose debts amount to more than 50% of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold approval.

2.2.4 The basis for determining the amount of the remuneration payable may be a commission calculated by reference to the value of the company's property with which he has to deal, but in any event there shall be taken into account:

(a) the work which, having regard to that value, was reasonably undertaken by him; and

(b) the extent of his responsibilities in administering the company's assets.

Although not stated specifically in the Rules, the normal basis for determining the remuneration payable will be that of the time costs properly incurred by the administrator and his staff.

2.2.5 In cases where the petition is presented prior to 6 April 2006, Rules 4.32 and 4.35 apply to an administration. If an administrator's remuneration has been fixed by the creditors' committee and he considers that amount to be insufficient, he may request that it be increased by resolution of the creditors. He may also request the court for an order increasing its amount or rate, before or after recourse to the creditors. For appointments on or after 6 April 2006 Rule 2.39A (1) applies, which provides for appeal to the court if the administrator considers an amount fixed by the committee or by resolution of the creditors is insufficient.

2.2.6 Where the administrator has stated in his proposals that the company has insufficient property to enable a distribution to be made to unsecured creditors other than by virtue of the funds set aside out of floating charge assets, then a resolution of creditors (to increase the remuneration

Previous page

Next page

set by the creditors' committee or to determine the apportionment in circumstances where joint administrators cannot agree as to how the remuneration should be apportioned) shall be taken to be passed if (and only if) passed with the approval of:

- Each secured creditor of the company; or
- If the administrator has made, or proposes to make, a distribution to preferred creditors:
    - Each secured creditor of the company; and
    - Preferential creditors whose debts amount to more than 50% of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold approval.

2.2.7 By virtue of Section 53(6) of the Bankruptcy Act, (as applied by Rules 2.39 and 4.32), creditors have a right of appeal against the administrator's remuneration. If his remuneration has been determined by a creditors' committee, the right of appeal is to the court while if the determination is by the court, the right of appeal is to a higher court. In cases where the petition was presented on or after 6 April 2006, and no statement has been made under paragraph 52(1)(b), in terms of Rule 2.39A(5), the creditors' right of appeal is to the court.

2.2.8 In terms of the Act, any appeal must be made not later than eight weeks from the end of the relevant accounting period. However as the determination may not have been made by that time, best practice is to give creditors to the end of the later of eight weeks from the end of the accounting period or 14 days from the date they are notified of the determination.

2.2.9 In cases where the petition is presented after 15 September 2003 a resolution of creditors may be taken by correspondence rather than at a meeting.

2.3 Insolvent liquidations

2.3.1 The basis for fixing remuneration is broadly the same for both insolvent liquidations and sequestrations.

Previous page

Next page

2.3.2 The relevant provisions are Rule 4.32 and Section 53 of the Bankruptcy Act applied to liquidations by Rule 4.68.

2.3.3 These state that the remuneration may be fixed as a percentage of the value of the assets which are realised but there shall in any event be taken into account:

(a) the work which, having regard to that value, was reasonably undertaken; and

(b) the extent of the responsibilities in administering those assets.

2.3.4 It is for the liquidation committee (if there is one) to fix remuneration. If there is no committee, or the committee does not make the requisite determination, the remuneration is fixed by the court.

2.3.5 Rule 4.35 gives creditors the right to appeal to the court for an order that the office holder's remuneration is excessive.

2.3.6 Rule 4.33 applies where a liquidator considers the amount fixed by the liquidation committee to be insufficient. He may request that it be increased by resolution of the creditors. He may also (by virtue of Rule 4.34) request the court for an order increasing its amount or rate, before or after recourse to the creditors.

2.3.7 In court liquidations, Rule 4.12(3) empowers the first meeting of creditors to resolve, inter-alia, unless a liquidation committee is to be established, the terms on which the liquidator is to be remunerated.

2.3.8 Rule 4.12 does not extend to creditors' voluntary liquidations.

2.3.9 In court liquidations, Rule 4.5 lays down that the remuneration of a provisional liquidator can only be fixed by the court. There is no specific provision in the insolvency legislation giving anyone the right of appeal against a court's determination of the remuneration due to a provisional liquidator. Consequently any appeal must be made to the appropriate court in accordance with normal court rules. Such rules normally provide for any appeal to be made within 14 days of the court's decision. Consequently, if there is a separate determination of remuneration due to a provisional liquidator, best practice is that creditors should be advised of the court's determination and of their right of appeal as soon as practicable after such determination.

2.3.10 A liquidator's outlays are also subject to approval by virtue of Rule 4.32.

2.4 Expenses of meeting under Section 98

2.4.1 Payment may be made out of the company's assets as an expense of the liquidation, either before or after the commencement of the winding up, of any reasonable and necessary expenses incurred in connection with the summoning, advertisement and holding of a creditors' meeting under Section 98.

2.4.2 Where any such payments are made before the commencement of the winding up, the director presiding at the creditors' meeting shall inform the meeting of their amount and the identity of the persons to whom they were made.

2.4.3 The liquidator appointed under Section 100 may make such a payment (subject to the next paragraph); but if there is a liquidation committee, he must give the committee at least seven days' notice of his intention to make the payment.

2.4.4 Such a payment shall not be made by the liquidator to himself, or to any associate of his, otherwise and with the approval of the liquidation committee, the creditors, or the court.

2.5 Statement of affairs fee

2.5.1 Payment may be made as an expense of the liquidation, either before or after the commencement of the winding up, of any reasonable and necessary expenses of preparing the Statement of Affairs under Section 99.

2.5.2 Where such a payment is made before the commencement of the winding up, the director presiding at the creditors meeting held under Section 98 shall inform the meeting of the amount and the identity of the person to whom it was made.

2.5.3 The liquidator appointed under Section 100 may make such a payment (subject to the next paragraph); but if there is a liquidation committee he must give at least 7 days notice of his intention to make it.

2.5.4 Such a payment shall not be made to the liquidator himself, or to any associate of his, other than with the approval of the liquidation committee, the creditors, or the court.

2.6 Members' voluntary liquidations

2.6.1 There are no statutory provisions relating to the fixing of remuneration in members' voluntary liquidations. It is recommended that the liquidator's remuneration in a members' voluntary liquidation should be determined by the members of the company in general meeting.

2.6.2 In determining the basis of the liquidator's remuneration, the members may have regard to the same factors as for insolvency liquidations.

2.7 Company voluntary arrangements

2.7.1 The fees, costs, charges and expenses which may be incurred for any of the purposes of a voluntary arrangement are set out in Rule 1.22. They are:

- any disbursements made by the nominee prior to the decision approving the arrangement taking effect, and any remuneration for his services as such agreed between himself and the company (or the administrator or liquidator, as the case may be);
- any fees, costs, charges or expenses which are sanctioned by the terms of the arrangement, or would be payable or correspond to those which would be payable, in an administration or winding-up.

Rule 1.3 also requires the following matters to be stated or otherwise dealt with in the proposal:

- the amount proposed to be paid to the nominee (as such) by way of remuneration and expenses, and
- he manner in which it is proposed that the supervisor of the arrangement should be remunerated and his expenses defrayed.

2.7.2 It is for the creditors' meeting to decide whether to agree these terms along with the other provisions of the proposal. The creditors' meeting has the power to modify any of the terms of the proposal, including those relating to the fixing of remuneration. The nominee should be prepared to disclose the basis of his remuneration to the meeting if called upon to do so. Where

Previous page
Next page

a committee set up under the terms of a company voluntary arrangement is given the power to fix remuneration, it should be provided with the same information as if it were fixing remuneration in an administration.

2.8 Receiverships

2.8.1 The remuneration of a receiver appointed over property under powers contained in a floating charge will be a matter for agreement between the receiver and the holder of the floating charge under which he is appointed.

2.8.2 In terms of Section 58 (2) of the Insolvency Act 1986, where the remuneration to be paid to the receiver has not been determined by agreement between the receiver and the holder of the floating charge by virtue of which he was appointed, or where it has been so determined but is disputed by any of the following :

a) the receiver;

b) the holder of any floating charge or fixed security over all or any part of the property of the company;

c) the company;

d) the liquidator of the company;

it may be fixed instead by the Auditor of the Court of Session on application made to him by any of the aforementioned parties.

2.9 Sequestrations

2.9.1 The basis for fixing the trustee's remuneration in a sequestration is governed by Section 53 of the Bankruptcy Act. Under this section, remuneration may be calculated by reference to the value of the assets which are realised but there shall in any event be taken into account:

(a) the work which, having regard to that value, was reasonably undertaken; and

(b) the extent of the responsibilities in administering the estate.

2.9.2 It is for the commissioners to fix the remuneration but if there are no commissioners it will be determined by the Accountant in Bankruptcy.

2.9.3 Section 53(6) of the Bankruptcy Act gives creditors and the debtor the right of appeal that the office holder's remuneration is excessive. If the determination is made by commissioners the creditor or debtor must appeal to the Accountant in Bankruptcy, whilst if a determination is made by the Accountant in Bankruptcy the creditor or debtor must appeal to the Sheriff. In both instances a simultaneous notice of appeal must be sent to the trustee.

2.9.4 A debtor may appeal under Section 53(6) of the Bankruptcy Act if, and only if, he satisfies the Accountant in Bankruptcy or, as the case may be, the Sheriff, that he has, or is likely to have, a pecuniary interest in the outcome of the appeal.

2.9.5 In terms of the Bankruptcy Act, any appeal must be made not later than 8 weeks from the end of the relevant accounting period. However as the determination may not have been made by that time, best practice is to give creditors to the end of the later of 8 weeks from the end of the accounting period or 14 days from the date they are notified of the determination.

2.9.6 A trustee's claim for outlays is subject to the same approval procedure as for his remuneration by virtue of Section 53 (1) (b) of the Bankruptcy Act.

2.9.7 Whether or not an interim trustee has been appointed, in cases where the original trustee does not himself become the trustee or where the Accountant in Bankruptcy was the original trustee and some other person becomes the trustee, the Accountant in Bankruptcy shall issue a determination fixing the amount of remuneration and outlays payable to the trustee as provided by Sections 26 or 26(A) of the Bankruptcy Act.

2.9.8 The original trustee (except where the Accountant in Bankruptcy has been the original trustee), the trustee, the debtor or any creditor may appeal to the Sheriff against such determination as provided for under Sections 26(4) or 26(A)(5).

2.10 Other types of appointment and situations

2.10.1 **Trustee acting under a Trust Deed**

The remuneration of a trustee acting under a trust deed will be determined by the trust deed.

Whether or not provision is made in the trust deed for auditing the trustee's accounts and for determining the method of fixing the trustee's remuneration or whether or not the trustee and the creditors have agreed on such auditing and the method of fixing the remuneration, the debtor, the trustee or any creditor may, at any time before the final distribution of the debtor's estate among the debtor's creditors, have the trustee's accounts audited by and his remuneration fixed by the Accountant in Bankruptcy.

2.10.2 A debtor may appeal under Section 53(6) of the Bankruptcy Act if, and only if, he satisfies the Accountant in Bankruptcy or, as the case may be, the Sheriff, that he has, or is likely to have, a pecuniary interest in the outcome of the appeal.

2.10.3 **Sale of Assets on behalf of a Secured Creditor**

In certain cases an insolvency practitioner will realise assets on behalf of a secured creditor and will agree with the secured creditor to be remunerated out of the proceeds of sale. This will be a matter between the practitioner and the secured creditor providing that it has no impact on any other creditor or class of creditor.

Practitioners should ensure that any fees which have an impact on the funds available to non-secured creditors are approved in accordance with the appropriate provisions contained within this guideline.

2.10.4 **Allocation of Fees**

In particular, in relation to the prescribed part set aside for the benefit of unsecured creditors, fees incurred in relation to prescribed part issues (such as the administration of and agreeing unsecured creditors' claims) should be applied against the funds of the prescribed part, and should not be treated as general fees chargeable against total distributable funds. Fees incurred in respect of the proposals for and meetings of creditors and general creditor correspondence are chargeable against total distributable funds.

Previous page

Next page

3. THE PROVISION OF INFORMATION WHEN SEEKING APPROVAL OF REMUNERATION

3.1 Members should be mindful at all times of the rights accorded to creditors in relation to remuneration under insolvency legislation, and when acting in an advisory capacity or as office holder should ensure that adequate steps are taken to bring those rights to their attention. Appendix B contains the text of a set of explanatory notes on the basis on which office holders' remuneration is fixed in a format suitable for making creditors aware of the relevant provisions. Members are required to ensure that information on how to access the explanatory note appropriate to the type of insolvency proceedings concerned or the equivalent information in some other suitable format, is made available to creditors before any resolution is passed to fix or approve the office holder's remuneration.

3.2 The particular nature of an insolvency office holder's position renders it of primary importance that all payments made to his own firm out of funds under his control should be disclosed and explained to those who are charged with the responsibility for approving his remuneration. When seeking agreement to his remuneration, the office holder should be prepared to provide sufficient supporting information to enable those responsible for approving his remuneration to form a judgement as to whether the proposed remuneration is reasonable having regard to all the circumstances of the case. The nature and extent of the supporting information which should be provided will depend on:

- the nature of the approval being sought;
- the stage during the administration of the case at which it is being sought; and
- the size and complexity of the case.

3.3 Where, at any creditors' or committee meeting, agreement is sought to the terms on which the office holder is to be remunerated, he should provide the meeting with details of the charge-out rates of all grades of staff, including principals, which are likely to be involved in the case.

3.4 Where remuneration is sought during the course of an assignment an up to date receipts and payments account should always be available. Where the remuneration is based on time costs the office holder should be prepared

Previous page

Next page

to disclose the time spent and the charge-out value in the particular case, together with such additional information as may reasonably be required having regard to the size and complexity of the case. The additional information should comprise a sufficient explanation of what the office holder has achieved and how it was achieved to enable the value of the exercise to be assessed (whilst recognising that the office holder must fulfil certain statutory obligations that might be seen to bring no added value for creditors) and to establish that the time has been properly spent on the case. That assessment will need to be made having regard to the time spent and the rates at which that time was charged, bearing in mind the complexity, responsibility, value and nature of assets with which he has had to deal. Appendix C sets out a suggested format, with explanatory notes, for producing the information required to enable this assessment to be carried out. It provides for a degree of analysis of time by activity and grade of staff and sets out suggested categories for the purpose of this analysis. Whilst the approach embodied in Appendix C is potentially applicable to all types and sizes of case, the degree of analysis and form of presentation should be proportionate to the size and complexity of the case, and not all categories of activity will always be relevant.

3.5 The case records required to be maintained and retained under the Insolvency Regulations 1994 should include sufficient information to show full details of the time spent on the case by the office holder and his staff in cases where remuneration is on a time cost basis.

3.6 Where the remuneration is charged on a percentage basis the office holder should provide details of any work which has been or is intended to be sub-contracted out which would normally be carried out by office holders themselves.

3.7 A receiver appointed in relation to a company should on request provide the information detailed in paragraphs 3.4 to 3.6 to the company's liquidator.

3.8 When notices are sent out convening meetings under Section 98 of the Insolvency Act 1986 they should include a statement to the effect that the resolutions to be taken at the meeting may include a resolution specifying the terms on which the liquidator is to be remunerated, (although the actual liquidator's remuneration can only be approved by the liquidation committee or the court) and that the meeting may receive information about, or be

called upon to approve, the costs of preparing the statement of affairs and convening the meeting. Members should advise directors when convening Section 98 meetings that the notices despatched to creditors should include such a statement and contain information on how to access the appropriate explanatory note referred to in paragraph 3.1. If that advice is given orally and not accepted by the directors it should be confirmed in writing.

3.9 In an administration, liquidation or a sequestration, where the office holder realises an asset on behalf of a secured creditor and receives remuneration out of the proceeds, he should disclose the amount of that remuneration to the committee (if there is one), to the commissioners (if there are any), to any meeting of creditors convened for the purposes of determining his remuneration, and in his reports to creditors.

3.10 In a sequestration or initially solvent liquidation where realisations are sufficient for payment of creditors in full, with interest, it should be remembered that, notwithstanding the right of the creditors or the committee to fix the office holder's remuneration, it will be the debtor or the members, as the case may be, who will have the principal financial interest in the level of remuneration. The office holder should therefore on request provide them with information, in accordance with the principles set out in paragraphs 3.2 – 3.6, about how the remuneration has been calculated.

4. PROVISION OF INFORMATION AFTER APPROVAL OF REMUNERATION

4.1 Where a resolution fixing the basis of remuneration is passed at any creditors meeting held before he has substantially completed his administration the office holder should immediately notify the creditors of the details of the resolution. In subsequent reports to creditors the office holder should specify the amount of remuneration he has had approved (by the committee or the court) and has drawn in accordance with the resolution. Where the remuneration is based on time costs he also should provide details of the time spent and charge-out value to date and any material changes in the rates charged since the resolution was first passed. Where the remuneration is charged on a percentage basis the office holder should provide the details set out in paragraph 3.2 above regarding work which has been sub-contracted out. The same applies where the basis of the remuneration of a supervisor in a voluntary arrangement as set out in the proposal does not require any further approvals by the creditors or any creditors' committee established under the proposal.

Previous page

Next page

4.2 It should be borne in mind, however, that in certain cases creditors have the right to requisition a meeting or to apply to the court if they consider the office holder's remuneration to be excessive. The office holder should provide creditors with sufficient information to enable them to decide whether to exercise those rights. The information provided in accordance with paragraph 3.4 should normally be sufficient for this purpose. Where, however, creditors make a reasonable request for further information, it should be provided.

5. OUTLAYS, EXPENSES AND DISBURSEMENTS

5.1 Approval is generally required for the drawing of necessary outlays, expenses and disbursements (together referred to as disbursements). However, not all costs properly charged in connection with insolvency assignments may necessarily be regarded as disbursements. The precise demarcation line between disbursements and remuneration is not defined by statute and has not been specifically determined by the courts. Particular difficulties arise in connection with charges that involve calculation of shared and overhead costs, as these may include an element of remuneration.

5.2 In the absence of a clear statutory definition best practice is that only those costs that clearly meet the definition of disbursements, where there is specific expenditure relating to the administration of the insolvent's affairs and referable to payment to an independent third party, are treated as disbursements. In this statement these are referred to as „category 1 disbursements'. Category 1 disbursements will generally comprise external supplies of incidental services specifically identifiable to the case, typically for items such as identifiable telephone calls, postage, case advertising, invoiced travel and properly reimbursed expenses incurred by personnel in connection with the case. Also included will be services specific to the case where these cannot practically be provided internally such as printing, room hire and document storage.

Members should be prepared to disclose information about specific category 1 disbursements where reasonably requested.

5.3 Where it is proposed to recover costs which, whilst being of the nature of disbursements, include elements of shared or allocated costs, they should be identified and subject to approval as if they were remuneration. If the

office holder wishes to make a separate charge for disbursements in this second category, he may do so provided that:

- Such disbursements are of an incidental nature and are directly incurred on the case, and there is a reasonable method of calculation and allocation; it will be persuasive evidence of reasonableness, if the resultant charge to creditors is in line with the cost of external provision; and
- The basis of the proposed charge is disclosed and is authorised by those responsible for approving his remuneration.

5.4 These are defined as category 2 disbursements. Category 2 disbursements will comprise cost allocations which may arise on some of the category 1 disbursements where supplied internally: typically, items such as room hire and document storage. Also typically included will be routine or more specialist copying and printing, and allocated communication costs provided by the practitioner or his firm. A charge for disbursements calculated as a percentage of the amount charged for remuneration will not constitute either category 1 or category 2 disbursements. Charges cannot be made on this basis.

5.5 Payments to outside parties in which the office holder or his firm or any associate (as defined by Section 435 of the Insolvency Act 1986) has an interest should be treated in the same way as remuneration payments to himself and subject to the same approval requirements.

6. CLOSURE OF CASES

6.1 On the closure of a liquidation or sequestration there will frequently be a small residual balance of funds in hand, due to the unavoidable difficulty of calculating the final outcome with absolute precision. Such monies should be consigned in accordance with the guidelines laid down by the Accountant of Court in the prescribed form in terms of Section 57 of the Bankruptcy Act and Section 193 of the Insolvency Act 1986.

6.2 The guidelines issued by the Accountant in Bankruptcy are to the effect that such funds in a sequestration should be forwarded to the Accountant in Bankruptcy to be deposited in a bank account designated by the Accountant in Bankruptcy. The consignation receipt detailing those entitled to claim should also be forwarded at the same time.

In respect of such funds in liquidation the guidelines issued by the Accountant of Court are to the effect that such funds should be deposited with the Royal Bank of Scotland plc, who should be instructed to place the funds in a special deposit account in the name of the Accountant of Court, bearing reference to the relevant liquidation. The consignation receipt detailing those entitled to claim should also be sent to the Accountant of Court.

Effective Date: 1 February 2010

Previous page

Next page

APPENDIX A

The following is the full text of the rules relating to the remuneration of office holders in the various types of proceedings covered by this statement of insolvency practice.

A.1 Administration

Rule 2.39 Determination of remuneration and outlays

2.39 (1) Within 2 weeks after the end of an accounting period, the administrator shall in respect of that period submit to the creditors' committee or, if there is no creditors' committee, to a meeting of creditors–

(a) his accounts of his intromissions with the company's assets for audit and, where funds are available after making allowance for contingencies, a scheme of division of the divisible funds; and

(b) a claim for the outlays reasonably incurred by him and for his remuneration.

2.39 (2) The administrator may, at any time before the end of an accounting period, submit to the creditors' committee or, if there is no creditors' committee, a meeting of creditors an interim claim in respect of that period for the outlays reasonably incurred by him and for his remuneration and the creditors' committee or meeting of creditors, as the case may be, may make an interim determination in relation to the amount of the outlays and remuneration payable to the administrator and, where they do so, they shall take into account that interim determination when making their determination under paragraph (3)(a)(ii).

2.39(3) Within 6 weeks after the end of an accounting period–

(a) the creditors' committee or, as the case may be, a meeting of creditors–

(i) may audit the accounts; and

(ii) shall issue a determination fixing the amount of the outlays and the remuneration payable to the administrator; and

Previous page

Next page

(b) the administrator shall make the audited accounts, scheme of division and the said determination available for inspection by the members of the company and the creditors.

2.39 (4) The basis for fixing the amount of the remuneration payable to the administrator may be a commission calculated by reference to the value of the company's assets which have been realised by the administrator, but there shall in any event be taken into account–

(a) the work which, having regard to that value, was reasonably undertaken by him; and

(b) the extent of his responsibilities in administering the company's assets.

2.39(5) If the administrator's remuneration and outlays have been fixed by determination of the creditors' committee in accordance with paragraph (3)(a)(ii) and he considers the amount to be insufficient, he may request that it be increased by resolution of the creditors.

2.39(6) If the creditors' committee fails to issue a determination in accordance with paragraph (3)(a)(ii), the administrator shall submit his claim to a meeting of creditors and they shall issue a determination in accordance with paragraph (3)(a)(ii).

2.39(7) If the meeting of creditors fails to issue a determination in accordance with paragraph (6) then the administrator shall submit his claim to the court and it shall issue a determination.

2.39 (8) In a case where the administrator has made a statement under paragraph 52(1)(b), a resolution under paragraph (5) or Rule 2.39A(8) shall be taken to be passed if (and only if) passed with the approval of–

(a) each secured creditor of the company; or

(b) if the administrator has made, or proposes to make, a distribution to preferential creditors–

(i) each secured creditor of the company; and

(ii) preferential creditors whose debts amount to more than

50% of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold approval.

2.39(9) In a case where the administrator has made a statement under paragraph 52(1)(b), if there is no creditors' committee, or the committee does not make the requisite determination in accordance with paragraphs (2) or (3)(a)(ii), the administrator's remuneration and outlays may be fixed (in accordance with this Rule) by the approval of–

(a) each secured creditor of the company; or

(b) if the administrator has made, or proposes to make, a distribution to preferential creditors–

(i) each secured creditor of the company; and

(ii) preferential creditors whose debts amount to more than 50% of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold approval.

2.39 (10) In fixing the amount of the administrator's remuneration and outlays in respect of any accounting period, the creditors' committee or, as the case may be, a meeting of creditors may take into account any adjustment which the creditors' committee or meeting of creditors may wish to make in the amount of the remuneration and outlays fixed in respect of any earlier accounting period.

Appeal against fixing of remuneration

2.39A(1) If the administrator considers that the remuneration fixed for him by the creditors' committee, or by resolution of the creditors is insufficient, he may apply to the court for an order increasing its amount or rate.

2.39A(2) The administrator shall give at least 14 days' notice of his application to the members of the creditors' committee; and the committee may nominate one or more members to appear or be represented, and to be heard, on the application.

Previous page

Next page

2.39A(3) If there is no creditors' committee, the administrator's notice of his application shall be sent to such one or more of the company's creditors as the court may direct, which creditors may nominate one or more of their number to appear or be represented and be heard.

2.39A(4) The court may, if it appears to be a proper case, order the expenses of the administrator's application, including the expenses of any member of the creditors' committee appearing or being represented on it, or any creditor so appearing or being represented, to be paid as an expense of the administration.

2.39A(5) If the administrator's remuneration has been fixed by the creditors' committee or by the creditors, any creditor or creditors of the company representing in value at least 25 percent of the creditors may apply to the court not later than 8 weeks after the end of an accounting period for an order that the administrator's remuneration be reduced, on the grounds that it is, in all the circumstances, excessive.

2.39A(6) If the court considers the application to be well-founded, it shall make an order fixing the remuneration at a reduced amount or rate.

2.39A(7) The court may, if it appears to be a proper case, order the expenses of the creditor making the application to be paid as an expense of the administration.

2.39A(8) Where there are joint administrators–

(a) it is for them to agree between themselves as to how the remuneration payable should be apportioned;

(b) if they cannot agree as to how the remuneration payable should be apportioned, any one of them may refer the issue for determination–

(i) by the court; or

(ii) by resolution of the creditors' committee or a meeting of creditors.

Rule 2.39 Determination of remuneration and outlays (prior to 6 April 2006)

2.39 (1) Rules 4.32 to 4.35 and Rule 4.76 shall apply to an administration as they apply to a liquidation, subject to the modifications specified in the following paragraph of this Rule and to any other necessary modifications.

2.39 (2) For any references in the said Rules 4.32 to 4.35 and 4.76 or in the provisions of the Bankruptcy Act as applied by Rule 4.32 to the liquidator, the liquidation and the liquidation committee, there shall be substituted a reference to the administrator, the administration and the creditors' committee in the administration.

2.39 (3) Where the administrator has made a statement under paragraph 52(1)(b), a resolution under Rule 4.33, as applied by this Rule, or a resolution under paragraph 4(b) of this Rule, shall be taken to be passed if (and only if) passed with the approval of –

(a) each secured creditor of the company; or

(b) if the administrator has made, or proposes to make, a distribution to preferential creditors –

(i) each secured creditor of the company; and

(ii) preferential creditors whose debts amount to more than 50% of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold approval.

2.39 (4) (a) Where there are joint administrators, it is for them to agree between themselves as to how the remuneration payable should be apportioned.

(b) Where joint administrators cannot agree as to how the remuneration payable should be apportioned, any one of them any refer the issue for determination

(i) by the court; or

(ii) by resolution of the creditors' committee or a meeting of creditors.

Previous page

Next page

Rule 4.32 Determination of amount of remuneration and outlays

4.32(1) **[Application of S53]** Subject to the provisions of Rules 4.33 to 4.35, claims by the administrator for the outlays reasonably incurred by him and for his remuneration shall be made in accordance with section 53 of the Bankruptcy Act as applied by Rule 4.68 and as further modified by paragraphs (2) and (3) below.

4.32(2) **[Subsection]** After Section 53(1) of the Bankruptcy Act, there shall be inserted the following subsection -

"(1A) The administrator may, at any time before the end of an accounting period, submit to the creditors' committee (if any) an interim claim in respect of that period for the outlays reasonably incurred by him and for his remuneration and the creditors' committee may make an interim determination in relation to the amount of the remuneration and outlays payable to the administrator and, where they do so, they shall take into account that interim determination when making their determination under subsection (3)(a)(ii)."

4.32(3) **[Reference to subsection]** In Section 53(6) of the Bankruptcy Act, for the reference to "subsection (3)(a)(ii)" there shall be submitted a reference to "subsection (1A) or (3)(a)(ii)".

Rule 4.33 Recourse of administrator to meetings of creditors

4.33 **[Resolution of creditors]** If the administrator's remuneration has been fixed by the creditors' committee and he considers the amount to be insufficient, he may request that it be increased by resolution of the creditors.

Rule 4.34 Recourse to the court

4.34(1) **[Application to court]** If the administrator considers that the remuneration fixed for him by the creditors' committee, or by resolution of the creditors, is insufficient he may apply to the court for an order increasing its amount or rate.

4.34(2) **[Notice of application]** The administrator shall give at least 14 days' notice of his application to the members of the creditors' committee; and the committee may nominate one or more members to appear or be represented, and to be heard, on the application.

4.34(3) **[If no committee]** If there is no creditors' committee, the administrator's notice of his application shall be sent to one or more of the company's creditors as the court may direct, which creditors may nominate one or more of their number to appear or be represented.

4.34(4) **[Expenses of application]** The court may, if it appears to be a proper case, order the expenses of the administrator's application, including the expenses of any member of the creditors' committee appearing [or being represented] on it, or any creditor so appearing [or being represented], to be paid as an expense for the administration.

Rule 4.35 Creditors' claim that remuneration is excessive

4.35(1) If the administrator's remuneration has been fixed by the creditors committee, any creditor or creditors of the company representing in value at least 25 per cent of the creditors may apply to the court for an order that the administrator's remuneration be reduced, on the grounds that it is, in all the circumstances, excessive.

4.35(2) If the court considers the application to be well-founded, it shall make an order fixing the remuneration at a reduced amount or rate.

4.35(3) Unless the court orders otherwise, the expenses of the application shall be paid by the applicant, and are not payable as an expense of the administration.

Section 53 Procedure after end of accounting period

53 (1) **[Submissions to creditors' committee]** Within 2 weeks after the end of an accounting period, the administrator shall in respect of that period submit to the creditors' committee or, if there is no creditors' committee, to the court -

(a) his accounts of his intromissions with the company's assets for audit and, where funds are available after making allowance for contingencies, a scheme of division of the divisible funds; and

(b) a claim for the outlays reasonably incurred by him and for his remuneration;

and, where the said documents are submitted to the liquidation committee, he shall send a copy of them to the court.

53 (3) **[Action on receiving submissions]** Within 6 weeks after the end of an accounting period -

(a) the creditors' committee or, as the case may be, the court shall -

(i) audit the accounts; and

(ii) issue a determination fixing the amount of the outlays and the remuneration payable to the administrator; and

(b) the administrator shall make the audited accounts, scheme of division and the said determination available for inspection by the company and the creditors.

53 (4) **[Basis]** The basis for fixing the amount of remuneration payable to the administrator may be a commission calculated by reference to the value of the company's assets which has been realised by the administrator, but there shall in any event be taken into account -

(a) the work which, having regard to that value, was reasonably undertaken by him; and

(b) the extent of his responsibilities in administering the company's assets.

53 (5) **[Adjustments in final period]** In fixing the amount of such remuneration in respect of the final accounting period, the creditors' committee or, as the case may be, the court may take into account any adjustment which the creditors' committee or the court may wish to make in the amount of the remuneration fixed in respect of any earlier accounting period.

53 (6) **[Appeal against determination]** Not later than 8 weeks after the end of an accounting period, the administrator, the company or any creditor may appeal against a determination issued under subsection (1A) or (3)(a)(ii) above -

(a) where it is a determination of the creditors' committee, to the court; and

(b) where it is a determination of the court, to a higher court;

and the determination of the court under paragraph (a) above shall be appealable to a higher court.

53 (10) **[Filing of determination]** The administrator shall insert in the sederunt book the audited accounts, the scheme of division and the final determination in relation to the administrator's remuneration and outlays.

A.2 Provisional Liquidation

Rule 4.5 Remuneration

4.5 (1) **[Fixing of remuneration]** The remuneration of the provisional liquidator shall be fixed by the court from time to time.

4.5 (2) **[Basis]** Section 53(4) of the Bankruptcy Act shall apply to determine the basis for fixing the amount of the remuneration of the provisional liquidator, subject to the modifications specified in Rule 4.16(2) and to any other necessary modifications.

4.5 (3) **[Payment of remuneration]** Without prejudice to any order of the court as to expenses, the provisional liquidator's remuneration shall be paid to him, and the amount of any expenses incurred by him (including the remuneration and expenses of any special manager appointed under Section 177) reimbursed:

(a) if a winding up order is not made, out of the property of the company, and

(b) if a winding up order is made, as an expense of the liquidation.

4.5 (4) **[If winding up order not made]** Unless the court otherwise directs, in a case falling within paragraph (3)(a) above, the provisional liquidator may retain out of the company's property such sums or property as are or may be required for meeting his remuneration and expenses.

Section 53 Procedure after end of accounting period

53(4) **[Basis]** The basis for fixing the amount of the remuneration payable to the provisional liquidator may be a commission calculated by reference to the value of the company's assets which has been realised by the provisional liquidator, but there shall in any event be taken into account -

(a) the work which, having regard to that value, was reasonably undertaken by him; and

(b) the extent of his responsibilities in administering the company's assets.

A.3 Liquidations

Rule 4.32 Determination of amount of remuneration and outlays

4.32(1) **[Application of S53]** Subject to the provisions of Rules 4.33 to 4.35, claims by the liquidator for the outlays reasonably incurred by him and for his remuneration shall be made in accordance with Section 53 of the Bankruptcy Act as applied by Rule 4.68 and as further modified by paragraphs (2) and (3) below.

4.32(2) **[Subsection]** After Section 53(1) of the Bankruptcy Act, there shall be inserted the following subsection:

"(1A) The liquidator may, at any time before the end of an accounting period, submit to the liquidation committee (if any) an interim claim in respect of that period for the outlays reasonably incurred by him and for his remuneration and the liquidation committee may make an interim determination in relation to the amount of the remuneration and outlays payable to the liquidator and, where they do so, they shall take into account that interim determination when making their determination under subsection (3)(a)(ii)."

4.32(3) **[Reference to subsection]** In Section 53(6) of the Bankruptcy Act, for the reference to "subsection (3)(a)(ii)" there shall be substituted a reference to "subsection (1A) or (3)(a)(ii)".

Rule 4.33 Recourse of liquidator to meeting of creditors

4.33 **[Resolution of creditors]** If the liquidator's remuneration has been fixed by the liquidation committee and he considers the amount to be insufficient, he may request that it be increased by resolution of the creditors.

Rule 4.34 Recourse to the court

4.34(1) **[Application to court]** If the liquidator considers that the remuneration fixed for him by the liquidation committee, or by resolution of the creditors, is insufficient he may apply to the court for an order increasing its amount or rate.

4.34(2) **[Notice of application]** The liquidator shall give at least 14 days' notice of his application to the members of the liquidation committee; and the committee may nominate one or more members to appear or be represented, and to be heard, on the application.

4.34(3) **[If no committee]** If there is no liquidation committee, the liquidator's notice of his application shall be sent to such one or more of the company's creditors as the court may direct, which creditors may nominate one or more of their number to appear or be represented.

4.34(4) **[Expenses of application]** The court may, if it appears to be a proper case, order the expenses of the liquidator's application, including the expenses of any member of the liquidation committee appearing [or being represented] on it, or any creditor so appearing [or being represented], to be paid as an expense for the liquidation.

Rule 4.35 Creditors' claim that remuneration is excessive

4.35(1) **[Application to court]** If the liquidator's remuneration has been fixed by the liquidation committee or by the creditors, any creditor or creditors of the company representing in value at least 25 per cent of the creditors may apply to the court for an order that the liquidator's remuneration be reduced, on the grounds that it is, in all the circumstances, excessive.

4.35(2) **[Order to fix remuneration]** If the court considers the application to be well-founded, it shall make an order fixing the remuneration at a reduced amount or rate.

4.35(3) **[Expenses of application]** Unless the court orders otherwise, the expenses of the application shall be paid by the applicant, and are not payable as an expense of the liquidation.

Section 53 Procedure after end of accounting period

53 (1) **[Submissions to liquidation committee]** Within 2 weeks after the end of an accounting period, the liquidator shall in respect of that period submit to the liquidation committee or, if there is no liquidation committee, to the court:

(a) his accounts of his intromissions with the company's assets for audit and, where funds are available after making allowance for contingencies, a scheme of division of the divisible funds; and

(b) a claim for the outlays reasonably incurred by him and for his remuneration;

and, where the said documents are submitted to the liquidation committee, he shall send a copy of them to the court.

53 (3) **[Action on receiving submissions]** Within 6 weeks after the end of an accounting period:

(a) the liquidation committee or, as the case may be, the court shall -

(i) audit the accounts; and

(ii) issue a determination fixing the amount of the outlays and the remuneration payable to the liquidator; and

(b) the liquidator shall make the audited accounts, scheme of division and the said determination available for inspection by the company and the creditors.

53 (4) **[Basis]** The basis for fixing the amount of remuneration payable to the liquidator may be a commission calculated by reference to the value of the company's assets which has been realised by the liquidator, but there shall in any event be taken into account:

(a) the work which, having regard to the value, was reasonably undertaken by him; and

(b) the extent of his responsibilities in administering the company's assets.

53 (5) **[Adjustments in final period]** In fixing the amount of such remuneration in respect of the final accounting period, the liquidation committee or, as the case may be, the court may take into account any adjustment which the liquidation committee or the court may wish to make in the amount of the remuneration fixed in respect of any earlier accounting period.

53 (6) **[Appeal against determination]** Not later than 8 weeks after the end of an accounting period, the liquidator, the company or any creditor may appeal against a determination issued under subsection (1A) or (3)(a)(ii) above:

(a) where it is a determination of the liquidation committee, to the court; and

(b) where it is a determination of the court, to the sheriff;

and the determination of the court under paragraph (a) above shall be appealable to the sheriff.

53 (10) **[Filing of determination]** The liquidator shall insert in the sederunt book the audited accounts, the scheme of division and the final determination in relation to the liquidator's remuneration and outlays.

Rule 4.12 First meetings in the liquidation

4.12(3) **[Terms of remuneration]** Subject as follows, no resolution shall be taken at first meeting of creditors other than the following:

(c) unless a liquidation committee is to be established, a resolution specifying the terms on which the liquidator is to be remunerated or to defer consideration of that matter;

Rule 4.13 Other meetings

4.13(2) **[Meetings of creditors and contributories]** Subject to the above provision, the liquidator may summon a meeting of the creditors or of the contributories at any time for the purpose of ascertaining their wishes in all matters relating to the liquidation.

Previous page

Next page

A.4 Bankruptcy

Section 53 Procedure after end of accounting period

53 (1) **[Submissions to commissioners]** Within 2 weeks after the end of an accounting period, the trustee shall in respect of that period submit to the commissioners or, if there are no commissioners, to the Accountant in Bankruptcy:

(a) his accounts of his intromissions with the debtor's estate for audit and, where funds are available after making allowance for contingencies, a scheme of division of the divisible funds; and

(b) a claim for the outlays reasonably incurred by him and for his remuneration;

and, where the said documents are submitted to the commissioners, he shall send a copy of them to the Accountant in Bankruptcy.

53 (3) **[Action on receiving submissions]** Within 6 weeks after the end of an accounting period:

(a) the commissioners or, as the case may be, the Accountant in Bankruptcy shall:

(i) audit the accounts; and

(ii) issue a determination fixing the amount of the outlays and the remuneration payable to the trustee; and

(b) the trustee shall make the audited accounts, scheme of division and the said determination available for inspection by the debtor and the creditors.

53 (4) **[Basis]** The basis for fixing the amount of remuneration payable to the trustee may be a commission calculated by reference to the value of the debtor's estate which has been realised by the trustee, but there shall in any event be taken into account:

(a) the work which, having regard to the value, was reasonably undertaken by him; and

(b) the extent of his responsibilities in administering the debtor's estate.

53 (5) **[Adjustments in final period]** In fixing the amount of such remuneration in respect of the final accounting period, the commissioners or, as the case may be, the Accountant in Bankruptcy may take into account any adjustment which the commissioners or the Accountant in Bankruptcy may wish to make in the amount of the remuneration fixed in respect of any earlier accounting period.

53 (6) **[Appeal against determination]** Not later than 8 weeks after the end of an accounting period, the trustee, the debtor or any creditor may appeal against a determination issued under (3)(a)(ii) above:

(a) where it is a determination of the commissioners, to the Accountant in Bankruptcy; and

(b) where it is a determination of the Accountant in Bankruptcy, to the sheriff;

and the determination of the Accountant in Bankruptcy under paragraph (a) above shall be appealable to the sheriff.

53 (10) **[Filing of determination]** The trustee shall insert in the sederunt book the audited accounts, the scheme of division and the final determination in relation to the permanent trustee's remuneration and outlays.

A.5 Trustee acting under a trust deed

Schedule 5 Voluntary trust deeds for creditors

Sch 5(1) **[Remuneration of trustee]** Whether or not provision is made in the trust deed for auditing the trustee's accounts and for determining the method of fixing the trustee's remuneration or whether or not the trustee and the creditors have agreed on such auditing and the method of fixing the remuneration, the debtor, the trustee or any creditor may, at any time before the final distribution of the debtor's estate among the creditors, have the trustee's accounts audited by and his remuneration fixed by the Accountant in Bankruptcy.

Section 56 Appeals

56(6A) A debtor may appeal under Section 53(6) of the Bankruptcy Act if, and only if, he satisfies the Accountant in Bankruptcy or, as the case may be, the Sheriff, that he has, or is likely to have, a pecuniary interest in the outcome of the appeal.

A.6 Voluntary arrangements

Rule 1.22 Fees, costs, charges and expenses

1.22 **[Fees, etc which may be incurred]** The fees, costs, charges and expenses that may be incurred for any of the purposes of a voluntary arrangement are:

(a) any disbursements made by the nominee prior to the decision approving the arrangement taking effect under section 4A, and any remuneration for his services as is agreed between himself and the company (or, as the case may be, the administrator or liquidator);

(b) any fees, costs, charges or expenses which:

(i) are sanctioned by the terms of the arrangement, or

(ii) would be payable in, or correspond to those which would be payable, in an administration or winding up.

Rule 1.3 Contents of proposal

1.3(2)(g) **[Amount of remuneration and expenses]** The amount proposed to be paid to the nominee (as such) by way of remuneration and expenses.

1.3(2)(h) **[Manner of remuneration]** The manner in which it is proposed that the supervisor of the arrangement should be remunerated and his expenses defrayed;

A.7 Receiverships

Section 58 Remuneration of receiver

58(1) **[Agreement with floating charge holder]** The remuneration to be paid to a receiver is to be determined by agreement between the receiver and the holder of the floating charge by virtue of which he was appointed.

58(2) **[Where not determined under (1)]** Where the remuneration to be paid to the receiver has not been determined under subsection (1), or where it has been so determined but is disputed by any of the persons mentioned in paragraphs (a) to (d) below, it may be fixed instead by the Auditor of the Court of Session on application made to him by:

(a) the receiver

(b) the holder of any floating charge or fixed security over all or any part of the property of the company;

(c) the company; or

(d) the liquidator of the company.

58(3) **[Remuneration in excess to that fixed]** Where the receiver has been paid or has retained for his remuneration for any period before the remuneration has been fixed by the Auditor of the Court of Session under subsection (2) any amount in excess of the remuneration so fixed for that period, the receiver or his personal representatives shall account for the excess.

Previous page

Next page

APPENDIX B

A CREDITORS' GUIDE TO ADMINISTRATORS' REMUNERATION

SCOTLAND

This guide applies to all appointments on or after 6 April 2006. Any creditor requiring guidance on a case where the Insolvency Practitioner was appointed prior to 6 April 2006 should refer to the previous guide, which should have been issued to all creditors at the time of appointment.

1. INTRODUCTION

1.1 When a company goes into administration the costs of the proceedings are paid out of the company's assets in priority to creditors' claims. The creditors, who hope eventually to recover some of their debts out of the assets, therefore have a direct interest in the level of costs, and in particular the remuneration of the insolvency practitioner appointed to act as administrator. The insolvency legislation recognises this interest by providing mechanisms for creditors to determine the basis of the administrator's remuneration. This guide is intended to help creditors be aware of their rights under the legislation to approve and monitor remuneration and outlays and explain the basis on which remuneration and outlays are fixed.

2. THE NATURE OF ADMINISTRATION

2.1 Administration is a procedure which places a company under the control of an insolvency practitioner and the protection of the court with the objective of:

(a) rescuing the company as a going concern, or

(b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up(without first being in administration), or

(c) realising property in order to make a distribution to one or more secured or preferential creditors

Administration may be followed by a company voluntary arrangement or liquidation.

3. THE CREDITORS' COMMITTEE

3.1 Where a meeting is held by the administrator the creditors have the right to appoint a committee with a minimum of 3 and a maximum of 5 members. One of the functions of the committee is to determine the basis of the administrator's remuneration. The committee is established at the meeting of creditors which the administrator is required to hold within 10 weeks of the administration order (or longer with the consent of the court) to consider his proposals. The administrator must call the first meeting of the committee within 3 months of its establishment, and subsequent meetings must be held either at specified dates agreed by the committee, or when a member of the committee asks for one, or when the administrator decides he needs to hold one. The committee has power to summon the administrator to attend before it and provide such information as it may require.

4. FIXING THE ADMINISTRATOR'S FEES

4.1 The basis for fixing the administrator's remuneration is set out in Rule 2.39 of the Insolvency (Scotland) Rules 1986 which states that it may be a commission calculated by reference to the value of the company's property with which he has to deal.

It is for the creditors' committee (if there is one) to fix the remuneration and Rule 2.39 says that in arriving at its decision the committee shall take into account:

- the work which, having regard to the value of the company's property, was reasonably undertaken by the administrator; and
- the extent of his responsibilities in administering the company's assets

Although not specifically stated in the rules, the normal basis for determining the remuneration will be that of the time costs properly incurred by the administrator and his staff.

4.2 If there is no creditors' committee, or the committee does not make the requisite determination, the administrator's remuneration will be fixed by the creditors.

4.3 Where no meeting is held, the administrator's remuneration is approved

Previous page

Next page

by each secured creditor of the company or where a distribution to the preferential creditors is proposed by each secured creditor and 50% in value of the preferential creditors disregarding those who do not respond or withhold approval.

5. WHAT INFORMATION SHOULD BE PROVIDED BY THE ADMINISTRATOR?

5.1 Claims by the administrator for the outlays reasonably incurred by him and for his remuneration shall be made in accordance with Rule 2.39 of the Insolvency (Scotland) Rules 1986 which provides that within two weeks after the end of an accounting period, the administrator shall submit to the creditors' committee or if there is no creditors' committee, to a meeting of creditors:

- his accounts of intromissions for audit;
- a claim for the outlays reasonably incurred by him and for his remuneration, broken down into category 1 disbursements, being those costs where there is specific expenditure relating to the administration of the insolvent's affairs and referable to payment to an independent third party, and category 2 disbursements, which are costs which include elements of shared or allocated costs, and are supplied internally by the administrator' own firm

5.2 The administrator may at any time before the end of an accounting period submit to the creditors' committee or a meeting of creditors an interim claim for category 1 and 2 disbursements reasonably incurred by him and for his remuneration.

5.3 When seeking agreement to his fees and disbursements, the administrator should provide sufficient supporting information to enable the committee or the creditors to form a judgement as to whether the proposed fee and disbursements are reasonable having regard to all circumstances of the case. The nature and extent of the supporting information which should be provided will depend on:

- the nature of the approval being sought;
- the stage during the administration of the case at which it is being sought; and
- the size and complexity of the case.

5.4 Where, at any creditors' committee meeting or meeting of creditors, the administrator seeks agreement to the terms on which he is to be remunerated, he should provide the meeting with details of the charge-out rates of all grades of staff, including principals, which are likely to be involved on the case.

5.5 Where the administrator seeks agreement to his remuneration during the course of the administration, he should always provide an up to date receipts and payments account. Where the proposed remuneration is based on time costs the administrator should disclose to the committee or the creditors the time spent and the charge-out value in the particular case, together with, where appropriate, such additional information as may reasonably be required having regard to the size and complexity of the case. The additional information should comprise a sufficient explanation of what the administrator has achieved and how it was achieved to enable the value of the exercise to be assessed (whilst recognising that the administrator must fulfil certain statutory obligations that might be seen to bring no added value for creditors) and to establish that the time has been properly spent on the case. That assessment will need to be made having regard to the time spent and the rates at which that time was charged, bearing in mind the factors set out in paragraph 4.1 above. To enable this assessment to be carried out it may be necessary for the administrator to provide an analysis of the time spent on the case by type of activity and grade of staff. The degree of detail will depend on the circumstances of the case, but it will be helpful to be aware of the professional guidance which has been given to insolvency practitioners on this subject.

The guidance suggests the following areas of activity as a basis for the analysis of time spent:

- Administration and planning
- Investigations
- Realisation of assets
- Trading
- Creditors
- Any other case specific matters

The following categories are suggested as a basis for analysis by grade of staff:

- Partner
- Manager
- Other senior professionals
- Assistants and support staff

The explanation of what has been done can be expected to include an outline of the nature of the assignment and the administrator's own initial assessment, including the anticipated return to creditors. To the extent applicable it should also explain:

- Any significant aspects of the case, particularly those that affect the amount of time spent.
- The reasons for subsequent changes in strategy.
- Any comments on any figures in the summary of time spent accompanying the request the administrator wishes to make.
- The steps taken to establish the views of creditors, particularly in relation to agreeing the strategy for the assignment, budgeting, time recording, or the drawing, or agreement of remuneration.
- Any existing agreement about remuneration.
- In cases where there are distributable funds available to unsecured creditors by means of the creditors' prescribed part, how the administrator has allocated remuneration and costs with regard to dealing with the administration of and agreeing of unsecured creditors' claims. Remuneration in respect of time spent dealing with issues specific to the funds for ordinary creditors will be applied against the creditors prescribed part, prior to the funds being distributed, and will not be applied against the total funds available to all creditors, including those available to the floating charge holder.
- Details of how other professionals, including subcontractors, were chosen, how they were contracted to be paid, and what steps have been taken to review their fees.

It should be borne in mind that the degree of analysis and form of presentation should be proportionate to the size and complexity of the case. In smaller cases not all categories of activity will be relevant, whilst further analysis may be necessary in larger cases.

5.6 Where the remuneration is charged as a commission based on the value of the company's property with which the administrator has had to deal, the administrator should provide details of any work which has been or is intended to be contracted out which would normally be undertaken directly by the administrator or his staff.

5.7 As noted in 5.1, any claim for outlays must be approved in the same way as remuneration. Professional guidance issued to Insolvency Practitioners requires that where the administrator proposes to recover costs which, whilst being in the nature of expenses or disbursements may include an element of shared or allocated costs (such as room hire, document storage or communication facilities) they must be approved as if they were remuneration. Such disbursements must be directly incurred on the case and subject to a reasonable method of calculation and allocation. A charge for disbursements calculated as a percentage of the amount charged for remuneration is not allowed.

5.8 Payments to outside parties in which the office holder or his firm or any associate has an interest should be disclosed to the body approving remuneration and should be treated in the same way as payments to himself. They therefore require specific approval as remuneration prior to being paid.

6. WHAT IF A CREDITOR IS DISSATISFIED?

6.1 If the administrator's remuneration has been fixed by the creditors' committee or by the creditors, by virtue of Rule 2.39A of the Insolvency (Scotland) Rules 1986, any creditor or creditors of the company representing in value at least 25 percent of the creditors may apply to the court not later than eight weeks after the end of an accounting period for an order that the administrator's remuneration be reduced, on the grounds that it is, in all the circumstances excessive.

6.2 Notwithstanding the fact that the statutory time limit for appealing expires

eight weeks from the end of the accounting period concerned, it is normal practice to advise the creditors that they may appeal within 14 days of being notified of the determination in cases where this extends beyond the statutory appeal period.

7. WHAT IF THE ADMINISTRATOR IS DISSATISFIED?

7.1 If the administrator considers that the remuneration fixed by the creditors' committee or by resolution of the creditors is insufficient he may apply to the court for an order increasing its amount or rate. If he decides to apply to the court he must give at least 14 days' notice to the members of the creditors' committee and the committee may nominate one or more of its members to appear or be represented on the application. If there is no committee, the administrator's notice of his application must be sent to such of the company's creditors as the court may direct, and they may nominate one or more of their number to appear or be represented. The court may order the costs to be paid as an expense of the administration.

8. OTHER MATTERS RELATING TO FEES

8.1 Where there are joint administrators it is for them to agree between themselves how remuneration payable should be apportioned. Any dispute arising between them may be referred to the court, the creditors' committee or a meeting of creditors.

A CREDITORS' GUIDE TO LIQUIDATORS' REMUNERATION SCOTLAND

1. INTRODUCTION

1.1 When a company goes into liquidation the costs of the proceedings are paid out of its assets in priority to creditors' claims. The creditors, who hope to recover some of their debts out of the assets, therefore have a direct interest in the level of costs, and in particular the remuneration of the insolvency practitioner appointed to act as liquidator. The insolvency legislation recognises this interest by providing mechanisms for creditors to fix the basis of the liquidator's remuneration. This guide is intended to help creditors be aware of their rights to approve and monitor remuneration and disbursements, and explains the basis on which remuneration and disbursements are fixed.

2. LIQUIDATION PROCEDURE

2.1 Liquidation (or "winding up") is the most common type of corporate insolvency procedure. Liquidation is the formal winding up of a company's affairs entailing the realisation of its assets and the distribution of the proceeds in a prescribed order of priority. Liquidation may be either voluntary, when it is instituted by resolution of the shareholders, or court, when it is instituted by order of the court.

2.2 Voluntary and court liquidation are equally common. An insolvent voluntary liquidation is called a creditors' voluntary liquidation (often abbreviated to "CVL"). In this type of liquidation an insolvency practitioner acts as liquidator throughout and the creditors can vote on the appointment of the liquidator at the first meeting of creditors.

2.3 In a court liquidation an insolvency practitioner may be appointed to act as provisional liquidator until the making of the winding up order. In all court liquidations, an insolvency practitioner is appointed to act as interim liquidator from the making of the winding up order until the first meeting in the liquidation, and the creditors can vote on the appointment of the liquidator at the first meeting of creditors.

2.4 Where a court liquidation follows immediately on an administration the court may appoint the former administrator to act as liquidator.

3. THE LIQUIDATION COMMITTEE

3.1 In a liquidation (whether voluntary or court) the creditors have the right to appoint a committee called the liquidation committee, with a minimum of 3 and a maximum of 5 members, to monitor the conduct of the liquidation and approve the liquidator's remuneration and disbursements. The committee is usually established at the creditors' meeting which appoints the liquidator, but in cases where a liquidation follows immediately on from an administration any committee established for the purposes of the administration will continue in being as the liquidation committee.

3.2 The liquidator must call the first meeting of the committee within 3 months of its establishment (or his appointment if that is later), and subsequent meetings must be held either at specified dates agreed by the committee, or when requested by a member of the committee, or when the liquidator

decides he needs to hold one. The liquidator is required to report to the committee at least every 6 months on the progress of the liquidation. This provides the opportunity for the committee to monitor and discuss the progress of the insolvency and the level of the liquidator's remuneration.

4. FIXING THE LIQUIDATOR'S FEES

4.1 The basis for fixing the liquidator's (which includes an interim liquidator's) remuneration is set out in Rule 4.32 of the Insolvency (Scotland) Rules 1986 (as amended) ("the Rules"), and in Section 53 of the Bankruptcy (Scotland) Act 1985 (as amended) ("the Bankruptcy Act") which is applied to liquidations by Rule 4.68. These Rules state that the remuneration may be a commission calculated by reference to the value of the assets which are realised but there shall in any event be taken into account the work which, having regard to that value, was reasonably undertaken, and the extent of the responsibilities in administering the estate.

4.2 It is for the liquidation committee (if there is one) to fix the remuneration and approve disbursements. If there is no liquidation committee, or the committee does not make the requisite determination, the liquidator's remuneration is fixed by the court.

4.3 Rule 4.5 lays down that the remuneration of a provisional liquidator can only be fixed by the court.

5. WHAT INFORMATION SHOULD BE PROVIDED BY THE LIQUIDATOR?

5.1 When seeking agreement to his remuneration and disbursements, the liquidator should provide sufficient supporting information to enable the committee or the court to form a judgement as to whether the proposed remuneration and disbursements are reasonable having regard to all the circumstances of the case. The nature and extent of the supporting information which should be provided will depend on:

- The nature of the approval being sought;
- The stage during the administration of the case at which it is being sought; and
- The size and complexity of the case.

Where, at any creditors' meeting, the liquidator seeks agreement to the terms on which he is to be remunerated, he should provide the meeting with details of the charge-out rates of all grades of staff, including principals, which are likely to be involved on the case.

Where the liquidator seeks agreement to his remuneration during the course of the liquidation, he should always provide an up to date receipts and payments account. Where the proposed remuneration is based on time costs the liquidator should disclose to the committee or the creditors the time spent and the charge-out value in the particular case, together with, where appropriate, such additional information as may reasonably be required having regard to the size and complexity of the case.

The additional information should comprise a sufficient explanation of what the liquidator has achieved and how it was achieved to enable the value of the exercise to be assessed (whilst recognising that the liquidator must fulfil certain statutory obligations that might be seen to bring no added value for creditors) and to establish that the time has been properly spent on the case. That assessment will need to be made having regard to the time spent and the rates at which that time was charged, bearing in mind the factors set out in paragraph 4.1 above. To enable this assessment to be carried out it may be necessary for the liquidator to provide an analysis of the time spent on the case by type of activity and grade of staff. The degree of detail will depend on the circumstances of the case, but it will be helpful to be aware of the professional guidance which has been given to insolvency practitioners on this subject.

The guidance suggests the following areas of activity as a basis for the analysis of time spent:

- Administration and planning
- Investigations
- Realisation of assets
- Trading
- Creditors
- Any other case specific matters

The following categories are suggested as a basis for analysis by grade of staff:

- Partner
- Manager
- Other senior professionals
- Assistants and support staff

The explanation of what has been done can be expected to include an outline of the nature of the assignment and the liquidator's own initial assessment, including the anticipated return to creditors.

5.2 To the extent applicable it should also explain:

- Any significant aspects of the case, particularly those that affect the amount of time spent.
- The reasons for subsequent changes in strategy.
- Any comments on any figures in the summary of time spent accompanying the request the liquidator wishes to make.
- The steps taken to establish the views of creditors, particularly in relation to agreeing the strategy for the assignment, budgeting, time recording, or the drawing or agreement of remuneration.
- Any existing agreement about remuneration.
- Details of how other professionals, including subcontractors, were chosen, how they were contracted to be paid, and what steps have been taken to review their fees.

It should be borne in mind that the degree of analysis and form of presentation should be proportionate to the size and complexity of the case. In smaller cases not all categories of activity will always be relevant, whilst further analysis may be necessary in larger cases.

The liquidator should always make available an up to date receipts and payments account. Where the remuneration is to be charged on a time basis the liquidator should be prepared to disclose the amount of time spent on the case and the charge-out value of the time spent, together with such additional information as may reasonably be required having regard to the size and complexity of the case. Where the remuneration is charged on a percentage basis, the liquidator should provide details of any work

which has been or is intended to be contracted out which would normally be undertaken directly by a liquidator or his staff.

5.3 A liquidator's disbursements are subject to approval by virtue of Rule 4.32. Where a liquidator makes, or proposes to make, a separate charge by way of disbursements to recover the cost of facilities provided by his own firm (such as room hire, document storage or communication facilities), (category 2 disbursements) he should disclose those charges to the committee or the creditors when seeking approval of his remuneration and disbursements together with an explanation of how those charges are made up. Disbursements must either be directly incurred on the case or be subject to a reasonable method of calculation and allocation and the basis on which they are allocated must be disclosed. Such disbursements must be directly incurred on the case and subject to a reasonable method of calculation and allocation. A charge for disbursements calculated as a percentage of the amount charged for remuneration is not allowed.

5.4 Payments to outside parties in which the office holder or his firm or any associate has an interest should be disclosed to the body approving remuneration and should be treated in the same way as payments to himself. They therefore require specific approval as remuneration prior to being paid.

5.5 In Rule 4.12, a resolution may be passed fixing the basis of remuneration at the first meeting of creditors in a court liquidation. The liquidator should immediately notify the creditors of the details of the resolution, and when subsequently reporting to creditors on the progress of the liquidation, or submitting his final report, he should specify the amount of remuneration he has drawn in accordance with the resolution. Where the remuneration is based on time costs he also should provide details of the time spent and charge-out value to date and any material changes in the rates charged since the resolution was first passed. Where the remuneration is charged on a percentage basis the liquidator should provide the details set out in paragraph 5.1 above regarding work which has been sub-contracted out.

5.6 Paragraph 5.3 above does not however apply to a voluntary liquidation.

Previous page

Next page

6. WHAT IF A CREDITOR IS DISSATISFIED?

6.1 If a creditor believes that the liquidator's remuneration is too high he may, under Rule 4.35, apply to the court for an order that it be reduced. If the court considers the application to be well-founded, it shall make an order fixing the remuneration at a reduced amount or rate. Unless the court orders otherwise, the expenses of the application shall be paid by the applicant, and are not payable as an expense of the liquidation.

6.2 As noted in paragraph 4.3 above, the remuneration of a provisional liquidator is fixed by the court and there is no specific provision in the insolvency legislation to give creditors the right of appeal against the court's determination. Consequently if a creditor is dissatisfied, any appeal must be made to the appropriate court in accordance with normal court rules.

7. WHAT IF THE LIQUIDATOR IS DISSATISFIED?

7.1 If the liquidator considers that the remuneration fixed by the committee is insufficient he may request that it be increased by resolution of the creditors. He may also request the court for an order increasing its amount or rate, before or after recourse to the creditors. If he decides to apply to the court he must give at least 14 days' notice to the members of the committee and the committee may nominate one or more of its members to appear or be represented at the court hearing. If there is no committee, the liquidator's notice of his application must be sent to such of the creditors as the court may direct, and they may nominate one or more of their number to appear or be represented. The court may, if it appears to be a proper case, order the costs to be paid out of the assets of the company.

8. OTHER MATTERS RELATING TO REMUNERATION

8.1 Where the liquidator realises assets on behalf of a secured creditor, he will usually agree the basis of his remuneration for dealing with charged assets with the secured creditor concerned.

8.2 Where two (or more) joint liquidators are appointed it is for them to agree between themselves how the remuneration payable should be apportioned. Any dispute between them may be referred to the court, the committee or a meeting of creditors.

8.3 There may also be occasions when creditors will agree to make funds

available themselves to pay for the liquidator to carry out tasks which cannot be paid for out of the assets, either because they are deficient or because it is uncertain whether the work undertaken will result in any benefit to creditors. Arrangements of this kind are sometimes made to fund litigation or investigations into the affairs of the insolvent company. Any arrangements of this nature will be a matter for agreement between the liquidator and the creditors concerned and will not be subject to the statutory rules relating to remuneration.

A CREDITORS' GUIDE TO REMUNERATION OF TRUSTEES IN BANKRUPTCY

SCOTLAND

1. INTRODUCTION

1.1 When an individual becomes bankrupt the costs of the bankruptcy proceedings are paid out of his or her assets in priority to creditors' claims. The creditors, who hope to recover some of their debts out of the assets, therefore have a direct interest in the level of costs, and in particular the remuneration of the insolvency practitioner appointed to act as trustee. The insolvency legislation recognises this interest by providing mechanisms for creditors to determine the basis of the trustee's remuneration. This guide is intended to help creditors to be aware of their rights to approve and monitor remuneration and outlays and explain the basis on which remuneration and outlays are fixed.

2. SEQUESTRATION PROCEDURE

2.1 Sequestration is the court procedure for the administration of the affairs of an insolvent individual by a trustee in the interests of his creditors generally. The trustee's role is to preserve the debtor's estate until the assets can be realised and distributed among the creditors in a prescribed order of priority. Sequestration proceedings commence when an Award of Sequestration is made by the court as a result of a petition to the court at the instance of a creditor or a Trustee, or an application to the Accountant in Bankruptcy at the instance of the debtor. The petition for sequestration may nominate a trustee who may be appointed as interim trustee, who must be a registered

insolvency practitioner authorised by a recognised professional body or the Secretary of State, or the Accountant in Bankruptcy.

2.2 In certain cases no trustee is nominated in the petition or application for sequestration in which case the Accountant in Bankruptcy automatically becomes the trustee. The Accountant in Bankruptcy is an officer of the court appointed by the Secretary of State and will advise creditors within 60 days of the date award of sequestration as to whether he intends to call a statutory meeting.

3. COMMISSIONER/S

3.1 At the statutory meeting of creditors, or any subsequent meeting of creditors, the creditors or their mandatories have the right to appoint from amongst themselves a commissioner or commissioners (not more than five) to represent their interests throughout the sequestration process.

3.2 The trustee may call a meeting of commissioners at any time but he must hold one when required to do so by an order of the court or when the Accountant in Bankruptcy or any commissioner asks for one.

3.3 The trustee is required to report to the commissioners every 6 months on the progress of the sequestration. This provides an opportunity for the commissioners to monitor and discuss progress made and the level of the trustee's fees.

4. FIXING THE TRUSTEE'S REMUNERATION

4.1 The basis for fixing the trustee's remuneration and outlays is set out in Section 53 of the Bankruptcy (Scotland) Act 1985 (as amended) ("the Bankruptcy Act"). This section states that remuneration may be a commission calculated by reference to the value of the assets which are realised but that there shall be taken into account the work which, having regard to that value, was reasonably undertaken and the extent of the trustee's responsibilities in administering the estate.

4.2 If there are no commissioners, or the commissioners do not make the requisite determination, the level of the trustee's remuneration is determined by the Accountant in Bankruptcy.

Previous page

Next page

4.3 In fixing the trustee's remuneration for the final period the commissioners will require to take into account the trustee's best estimate of work required to conclude the case. The commissioners may also take into account any adjustment necessary relative to remuneration fixed in respect of a prior period when fixing the remuneration for any period.

4.4 In cases where a replacement trustee is elected at the statutory meeting of creditors and subsequently that election is confirmed by the Sheriff, the remuneration and outlays of the original trustee are fixed by the Accountant in Bankruptcy in accordance with Sections 26 and 26A of the Bankruptcy Act.

5. WHAT INFORMATION SHOULD BE PROVIDED BY THE TRUSTEE?

5.1 When seeking agreement to his remuneration and outlays, the trustee should provide sufficient supporting information to enable the commissioners or the Accountant in Bankruptcy to form a judgement as to whether the proposed remuneration and outlays are reasonable, having regard to all the circumstances of the case. The trustee should always make available an up to date receipts and payments account. Where the remuneration is to be charged on a time basis the trustee should be prepared to disclose the amount of time spent on the case and the charge-out value of the time spent, together with such additional information as may reasonably be required having regard to the size and complexity of the case. Where the remuneration is charged on a percentage basis, the trustee should provide details of any work which has been or is intended to be contracted out which would normally be undertaken directly by a trustee or his staff.

5.2 Where a trustee makes, or proposes to make, a separate charge by way of outlays to recover the cost of facilities provided by his own firm, such as room hire, document storage or communication facilities (category 2 disbursements), he should disclose those charges to the commissioners or the Accountant in Bankruptcy when seeking approval of his remuneration, together with an explanation of how those charges are made up and the basis on which they are arrived at.

6. WHAT IF A CREDITOR IS DISSATISFIED?

6.1 If a creditor believes the trustee's remuneration is too high, he may appeal it. The statutory time limits for appealing against the determination are contained within Section 53 of the Bankruptcy Act although it is common

practice to give fourteen days in which to appeal from the date of advising creditors of the determination of remuneration. If the determination is made by a commissioner he must do so to the Accountant in Bankruptcy, whilst if a determination is made by the Accountant in Bankruptcy he must do so to the Sheriff. In both instances a simultaneous notice of appeal must be sent to the trustee.

6.2 If a creditor believes that the original trustee's remuneration is too high, he may appeal it within 14 days of the issue of its determination. The appeal must be made to the sheriff and the detailed provisions are contained within Sections 26 and 26(A) of the Bankruptcy Act.

7. WHAT IF THE TRUSTEE IS DISSATISFIED?

7.1 The appeal procedure for a trustee is identical to the procedure noted in paragraph 6.1 above in respect of creditor's appeals with the obvious exception regarding the simultaneous notice of appeal.

7.2 In cases where the original trustee does not himself become the trustee, both he and the trustee have a right of appeal on the same terms as creditors detailed in paragraph 6.2 above.

7.3 In cases where the Accountant in Bankruptcy was the original trustee and some other person becomes the trustee, the trustee (but not the original trustee) has a right of appeal on the same terms as creditors detailed in paragraph 6.2 above. This is because in such cases, the original trustee being the Accountant in Bankruptcy will have determined his remuneration in accordance with a set scale and there is therefore no need for a right of appeal by the original trustee.

8. OTHER MATTERS RELATING TO REMUNERATION

8.1 There may be occasions when creditors will agree to make funds available themselves to pay for the trustee to carry out tasks which cannot be paid for out of the assets, either because they are deficient or because it is uncertain whether the work undertaken will result in any benefit to creditors. Arrangements of this kind are sometimes made to fund litigation or investigations into the bankrupt's affairs. Any arrangements of this nature will be a matter for agreement between the trustee and the creditors concerned and will not be subject to the statutory rules relating to remuneration.

A CREDITORS' GUIDE TO REMUNERATION FOR A TRUSTEE

ACTING UNDER A TRUST DEED

SCOTLAND

1. INTRODUCTION

1.1 When a debtor grants a trust deed the costs of the proceedings are paid out of the debtor's assets in priority to creditors' claims. The creditors, who hope to recover some of their debts out of the assets, therefore have a direct interest in the level of costs, and in particular the remuneration of the insolvency practitioner appointed to act as trustee. The insolvency legislation recognises this interest by providing mechanisms for creditors to fix the basis of the trustee's remuneration. This guide is intended to help creditors be aware of their rights to approve and monitor remuneration, and explains the basis on which remuneration is fixed.

2. TRUST DEED PROCEDURE

2.1 A trust deed is a deed granted by or on behalf of the debtor whereby his estate is conveyed to the trustee for the benefit of his creditors generally. It tends to be less formal and less expensive than a sequestration.

2.2 Under the deed, the debtor conveys his entire estate to a trustee, who is empowered to sell and dispose of all the assets, and to carry on any business formerly conducted by the debtor. The trustee will distribute the balance of funds available after the payment of expenses to the creditors, following which the trustee will obtain his discharge from the creditors.

2.3 Accession of creditors is an essential part of the procedure, as without it there may be problems in discharging the deed. Unless a majority of creditors or not less than one third in value object to the trust deed, the creditors are presumed to have acceded and it becomes a protected trust deed. Once a trust deed has become protected, a creditor who has been notified of but who has not acceded to the trust deed will have no higher right to recover his debt than a creditor who has acceded. It should be noted that if a creditor receives notification of, but does not object to a trust deed, he is deemed to have acceded.

2.4 If a trust deed remains unprotected, creditors can still take action to recover their debts. This covers the various forms of diligence available to them including petitioning for sequestration.

3. FIXING THE TRUSTEE'S REMUNERATION

3.1 The remuneration of a trustee will be determined by the trust deed. However, there is provision in the insolvency legislation for the formation of a committee of creditors to assist the trustee, audit his accounts and fix his remuneration.

3.2 Whether or not this provision is included in the deed, Schedule 5 of the Bankruptcy (Scotland)Act 1985 (as amended) ("the Bankruptcy Act") states that on application of the debtor, the trustee, or any creditor, the Accountant in Bankruptcy is specifically authorised to audit the trustee's accounts and fix his remuneration. Schedule 5 also provides that the Accountant in Bankruptcy may, at any time, audit the trustee's accounts and fix his remuneration. The Accountant in Bankruptcy is an officer of the court appointed by the Scottish Ministers.

3.3 The trustee under a protected trust deed, or the debtor, or any creditor may appeal to the sheriff by way of summary application against any determination by the Accountant in Bankruptcy fixing the remuneration to the trustee. A debtor or creditor may appeal only if able to satisfy the sheriff that he or she has, or is likely to have, a pecuniary interest in the outcome of the appeal.

4. WHAT INFORMATION SHOULD BE PROVIDED BY THE TRUSTEE?

4.1 There are no specific requirements under Schedule 5 of the Bankruptcy Act for the provision of information by the trustee.

A CREDITORS' GUIDE TO INSOLVENCY PRACTITIONERS' FEES

UNDER A VOLUNTARY ARRANGEMENT

SCOTLAND

1. INTRODUCTION

1.1 In a voluntary arrangement, as in other types of insolvency, the amount of money available for creditors is likely to be affected by the level of costs, including the remuneration of the insolvency practitioner appointed to implement the arrangement. This guide explains how fees are fixed in voluntary arrangements, how the creditors can affect the level of fees, and the information which should be made available to them regarding fees.

2. THE VOLUNTARY ARRANGEMENT PROCEDURE

2.1 Voluntary arrangements are available to companies and are often referred to as CVAs.

2.2 The procedure enables the company to put a proposal to their creditors for a composition in satisfaction of their debts or a scheme of arrangement of their affairs. A composition is an agreement under which creditors agree to accept a certain sum of money in settlement of the debts due to them. A CVA may be used as a stand-alone procedure or as an exit route from an administration. It may also be used where a company is in liquidation, but this is extremely rare. The proposal will be made by the directors, the administrator or the liquidator, depending on the circumstances. The procedure is extremely flexible and the form which the voluntary arrangement takes will depend on the terms of the proposal agreed by the creditors. The proposal must provide for an insolvency practitioner to supervise the implementation of the arrangement. Until the proposal is approved by the creditors, the practitioner is known as the nominee. If the proposal is approved, the nominee (or if the creditors choose to replace him, his replacement) becomes the supervisor.

3. FEES, COSTS AND CHARGES - STATUTORY PROVISIONS

3.1 The fees, costs, charges and expenses which may be incurred for the purposes of a voluntary arrangement are set out in the Insolvency (Scotland) Rules 1986 (as amended) ("the Rules) (rule 1.22). They are:

- any disbursements made by the nominee prior to the decision approving the arrangement taking effect under section 4A of the Insolvency Act 1986 (as amended), and any remuneration for his services agreed between himself and the company (or the administrator or liquidator, as the case may be);

- any fees, costs, charges or expenses which:

  - are sanctioned by the terms of the arrangement (see below), or

  - would be payable, or correspond to those which would be payable, in an administration or winding up.

3.2 The rules also require the following matters to be stated or otherwise dealt with in the proposal (Rule 1.3):

- The amount proposed to paid to the nominee (as such) by way of remuneration and expenses, and

- The manner in which it is proposed that the supervisor of the arrangement should be remunerated and his expenses defrayed.

4. THE ROLE OF THE CREDITORS

4.1 It is for the creditors' meeting to decide whether to agree the terms relating to remuneration along with the other provisions of the proposal. The creditors' meeting has the power to modify any of the terms of the proposal, including those relating to the fixing of remuneration. The nominee should be prepared to disclose the basis of his fees to the meeting if called upon to do so. Although there are no further statutory provisions relating to remuneration in voluntary arrangements, the terms of the proposal may provide for the establishment of a committee of creditors and may include among its functions the fixing of the supervisor's remuneration.

5. WHAT INFORMATION SHOULD THE CREDITORS RECEIVE?

5.1 Whether the basis of the supervisor's remuneration is determined at the meeting which approves the arrangement or by a committee of creditors, the supervisor, or proposed supervisor should provide details of the charge-out rates of all grades of staff, including principals, which are likely to be involved on the case.

Previous page

Next page

5.2 Where the supervisor's fees are to be agreed by a committee of creditors during the course of the arrangement, the supervisor should provide sufficient supporting information to enable the committee to form a judgement as to whether the proposed fee is reasonable having regard to all the circumstances of the case, and should always provide an up to date receipts and payments account. Where the fee is to be charged on a time basis the supervisor should disclose the amount of time spent on the case and the charge out value of the time spent, together with such additional information as may reasonably be required having regard to the size and complexity of the case and the functions conferred on the supervisor under the terms of the arrangement. The additional information should comprise a sufficient explanation of what the supervisor has achieved and how it was achieved to enable the value of the exercise to be assessed and to establish that the time has been properly spent on the case.

5.3 Where the basis of the remuneration of the supervisor as set out in the proposal does not require any further approvals by the creditors or any committee of creditors, the supervisor should specify the amount of remuneration he has drawn in accordance with the provisions of the proposal in his subsequent reports to creditors on the progress of the arrangement. Where the fee is based on time costs he should also provide details of the time spent and charge-out value to date and any material changes in the rates charged for the various grades since the arrangement was approved. He should also provide such additional information as may be required in accordance with paragraph 5.2.

5.4 Where the supervisor proposes to recover costs which, whilst being in the nature of expenses or disbursements, may include an element of shared or allocated costs (such as room hire, document storage or communication facilities provided by the supervisor's own firm), they must be disclosed and be authorised by those responsible for approving his remuneration. Such expenses must be directly incurred on the case and subject to a reasonable method of calculation and allocation. A charge for disbursements calculated as a percentage of the amount charged for remuneration is not allowed.

Previous page

Next page

APPENDIX C

Suggested format for production of information

Notes

1. The purpose of the attached form is to provide information to support requests for approval of office-holders' remuneration in a standard way so that those receiving such requests can make ready comparisons between cases and an informed assessment of each application. In larger or more complex cases further levels of narrative or tabular information may be needed.

   Office-holders should appreciate that it is for them to provide the information that those receiving the request will need in order to be satisfied about the reasonableness of their request and that failure to provide adequate information is likely to have an adverse effect on the assessment.

2. The time and rate schedules should be completed to show the total hours spent. Office-holders, if requested, should be able to give a breakdown of hours by person by period together with an explanation of the activity performed. Any such breakdown should identify clearly how each figure in the schedule is constituted.

3. The level of disclosure suggested by the standard format may not be appropriate in all instances. The office-holder may take account of the proportionality considerations referred to in paragraph 3.4 of Statement of Insolvency Practice 9. For example, where the cumulative remuneration for which approval is sought are expected to amount to less than £10,000 a breakdown of the summary should only be submitted if required to explain any unusual features. For cumulative remuneration between £10,000 and £50,000 a first level of breakdown similar to that shown may well provide the appropriate detail. Where cumulative remuneration exceeds £50,000, proportionality is likely to require a further level of breakdown.

4. The total remuneration included in the approval request should exclude VAT. In cases where VAT on fees is not recoverable, such VAT can be shown separately as a cost of the process.

5. In larger cases it will be appropriate to show other categories of work, particularly if they have already been produced for budgeting purposes or for creditors or their representatives, for example in reports to a charge holder in a receivership, or to informal committees of creditors in a provisional liquidation.

6. All payments from or on behalf of the insolvent estate to the office-holder's firm or to any party in which the office-holder, or his firm or any associate has an interest should be included in the disbursements schedules whether or not they are true disbursements or relate to out of pocket expenses. The office-holder should categorise these payments according to the recipient and their nature and purpose and the figures should be readily cross-referable to the receipts and payments account and shown net of VAT.

Suggested format	
Case name	
Court and number	
Office Holder	
Firm	
Address Telephone Reference	
Type of Appointment Date of Appointment Date of Administration/Liquidation*	

* Delete as appropriate

Previous page

Next page

1. AN OVERVIEW OF THE CASE

This overview should be framed in terms that will enable the approving body to judge

- the complexity of the case,
- any exceptional responsibility falling on the office-holder,
- the office-holder's effectiveness, and
- the value and nature of the property in question.

This overview would normally be expected to include an explanation of the nature of the assignment and the office-holder's own initial assessment of the assignment (including the anticipated return to creditors) and the outcome (if known). This should refer to the initial views on how the assignment was to be handled, including decisions on staffing or subcontracting and the appointment of advisers. It should also explain:

- Any significant aspects of the case, particularly those that affect the amount of time spent.
- The reasons for subsequent changes in strategy.
- Any comments on any figures in the summary of time spent accompanying the request the office-holder wishes to make. Office-holders should recognise that if they are not able to provide a clear and sufficient explanation of time spent then this is likely to have an adverse impact on the fee assessment.
- The steps taken to establish the views of creditors, particularly in relation to agreeing the strategy for the assignment, budgeting, time recording, or the drawing, or agreement of remuneration.
- Any existing agreement about remuneration.
- Details of how other professionals, including subcontractors, were chosen, how they were contracted to be paid, and what steps have been taken to review their fees.

In a larger case, particularly if it involved trading, the practitioner should be prepared to support his explanation with evidence of his considerations

about staffing and managing the assignment and how he set and reviewed his strategy. Where they have been agreed with creditors or their representatives, he should also provide copies of his time budgets and fee reports.

2. EXPLANATION OF OFFICE-HOLDERS CHARGING AND DISBURSEMENT RECOVERY POLICIES

This section should comprise:-

- A statement of the office-holder's charging policy in relation to time to enable those receiving the application to make a comparison with other applications and with current published fee information. It should be made clear what grades of staff were charged to the assignment and what sort of staff working on the assignment were not charged to it directly. For example, were secretaries and cashiers charged to the assignment for all the time they worked on it, only in respect of large blocks of time devoted to it or, being accounted for as an overhead cost of the office-holder's firm, not at all?

- A statement of the office-holder's policy in relation to recharges of disbursements. This should explain payments made to the office-holder's firm, whether simple reimbursement of actual payments made on behalf of the assignment, such as statutory advertising costs, or charges relating to the recovery of overhead costs, which are discussed in section 5 of SIP9.

3. NARRATIVE DESCRIPTION OF WORK CARRIED OUT

The narrative should provide details of work undertaken during the period and should be related to the table of time spent for the period.

An explanation should be given regarding the grades of staff used to undertake the different tasks carried out and the reasons why it was appropriate for those grades to be used.

Mention should also be made of any additional value brought to the estate during the period, for which the office-holder wishes to claim increased remuneration.

To aid understanding of the narrative it may be appropriate to divide it into separate time periods. These might be, for example, statutory accounting

periods, or periods devoted to trading or some other significant activity. In smaller or routine cases it may be appropriate for the narrative to treat the case as a whole.

4. TIME AND CHARGE OUT SUMMARIES

A table of time spent and charge out value should be provided for each of the time periods chosen by the office-holder under paragraph 3 above. The summary should be in the following (or similar) format:

	Hours					Time Cost £	Average hourly rate £
Classification of work function	Partner	Manager	Other Senior Professionals	Assistants & Support Staff	Total Hours		
Administration and planning							
Investigations							
Realisation of assets							
Trading							
Creditors							
Case specific matters (Specify)							
Total hours							
Total fees claimed (£)							

(Further analysis may be necessary in larger cases. In smaller cases these categories of activity may not always be relevant. See paragraph b) below and note 3 of the Notes to the suggested format.)

To be able to produce this information, the following points should be noted:-

a) For each individual working on the case, hours spent, by activity, will need to be collated, together with the total fees attributed to that time and a resultant average hourly rate.

b) The five standard activities - administration and planning, investigations, realisation of assets, trading and creditors - should be shown in every case (although, clearly, not all of these activities will always take place). However, there may well be additional activities that need to be identified separately in a particular case such as, for example, insurance litigation, managing investments in subsidiaries or negotiating settlement of claims against directors. A guide to what might be included in the standard activities is:

Standard Activity	Examples of work
Administration and Planning	Case planning
	Case reviewing
	Administrative set-up
	Appointment notification
	Maintenance of records
	Statutory reporting and compliance
Investigations	SIP 2 review
	CDDA reports
	Investigating antecedent transactions
Realisation of Assets	Identifying, securing, insuring assets
	Retention of title
	Debt collection
	Property, business and asset sales – fixed charge
	Property, business and asset sales - floating charge
Trading	Management of operations
	Accounting for trading
	On-going employee issues
Creditors	Communication with creditors
	Creditors' claims (including employees' and other preferential creditors')
	Adjudication on claims and closure

MAIN CONTENTS

SECTION 1
THE ETHICS CODE

SECTION 2
STATEMENTS OF INSOLVENCY PRACTICE (SCOTLAND)

SECTION 3
INSOLVENCY BULLETINS (SCOTLAND)

SECTION 4
INSOLVENCY GUIDANCE PAPERS

SECTION 5
PERSONAL DEBTORS (SCOTLAND)

SECTION 6
OTHER PROFESSION REGULATIONS AND GUIDANCE

CONTACTS

Previous page

Next page

5. CATEGORY 2 DISBURSEMENTS

Details of category 2 disbursements paid during each of the time periods should be provided in the following or similar format:-

Amounts paid or payable to the office holder's firm or to any party in which the office holder or his firm or any associate has an interest (note 6)	
Type and purpose	£
Total	

6. SUPPORTING DOCUMENTS

Any relevant documents should be attached and details should be supplied. Documents which will normally be required included:-

- An up to date receipts and payments account which complies with current best practice
- A schedule of charge out rates applied from time to time.
- Relevant resolutions (if any).

Previous page

Next page

2.11 STATEMENT OF INSOLVENCY PRACTICE 10 (SCOTLAND) PROXY FORMS

1. This statement of Insolvency Practice is to be read in conjunction with the Explanatory Foreword.

2. This statement applies to Scotland only.

Corporate Insolvency - Proxies

3.1 Rule 7.15(2) of the Insolvency (Scotland) Rules 1986 ("the Rules") stipulates that, when notice is given of a meeting to be held in corporate insolvency proceedings and forms of proxy are sent out with the notice, no form so sent out shall have inserted in it the name or description of any person. No proxy form, therefore, should have inserted in it the name or description of any person for appointment as an insolvency office holder, either solely or jointly, or for appointment as a member of a committee, or as proxy holder.

3.2 Members who send out proxy forms should ensure that no part of the form is pre-completed with the name or description of any person (except for the title of the proceedings, which may be inserted for the convenience of the person completing the form).

3.3 When a member advises on the sending out of proxy forms he is required to take all reasonable steps to ensure that no part of the form is pre-completed with the name or description of any person. If the person whom a member is advising refuses to accept the member's advice in this regard the member should ensure that he has put his advice in writing so that he can demonstrate that he has given advice consistent with the law.

3.4 Rule 7.16(2) of the Rules stipulates that a proxy may be lodged at or before the meeting at which it is to be used.

Individual Insolvency - Mandates

4.1 Paragraph 11 of Schedule 6 to the Bankruptcy (Scotland) Act 1985 provides that a creditor may authorise in writing any person to represent him at a meeting and such authorisation must be lodged with the Interim Trustee or, as the case may be, the Permanent Trustee before the commencement of the meeting. There is no form of mandate prescribed by legislation. It should

Previous page

Next page

be noted that although the prescribed form of statement of claim provides for the insertion of the name and address of the authorised person, this does not amount to a mandate. There is no legal requirement for members to send mandate forms to creditors (or, indeed, statement of claim forms except where obliged to do so in agency cases by the contract entered into with the Accountant in Bankruptcy).

4.2 Members who chose to send out mandate forms should ensure that no part of the form is pre-completed with the name or description of any person (except for the title of the proceedings, which may be inserted for the convenience of the person completing the form).

4.3 When a member advises on the sending out of mandate forms, he should take all reasonable steps to ensure that no part of the form is pre-completed with the name or description of any person. If the person whom a member is advising refuses to accept the member's advice in this regard, the member should ensure that he has put his advice in writing.

4.4 Although the statutory provision referred to in paragraph 4.1 does not apply to trust deeds, the statements of practice set out in paragraphs 4.2 and 4.3 should be followed in trust deed cases

Effective Date: 01 May 1997

Previous page

Next page

2.12 STATEMENT OF INSOLVENCY PRACTICE 11 (SCOTLAND) THE HANDLING OF FUNDS IN FORMAL INSOLVENCY APPOINTMENTS

1. INTRODUCTION

[Not reproduced. Superseded by SIP1 with effect from 02 May 2011.]

2. STATEMENT OF INSOLVENCY PRACTICE

2.1 This statement of insolvency practice concerns the handling of funds by insolvency office holders in the administration of insolvency cases. It applies to Scotland only.

2.2 Members should ensure that records are maintained to identify the funds (including any interest earned thereon) and other assets of each case for which they have responsibility as insolvency office holder. Such funds and assets must be maintained separately from those of the office holder or his firm. Subject to the rules relating to the payment of monies into the Insolvency Services Account, which are set out in Insolvency Technical Reminder 1 (English Registered Companies only), case funds should be held in a bank account(s) which meet the following criteria to ensure that these principles are adhered to:

- all money standing to the credit of the account(s) is held by the office holder as case money and the bank is not entitled to combine the account with any other account (including any global, omnibus, master, hub, nominee, sub accounts or similar) or exercise any right to set off or counterclaim against money in that account in respect of any money owed to it on any other account (including any global, omnibus, master, hub, nominee, sub accounts or similar) of the office holder or his firm;
- interest payable on the money in the account(s) must be credited to that account(s);
- the bank must describe the account(s) in its records to make it clear that the money in the account does not belong to office holder or his firm;
- no individual case funds/account(s) can be set off against any overdrawn case funds/accounts (including any global, omnibus, master, hub, nominee, sub accounts or similar).

Previous page

Next page

2.3 Where funds relating to a case are received by cheque payable to the office holder or his firm which cannot be endorsed to the insolvent estate, such cheques may be cleared through an account maintained in the name of the office holder or his firm. Such accounts should be operated on a trust basis and should be maintained separately from the practitioner's office accounts. Funds paid into such accounts should be paid out to the case to which they relate as soon as possible.

2.4 Monies coming into the hands of practitioners which are the property of individuals or companies for which they are acting otherwise than in the capacity of insolvency office holder must be held in an account operated on trust principles and subject to any applicable client money rules.

Effective Date: 01 June 2007

Previous page

Next page

2.13 STATEMENT OF INSOLVENCY PRACTICE 12 (SCOTLAND) RECORDS OF MEETINGS IN FORMAL INSOLVENCY PROCEEDINGS

1. INTRODUCTION

1.1 This statement of Insolvency Practice is to be read in conjunction with the Explanatory Foreword.

1.2 This statement of insolvency practice concerns the keeping of records of meetings of creditors, committees of creditors, and members or contributories of companies in formal insolvency proceedings. The statement is in two parts. The first summarises the statutory provisions regarding the keeping of such records in the various types of insolvency appointment. The second sets out the minimum standards which should be observed with regard to such records in all cases as a matter of best practice.

1.3 The statement applies to Scotland only. References to the Insolvency Act are to the Insolvency Act 1986, references to the Bankruptcy Act are to the Bankruptcy (Scotland) Act 1985 and references to the Rules are to the Insolvency (Scotland) Rules 1986.

2. THE STATUTORY PROVISIONS

2.1 **Meetings of Creditors - All Corporate Insolvencies** Chapter 1 of Part 7 of the Rules apply to all meetings held in corporate insolvency proceedings, other than creditor committees in liquidations, receiverships or administrations (Rule 7.1) and the comments in paragraph 2.2 to 2.8 apply only to corporate insolvency procedures.

2.2 **Report of Meetings - All Insolvencies**

The Chairman at any meeting shall cause a report to be made of the proceedings at the meeting which shall be signed by him. The report shall include:

a) a list of the creditors or contributories who attended the meeting, either in person or by proxy;

b) a copy of every resolution passed; and

Previous page

Next page

c) if the meeting established a creditors' committee or a liquidation committee, a list of the names and addresses of those elected to be members of the committee.

The Chairman shall keep a copy of the report of the meeting as part of the sederunt book in the insolvency proceedings. (Rule 7.13)

2.3 **Chairman of Meetings**

Rule 7.5 states that the Chairman of any meeting of creditors or contributories in insolvency proceedings other than at a meeting of creditors summoned under Section 98 shall be the responsible insolvency practitioner, or, except at a meeting of creditors summoned under Section 95, a person nominated by him in writing who must either be a qualified insolvency practitioner or an experienced employee of the responsible insolvency practitioner.

2.4 **Meeting of Creditors - Administrations**

In addition to the requirements in 2.2 above the administrator is required to annex to the report of the meeting details of the proposals which were considered by the meeting and of any revisions and modifications which were also considered. (Rule 2.13)

2.5 **Meeting of Creditors - Creditors Voluntary Liquidation**

The Chairman of the meeting summoned under Section 98 shall be one of the directors of the company. (Section 99(1)) Insolvency Act.

2.6 **Meeting of Creditors - Court Liquidation**

At the first meeting of creditors or contributories in a court liquidation, the interim liquidator shall be the Chairman except that, where a resolution is proposed to appoint the interim liquidator to be the liquidator, another person may be elected to act as Chairman for the purpose of choosing the liquidator.

2.7 **Meeting of Creditors and Members - Company Voluntary Arrangement**

In addition to the requirement of 2.2 above the report of the meetings summoned under Section 3 of the Insolvency Act shall state:

a) whether the proposal for a voluntary arrangement was approved or rejected and, if approved, with what (if any) modifications;

b) set out the resolutions which were taken at each meeting, and the decision on each one;

c) list the creditors and members of the company (with their respective values) who were present or represented at the meeting, and how they voted on each resolution; and

d) include such further information (if any) as the Chairman thinks it appropriate to make known to the court. (Rule 1.17.)

2.8 **Report as Evidence of Proceedings at Meetings**

A report of proceedings at a meeting of the company or of the company's creditors or contributories in any insolvency proceedings, which is signed by a person describing himself as the Chairman of that meeting, shall be deemed, unless the contrary is shown, to be sufficient evidence of the matters contained in that report (Rule 7.25).

2.9 **Meeting of Creditors - Sequestrations**

The provisions of the insolvency rules do not extend to sequestrations. The only requirement laid out in Section 23 of the Bankruptcy Act is for the Chairman to arrange for a record to be made of the proceedings at the meeting. It is suggested that this should include similar information to that prescribed for corporate insolvency proceedings.

2.10 **Meeting of Creditors - Trust Deeds**

There is no statutory requirement for a meeting to be held in a Trust Deed, but if one is held then the comments in 2.9 above should be applied.

3. BEST PRACTICE

3.1 Records should be kept of all meetings of creditors, committees of creditors, or members or contributories of companies, held in any insolvency proceedings. The record should include, as a minimum, the following information:

- The title of the proceedings
- The date, time and venue of the meeting
- The name and description of the Chairman and any other person involved in the conduct of the meeting

Previous page

Next page

- A list, either incorporated into the report or appended to it, of the creditors, members or contributories attending or represented at the meeting
- The name of any officer or former officer of the company attending the meeting if not attending in one of the above capacities
- The exercise of any discretion by the Chairman in relation to the admissibility or value of any claim for voting purposes
- The resolutions taken and the decision on each one and, in the event of a poll being taken, the value or number (as appropriate) of votes for and against each resolution
- Where a committee is established, the names and addresses of the members
- Such other matters as are required by the statutory provisions applicable to the relevant insolvency procedure as set out in section 2 above or, in the case of a voluntary arrangement, by the terms of the proposal.

Where a meeting has been asked to approve an office holder's remuneration, the information provided to the meeting in support of that request should form part of, or be retained with, the record of the proceedings.

3.2 The record should be signed by the Chairman and be inserted into the sederunt book. In the case of committee meetings a copy of the record should be sent to every person who attended, or was entitled to attend, the meeting.

3.3 Forms of proxy retained under Rule 7.17 should be inserted in the sederunt book.

3.4 Where a member is the office holder or is appointed office holder as a result of the proceedings at the meeting and has not himself acted as Chairman of the meeting, he should endeavour to ensure that the record is signed by the Chairman and complies with the above principles. If the member is not satisfied that the record signed by the Chairman is an accurate record of the proceedings, he should either prepare his own record for his files or prepare a note for his files explaining in what respects he disagrees with the Chairman's records.

Effective Date: 01 May 1997

2.14 STATEMENT OF INSOLVENCY PRACTICE 13 (SCOTLAND) ACQUISITION OF ASSETS OF INSOLVENT COMPANIES BY DIRECTORS

1. INTRODUCTION

1.1. This statement of Insolvency Practice is to be read in conjunction with the Explanatory Foreword. 1.2. The purpose of this statement of insolvency practice is to:

- ensure that members are familiar with the legal obligations of directors in relation to the acquisition of assets of companies by them or persons connected with the company (as defined by section 249 of the Insolvency Act 1986) (together in this statement referred to as "directors") and the statutory provisions relating to such acquisitions;
- ensure that members are aware of their legal obligations as insolvency office holders in relation to the disposal of assets to directors and of relevant statutory provisions;
- set out best practice with regard to the disposal of assets to, and their acquisition by, directors;
- set out best practice with regard to the disclosure of such transactions.

This statement has been produced in recognition of the fact that the acquisition of assets of insolvent and prospectively insolvent businesses by directors may give rise to concerns that assets may have been disposed of at less than market value and that those who have been prejudiced by the insolvency of the disposing company may be exposed to further risk through continued trading by those who have or may have had responsibility for the insolvency of the disposing company. It recognises that connected party transactions may be in the best interests of creditors but requires such transactions to be conducted with the greatest degree of propriety and with disclosure to those interested as soon as reasonably practicable.

2. SCOPE

The statement covers the following:

- legal obligations of directors and related statutory provisions;
- obligations of members acting as:
  - professional adviser to the directors as the people responsible for the conduct of the company's affairs;
  - insolvency practitioner assisting the directors in the convening of meetings of members and creditors in connection with the winding up of the company as a creditors' voluntary liquidation;
- obligations of members acting as;
  - nominee in relation to a proposed company voluntary arrangement;
  - office holder - as supervisor of such arrangement if approved by members and creditors;

    as administrator;

    as receiver or administrative receiver;

    as provisional liquidator;

    as liquidator in a winding up by the court or in a creditors' voluntary liquidation.

In this statement the word "director" includes directors by whatever name called and shadow directors, and the word "assets" includes all tangible and intangible assets including the goodwill and the right to use any trading name of the company.

3. THE LEGAL OBLIGATIONS OF DIRECTORS AND STATUTORY PROVISIONS

The following are the principal legal obligations and some of the statutory provisions of particular relevance to directors of a company which is or is prospectively insolvent.

The overriding obligation of directors of a company is to act in the best interests of the company, its creditors and its members. Failure to do so exposes directors to claims for misfeasance or breach of duty.

At any time when the directors knew or ought to have known that insolvent liquidation is unavoidable they have an obligation to take such action as is appropriate to protect the interests of creditors. Failure to do so renders them liable to claims under section 214 of the Insolvency Act 1986.

Transactions at an undervalue and preferences as defined in the insolvency act 1986 may be set aside at the instance of a liquidator or administrator.

The acquisition of assets of a company by directors or parties connected with them may require approval by the members of the company by resolution (Companies Act 1985 section 320). It is the duty of directors to ensure that when it is required, such approval is obtained before any relevant transaction is undertaken. Any transaction requiring approval but undertaken without it will be voidable at the instance of the company unless the conditions set out in subsection 322(2) of the Companies Act 1985 apply, and may give rise to claims against directors on any gains made by them.

The use by any person connected with a company which has gone into insolvent liquidation of the name of that company or of a similar name is only permissible if the provisions of section 216 of the Insolvency Act 1986 are complied with or the circumstance specified in rules 4.80 to 4.82 of the Insolvency (Scotland) Rules 1986 apply. Failure to comply renders the persons concerned liable to prosecution and personal liability for the debts of the company under section 217.

4. THE OBLIGATIONS OF MEMBERS ACTING IN AN ADVISORY CAPACITY

4.1. Members acting as Professional Advisers to Directors

4.1.1. Members acting in an advisory capacity in relation to the affairs of companies in financial difficulties must at all time have regard to the general professional conduct guidance of the body by whom they are authorised to act as a permit holder. Subject to this overriding obligation, an advising member should:

- agree and record the identity of the instructing client. This is particularly important where advice is given in relation to insolvent companies and members should ensure that it is clear whether the instructing party is the company, its board of directors or one or more of its directors individually;
- act in the interests of his client with objectivity, integrity and independence;
- ensure that his client is made aware of the matters set out in paragraph 3 above;
- keep under consideration whether his client has any conflicts of interest or duty and bring any such conflicts to the attention of his client. Where a client persists in disregarding material conflicts of interest or duty, the member should cease to act unless the client agrees to limit the client's retainer to one such duty or interest and to take advice on the other elsewhere;
- not accept instructions to assist a client in conduct which will undermine public confidence in the proper administration of insolvency procedures.

4.1.2. Members should bear in mind that, when asked to advise in relation to the planning or execution of a transaction, they may incur civil or criminal liability through participation, even in an advisory capacity, and will in any event be acting improperly if they assist directors in any conduct which amounts to misfeasance. A member should cease to act if his advice to an officer that a proposed act or omission would amount to misfeasance is disregarded. However, this does not prejudice any duty of a member to give confidential advice in the

interests of a client in relation to events which occurred before the member was instructed.

4.1.3. Members acting in an advisory capacity which may lead to their assisting the directors in relation to the creditors' voluntary liquidation of the company should bear in mind the requirements for disclosure at the section 98 meeting of transactions between the company and its directors (and connected parties) in the period of one year prior to the winding up and the names of those who advised the directors (as such) in relation to such transactions as set out in Statement of Insolvency Practice 8 (SCOT).

4.2. Members acting in relation to Section 98 Meetings

4.2.1. Where a member is assisting the directors in relation to the convening of meetings of members and creditors for the purposes of a creditors' voluntary liquidation, he should ensure that his advice to directors as such in the period prior to the commencement of the winding up is given on the same basis as set out in paragraph 4.1 above. There can be circumstances when it is in the best interest of creditors for a connected party transaction to be undertaken with complete propriety but it is essential that such a transaction is not undertaken without a thorough appraisal of its propriety and the benefits expected to accrue to creditors from it.

4.2.2. In paragraph 4.1.3 reference has been made to the disclosure requirements in Statement of Insolvency Practice 8 (SCOT). It is the duty of the advising member to inform the directors of the need for full disclosure of connected party transactions.

4.2.3. Members should consider, if any connected party transactions are undertaken at any time when they are acting as advisers to the directors, whether it is appropriate for them to seek appointment as liquidator, bearing in mind the obligations of liquidators to investigate antecedent transactions.

Previous page

Next page

5. MEMBERS ACTING AS OFFICE HOLDERS

5.1. The obligations on both directors and office holders in relation to the maximisation of realisations of assets or the optimisation of the position of members and creditors of the company do not in any way preclude disposals by way of connected party transactions. Members should ensure that such transactions are conducted with due regard to their own and the directors' obligations.

5.2. There are no requirements of Scots law which require assets to be disposed of by any particular method. There is an overriding duty to obtain the best price for assets whether sales are effected by private treaty sale, by sale by tender or at auction. While it is recognised that circumstances may arise when full exposure to the market of the availability of assets for purchase is not practicable, members are reminded that they should normally, unless sale by auction is the chosen means of disposal, take steps to advertise assets for sale or circularise (for example, by use of mailing lists) known prospective interested parties.

5.3. It is the member's duty to ensure that all transactions between the company (of which he is acting as office holder) and the directors and connected parties are conducted on a fully arms length basis and, as regards the value of any assets which are the subject of any such transaction, on the basis of a professional appraisal of the value of those assets. When such appraisal is not conducted by an independent valuer the office holder should ensure that he has conducted all due enquiries as to the value of the assets and retains appropriate documentation in his papers. Where assets are sold without professional valuation, the office holder should consider seeking the views of the committee, if there is one. It is his duty to ensure that the value of the assets is maximised but this does not require him to obtain the maximum value for each individual asset if disposal of a parcel of assets or the assets as a whole will, in aggregate, maximise total realisations. Since the allocation of the consideration between the constituent assets affects interests of creditors, it should be made on a basis which can be justified objectively.

5.4. Where a member is acting as provisional liquidator and it is proposed that assets of the company should be acquired by directors, the sanction of the court should be obtained.

Previous page

Next page

5.5. Where a member is acting as nominee or supervisor in relation to a voluntary arrangement, he should ensure that any connected party transactions are in the best interests of the company, its members and creditors, and are only undertaken in accordance with the terms of the arrangement as approved by the members and creditors. When a connected party transaction is proposed as part of an arrangement or has taken place in the year prior to the date of his appointment as nominee he should ensure that it is included in the proposals on a full disclosure Statement of Insolvency Practice 13

6. DISCLOSURE OF CONNECTED PARTY TRANSACTIONS

6.1. The requirement for disclosure of connected party transactions in the reports to meetings of members and creditors in creditors' voluntary winding up proceedings has been referred to above.

6.2. Where, prior to the section 98 meetings, directors have indicated that they may wish to make an offer to the liquidator (when appointed) for assets of the company, this should normally be disclosed at the meeting and the advising members should advise the creditors that if they form a liquidation committee the liquidator will, unless there are overriding commercial reasons why this should not be done, advise the committee of any offers for assets made by the directors and they will have the opportunity to comment on such offers. While the sanction of the committee is not required for a connected party transaction and full responsibility for it will rest with the liquidator, discussion of the proposed transaction with the committee should assist the liquidator in dispelling any concerns which creditors may have about it. In both voluntary and compulsory liquidations, the liquidator has a statutory obligation to give notice to the committee where he disposes of any property of the company to a person who is connected with the company. If it is not appropriate for there to be prior discussion with the committee the liquidator should report to the committee that he has contracted a disposal by way of connected party transaction as soon as reasonably practicable.

6.3. The liquidator should report any connected party transaction to members and creditors when he first reports to them after the transaction has taken place.

6.4. In administration order proceedings a member who is preparing an independent report (as provided for in Rule 2.1 of the Insolvency (Scotland) Rules 1986) should consider whether that report should contain details of

Previous page

Next page

any transactions between the company and its directors or other connected parties: any which might bear upon the court's consideration as to whether it is appropriate that an administration order be made should be included. In administration the administrator should include in his proposals under section 23 et seq. of the Insolvency Act 1986 reference to any connected party transaction undertaken in the period of two years prior to the making of the administration order and in the period since the making of that order, or proposed to be undertaken. If a creditors committee is appointed, the members of the committee should be advised of any such transaction undertaken after the meeting of creditors to consider the proposals.

6.5. In receivership, the receiver should include in his report to the creditors at the Section 67 meeting, information regarding any connected party transaction if this has taken place prior to the meeting and, if it takes place after that meeting, report it to any creditors committee appointed at that meeting.

6.6. Any disclosure made in accordance with the requirements set out in paragraphs 6.1 to 6.5 above should provide creditors with sufficient information to have a full appreciation of the nature of the transaction, and should normally include the following information:

- The date of the transaction
- Details of the asset involved and the nature of the transaction
- The consideration for the transaction and when it was paid
- The name of the counterparty
- The nature of the counterparty's connected party relationship with the vendor
- If the transaction took place before the appointment of the member as office holder, the name of any adviser to the vendor
- Whether the purchaser and (if the transaction took place before the appointment of the member as office holder) the vendor were independently advised

- Where the transaction took place before the commencement of liquidation or administration, the scope of the office holder's investigation and the conclusion reached
- Where the disclosure is to a liquidation committee and the committee has not been consulted prior to contract, the reason why such consultation did not take place
- Where, in a liquidation, the disclosure is to creditors, whether the liquidation committee (if there is one) has been consulted and the outcome of such consultation

Effective Date: 01 August 1998

2.15 STATEMENT OF INSOLVENCY PRACTICE 14 (SCOTLAND) A RECEIVER'S RESPONSIBILITY TO PREFERENTIAL CREDITORS

1. INTRODUCTION

1.1 This statement of insolvency practice is to be read in conjunction with the Explanatory Forward.

1.2 This statement has been prepared to summarise what is considered to be the best practice to be adopted by receivers of the assets of companies where any of those assets are subject to a floating charge so that the office holder has legal obligations to creditors whose debts are preferential. Its purpose is to:

- Ensure that insolvency practitioners are familiar with the statutory provisions;
- Set out best practice with regard to the application of statutory provisions;
- Set out best practice with regard to the provision of information to creditors whose debts are preferential and to responses to enquiries by such creditors.

Whilst this statement does not specifically address the treatment of preferential claims in liquidations, insolvency practitioners acting as liquidators (or in any other relevant capacity) should have due regard to the principles which it contains.

1.3 The statement is divided into the following sections:

- The statutory provisions
- Categorisation of assets and allocation of proceeds
- Apportionment of costs
- Determination of preferential debts
- Payment of preferential debts
- Disclosure to creditors with preferential debts
- Other matters

2. THE STATUTORY PROVISIONS

2.1 The rights of creditors whose debts are preferential in a receivership derive from section 59 of the Insolvency Act 1986 (`the Act'). Where a receiver is appointed on behalf of the holders of a floating charge and the company is not at the time in the course of being wound up, its preferential debts shall be paid out of the assets coming into the hands of the receiver in priority to any claims for principal or interest in respect of the floating charge by virtue of which the receiver was appointed.

Preferential debts are defined in section 386 of the Act and are set out in Schedule 6 to the Act (as amended from time to time), which is to be read in conjunction with Schedule 4 to the Pensions Schemes Act 1993 and are those which by the end of a period of 6 months after advertisement by the receiver for claims in the Edinburgh Gazette and in a newspaper circulating in the district where the company carries on business either

(a) have been intimated to him or

(b) have become known to him.

The date at which they are to be ascertained is the date of the appointment of the receiver (Section 387(4) of the Act).

2.2 Receivers should note that the statutory provisions give a right to creditors whose debts are preferential to be paid those debts in priority to the claims of floating charge holders, and the corollary of this right is the obligation of the receiver to pay them. Failure by a receiver to pay preferential debts out of available assets is a breach of statutory duty. However it is recognised that circumstances may arise when it is administratively convenient or cost-effective to co-operate with a company's liquidator and arrange for him to pay the receivership preferential debts, and guidance on such arrangements is given in paragraph 6.2 below. It should be noted that such arrangements do not exonerate the receiver from his obligations.

3. CATEGORISATION OF ASSETS AND ALLOCATION OF PROCEEDS

3.1 In order to ascertain which assets are subject to the statutory rights of preferential creditors it is necessary to confirm which assets are subject to a standard or other fixed security and which are subject to the floating charge.

3.2 The rights of statutory preferential creditors to a distribution from the assets require the receiver to identify the rights of other creditors in terms of Section 60(1) of the Insolvency Act (1986) and their order of priority.

3.3 It is not of itself sufficient for the charges to state that an asset is subject to a fixed charge or standard security for it to be subject to such a charge.

3.4 Receivers are reminded that it is the type of charge at the time of its creation which determines whether the assets are available to meet preferential debts. Crystallisation of a floating charge upon the appointment of a receiver does not affect the rights of creditors with preferential debts to be paid out of assets subject to a crystallised floating charge;

3.5 Section 59 of the Act requires that the preferential debts 'shall be paid out of the [floating charge] assets coming to the hands of the receiver in priority to' any claim for principal or interest by the floating charge holder. The effect is that a receiver is under a duty of care to the preferential creditors if, having had available assets in hand, he fails to apply them in terms of the order of priority set out in Section 60(1) including payment of the preferential debts. Where any action which he proposes to take could result in a diminution in the amount available to meet preferential debts the receiver should give the most serious consideration to the risks of such action.

3.6 When assets are sold as part of a going concern (or otherwise in parcels comprising both standard security and floating charge assets) the apportionment of the total consideration suggested by the purchaser (for example for his own financial reasons) may not properly reflect the financial interests of the different classes of creditors in the individual assets or categories of assets. In these circumstances the receiver should ensure that he will be able properly to discharge his obligations to account to holders of standard securities or other fixed security on the one hand and creditors interested in assets subject to floating charges on the other.

4. APPORTIONMENT OF COSTS

4.1 The amount available to meet preferential debts is the funds realised from the disposal of assets subject to a floating charge net of the costs of realisation and subject to the order of priority set out in Section 60(1). It is dependent, therefore, not only on the correct categorisation of the assets but also on the appropriate allocation of costs in effecting realisations.

Previous page

Next page

4.2 These costs will normally fall into one of three categories:

- Liabilities incurred by the company (the receiver having acted as agent) and costs incurred by the receiver and recoverable by him out of the company's assets under his statutory indemnity (other than those referred to below);
- The costs of the receiver in discharging his statutory duties;
- The remuneration and disbursements of the receiver.

4.3 The receiver's reasonable costs are sometimes readily identifiable as applicable to either the standard security or other fixed security or floating charge assets, but in other cases may not be so easily allocated between the two categories of assets. Where costs are clearly identifiable as having been incurred in the realisation or collecting in of one or other of the two categories they should be recorded as such in the receiver's records so that they can be deducted from realisation proceeds in ascertaining the amount available for each class of creditors.

4.4 If costs cannot be clearly identified as referring to the realisation of assets in each category, or refer to assets in both categories, the receiver will require to carry out an apportionment and, so far as possible, record his reasons for doing so. A receiver has a duty to allocate costs appropriately but that allocation will involve the exercise of professional judgement undertaken with a full appreciation that it must be made with independence of mind and with integrity.

4.5 The key principles for a receiver in his consideration of the allocation of costs are:

- The statutory rights of preferential creditors as set out in the Insolvency Act 1986 and the decisions of the courts in cases under that Act and predecessor legislation;
- The provisions of the charges;
- The maintenance of a proper balance as between the classes of creditors with whose interests he is required to deal in the light of their legal rights.

In order to enable a receiver to allocate costs on an appropriate basis, contemporaneous records of the dominant reasons for incurring costs should be maintained. These will also assist him in providing explanations as to how he arrived at what he considers to be an appropriate allocation and provide evidence should that allocation be challenged by any of the parties involved.

4.6 In allocating costs a receiver should have regard to:

- The objectives for which costs were incurred, it being recognised that certain types of costs may, properly, be allocated to the standard security or other fixed charge assets in one case and to the floating charge assets in another.[1] In another case such costs may enhance realisations in both categories.
- The benefits actually obtained for those financially interested in one or other category of asset in terms of protection of those assets or their value and any augmentation of that value.
- Whether the benefits to those interested in assets subject to a standard security or other fixed security have been enhanced by action which proves to be detrimental to those interested in floating charge assets (for example where trading losses are incurred to protect or enhance the value of property subject to a standard security).
- Whether the realisation of the undertaking and assets by means of a going concern sale has resulted in a reduction in the quantum of debts which are preferential due to the transfer of employment contracts.

4.7 A receivership arises only when there is a floating charge. A receiver whose appointment extends only to part of the property (rather than to the whole or substantially the whole of the property of the Company) has the same responsibilities with respect to the allocation of costs and payment of preferential debts as discussed in this SIP but with reference only to that property which has been attached.

1 For example the payment of rent on a leasehold property may be to preserve the value of the lease or to enable manufacturing to continue and work in progress to be completed.

Previous page

Next page

In apportioning the costs of fulfilling their statutory duties and in the absence of any guidance from the courts, receivers should have regard to the general principle referred to in paragraph 4.5 above of maintaining a proper balance.

4.8 The allocation of a receiver's remuneration and disbursements should be undertaken adopting the same principles as those applicable to costs and he should ensure that he maintains contemporaneous records which will enable him to make an appropriate division of his remuneration and disbursements between the different categories of assets.

5. DETERMINATION OF PREFERENTIAL DEBTS

5.1 As stated in paragraphs 2.1 and 2.2 of this statement it is a receiver's obligation to pay preferential debts out of assets available for that purpose.

5.2 Following advertisement and initial notification to potential preferential creditors of his appointment and before beginning the process of determining preferential debts, a receiver should assess whether there are likely to be sufficient floating charge realisations to pay a distribution. Where no payment will be made, it is not necessary to agree preferential claims. However, in such circumstances the receiver should write to creditors whose claims are preferential explaining why he is unable to make a payment to them.

5.3 Where there will be a distribution to preferential creditors, the receiver should assist those creditors, where possible, by providing adequate information to enable them to calculate their claims. In the case of all preferential creditors other than employees, the receiver is entitled to assume they have full knowledge of their legal entitlements under the Insolvency Act and should invite them to submit their claims. The receiver should then check those claims, and accept or reject them as appropriate.

5.4 In determining the preferential claims of employees, the receiver is not entitled to regard an individual employee as having full knowledge of his rights and entitlements. Accordingly, the receiver should obtain information from either the company's records or from the employee before calculating the claim (other than one which is payable to the Secretary of State by way of subrogation). The employee should be provided with details of the calculation of his claim and any further explanation that he may reasonably require.

Previous page

Next page

5.5 Receivers are reminded that Schedule 6 (paragraph 11) of the Act provides that anyone who has advanced money for the purpose of paying wages, salaries or accrued holiday remuneration of any employee is a preferential creditor to the extent that the preferential claim of the employee is reduced by such advance.

5.6 When an employee's preferential debt has been paid out of the National Insurance Fund under the provisions of the Employment Rights Act 1995, the Secretary of State is entitled, by virtue of section 189 of that Act to the benefit of the employee's preferential debt, in priority to any residual claim of the employee himself. A receiver is not obliged to accept the preferential claim of the Secretary of State without satisfying himself that it is correct. If a receiver is not able to accept the Secretary of State's claim he should contact the Redundancy Payments Service to explain why and attempt to reach agreement on the amount to be admitted.

6. PAYMENT OF PREFERENTIAL DEBTS

6.1 As soon as practicable after funds become available and the amount of the preferential debts has been ascertained, receivers should take steps to pay them. Under the statutory provisions preferential debts do not attract interest (unless all creditors (except postponed debts) are being paid in full) and payments to creditors should not be unnecessarily delayed. A receiver who does not comply timeously with his obligations under Section 59 and against whom decree is obtained may find himself ordered to pay interest by the court. While insolvency practitioners cannot be expected to bear any financial risk by paying some preferential debts before all such debts are agreed, there are often circumstances when it is possible to make payment either in full or on account before all claims have been agreed and this course of action should be adopted whenever it is practicable to do so.

6.2 Situations may arise where, notwithstanding a receiver's statutory duty to pay preferential debts, it may (exceptionally) be administratively convenient or cost-effective for a receiver to make arrangements for the liquidator to make payment of the preferential debts arising in the receivership. Such arrangements are made at the receiver's risk, and should not be on any basis which could result in payment of an amount less than that which would have been available to meet those debts if the receiver had himself paid them – or which would cause delay in paying them.

6.3 The receiver should provide preferential creditors with details of any such arrangement and the reason for making them.

7. DISCLOSURE TO CREDITORS WITH PREFERENTIAL DEBTS

7.1 When the funds realised from assets subject to a floating charge are inadequate to pay the preferential debts in full, the receiver should send those creditors a statement setting out the costs charged against the proceeds of realisation of assets.

7.2 Any further information which a creditor with a preferential debt reasonably requires should be provided promptly.

8. OTHER MATTERS

8.1 Difficulties may arise in determining the rights of creditors to have debts paid preferentially in priority to a prior floating charge holder when the receiver has been appointed under a second or subsequent charge. The law in this area is complex and insolvency practitioners should seek legal advice (and if necessary apply to the court for directions) when appointed under such a charge.

8.2 Situations will arise where payments sent out are not encashed and the payee cannot readily be located. The insolvency legislation does not make provision for this eventuality and there have been no reported cases where the courts have decided the matter. A schedule of unclaimed dividends should be prepared and a special deposit account for these should be opened with the Accountant of Court's designated bank, the Royal Bank of Scotland PLC at North Bridge, Edinburgh branch with notification to the Accountant of Court including a schedule of unclaimed dividends.

Effective Date: 01 January 2001

2.16 STATEMENT OF INSOLVENCY PRACTICE 15 (SCOTLAND) REPORTING AND PROVIDING INFORMATION ON THEIR FUNCTIONS TO COMMITTEES (AND COMMISSIONERS IN SEQUESTRATIONS) IN FORMAL INSOLVENCIES

1. INTRODUCTION

[Not reproduced. Superseded by SIP 1 with effect from 2 May 2011.]

2. SCOPE

This statement concerns:

- Written reporting by insolvency office holders to committees in corporate insolvencies or to commissioners in sequestrations, both where there are statutory requirements to do so and in other cases.
- The provision of information to members of committees or Commissioners about the rights, duties and functions of the committee or commissioners.

The statement does not apply to members' voluntary liquidations.

The statement applies to Scotland only. References to rules are to the Insolvency (Scotland) Rules 1986 as amended, the Insolvency (Scotland) Amendment Rules 2003 and the Insolvency Practitioner Regulations 2005. The Bankruptcy (Scotland) Act 1985 (as amended).

3. LIQUIDATIONS

3.1 Statutory Requirements

3.1.1 In liquidations statutory obligations are laid on the office holder to report to the liquidation committee. The reporting requirements are set out in rules 4.44 and 4.56. In this Part of the Statement the term 'office holder' refers to the liquidator.

3.1.2 Rule 4.44 stipulates that it is the duty of the office holder to report to the members of the committee all such matters as appear to him to be, or as they have indicated to him as being, of concern to them with respect to the winding up.

3.1.3 The office holder need not comply with any request for information where it appears to him that the request is frivolous or unreasonable, or the cost of complying would be excessive having regard to the relative importance of the information, or there are insufficient assets or funds in the estate to enable him to comply (rule 4.44(2)).

3.1.4 Where the committee has come into being more than 28 days after the appointment of the office holder he must report to the members in summary form what actions he has taken since his appointment and answer such questions as they may put to him regarding the conduct of the proceedings (rule 4.44(3)). A person who becomes a member of the committee at any time after its first establishment is not entitled to require a report to him by the office holder, otherwise than in summary form, of any matters previously arising (rule 4.44(4)). Nothing in rule 4.44 disentitles the committee or any member of it from having access to the office holder's records of the proceedings, or from seeking an explanation of any matter within the committee's responsibility (rule 4.44(5)).

3.1.5 Rule 4.56(1) provides that the office holder shall, as and when directed by the committee (but not more than once every 2 months), send a written report to every member of the committee setting out the position generally as regards the progress of the winding up, and matters arising in connection with it to which he (the office holder) considers the committee's attention should be drawn. In the absence of such directions by the committee the office holder must send such a report not less than once every 6 months (rule 4.56(2)).

3.1.6 Rule 4.32 applies the provisions of the Bankruptcy Act to the liquidator's accounting and claim for remuneration and via this mechanism determines the basis on which a liquidator's intromissions are audited by the Creditor Committee.

3.2 Agreeing reporting intervals with committee members

The office holder should discuss with committee members at their first meeting their requirements for reports and obtain their directions, having advised them of the statutory provisions set out in Rule 4.56(1) referred to in paragraph 3.1.5 above. These directions are likely to depend on the circumstances of the case and may change during the course of the proceedings. The directions of the committee should be recorded in the minutes of the meeting at which they are given and any changes should be similarly recorded.

3.3 Consideration of matters for inclusion in reports

The office holder should also discuss with committee members at his first meeting the type of matters which they wish to have reported to them so that matters of particular concern to them are identified. These should be recorded in the minutes of the meeting.

It is the duty of the office holder to consider whenever he reports, what matters (in addition to those already identified) he should include in his report, exercising his professional judgement as to which aspects of the proceedings should be of concern to the committee.

The office holder should bear in mind that the requirements of rule 4.44 to report matters of concern to the committee persist notwithstanding any directions given under rules 4.56. He should therefore ensure that during the conduct of the case he considers matter for report generally so that he is able to fulfil his obligations under rules 4.44 and should ensure that such matters are reported on a timely basis.

4. ADMINISTRATIONS

The rules applicable in administration depend on whether the proceedings are based on a petition presented before 15 September 2003. If they are, then the rules as they stood before the changes introduced by the Enterprise Act 2002 and its associated legislation continue to apply. Otherwise, the rules substituted by the Insolvency Scotland (Amendment) Rules 2003 will apply.

Previous page

Next page

In a case subject to the old rules the following requirements apply:

- The administrator must send an account of his receipts and payments to each member of the committee (rule 2.17).
- If the administrator intends to resign and there is no continuing administrator he must give the committee at least seven days' notice of his intention to do so or to apply for the court's permission to do so (rule 2.18).

In all other cases the second of these requirements applies regardless of whether there is a continuing administrator (amendment rule 2.50). There is no longer a specific obligation to send a receipts and payments account to each committee member because there is a new requirement to send reports, including a receipts and payments account, to all creditors.

Although there are no further statutory requirements for written reports, members should ensure that any arrangements which are made for reporting to a committee in such cases are properly documented and adhered to.

5. RECEIVERSHIPS

In receiverships the following requirements apply:

- The receiver must send an account of his receipts and payments to each member of the committee (rule 3.9).
- If the receiver intends to resign he must give the committee at least seven days' notice of his intention to do so, in terms of The Receivers (Scotland) Regulations 1986(6).
- When a receiver vacates office he must within 14 days forthwith give notice to the members of the committee (rule 3.11).

Apart from these there are no statutory requirements for written reports. However, members should ensure that any arrangements made for reporting to a committee in such cases are properly documented and adhered to.

6. SEQUESTRATIONS

6.1 Statutory Requirements

6.1.1 In a sequestration there is no ability to form a creditors' committee. However, at the statutory meeting (or any subsequent meeting of Creditors), Commissioners may be elected by the creditors for the purpose of supervising the Permanent Trustee's Intromissions and advising him.

6.1.2 Under Schedule 2 where the Interim Trustee is appointed rather than elected Permanent Trustee, Commissioners cannot exist.

6.1.3 Where no Commissioners are elected the Accountant in Bankruptcy becomes the Commissioner.

6.1.4 The general functions of the Commissioners are to supervise the Intromissions of the Permanent Trustee and to advise him (Section 4).

6.1.5 Any matter may be agreed with the Commissioners without a meeting, if such agreement is unanimous and is subsequently recorded in a minute signed by the Commissioners (Schedule 6, para 23) and therefore there is no requirement to hold Commissioners' meetings at regular intervals.

6.1.6 The Permanent Trustee may call a meeting of Commissioners at any time, but must call a meeting if required to do so by order of the Court, or on the request of the Accountant in Bankruptcy, or any Commissioner (Schedule 6, para 17).

6.1.7 It is the responsibility of the Commissioners to audit the Permanent Trustee's six monthly accounts and fix his remuneration. (Section 53, sub section3).

6.2 Reimbursement of Commissioners

The office of Commissioner is entirely gratuitous, even out of pocket expenses incurred cannot be recovered from the sequestration estate. Where the Commissioner acts as law agent for the Permanent Trustee he is not entitled to charge a fee for such legal services. (Notes for Guidance of Interim Trustees, Permanent Trustees and Agents – issued by the Accountant in Bankruptcy).

7. PROVISION OF INFORMATION TO MEMBERS OF COMMITTEES AND COMMISSIONERS ON THEIR RIGHTS, DUTIES AND FUNCTIONS

The Association of Business Recovery Professionals has produced a series of guides for members of committees and Commissioners for use in formal insolvency proceedings. The texts of the guides are appended to this statement. In all cases where there are Commissioners or a committee is established the insolvency office holder should ensure that the guide appropriate to the type of procedure concerned, or the equivalent information in some other suitable format, is made available to the Commissioners or members of the committee, either at the meeting at which the Commissioners are elected or the committee is established or as soon as practicable thereafter.

Effective Date: 01 August 2005

Previous page

Next page

SECTION 1
THE ETHICS CODE

SECTION 2
STATEMENTS OF INSOLVENCY PRACTICE (SCOTLAND)

SECTION 3
INSOLVENCY BULLETINS (SCOTLAND)

SECTION 4
INSOLVENCY GUIDANCE PAPERS

SECTION 5
PERSONAL DEBTORS (SCOTLAND)

SECTION 6
OTHER PROFESSION REGULATIONS AND GUIDANCE

CONTENTS

Previous page

Next page

1. GENERAL

1.1 Where a meeting of creditors summoned to consider an administrator's proposals has approved the proposals, it may establish a creditors' committee. The function of the committee is to assist the administrator in discharging his functions, and act in relation to him in such manner as may be agreed from time to time. The committee may also require the administrator to attend before it at any reasonable time and furnish it with such information relating to the carrying out of his functions as it may reasonably require. **(Sch B1, para 57 r.2.36)**

1.2 The purpose of the committee is to represent the interests of the creditors as a whole, not just the interests of its individual members. In addition to its statutory functions, which are set out in this guidance note, it may also serve to assist the administrator generally and act as a sounding board for him to obtain views on matters pertaining to the administration.

1.3 The margin references are to the Insolvency Act 1986, the Insolvency (Scotland) Rules 1986, (both as amended), the Insolvency Practitioner Regulations 2005, the Bankruptcy (Scotland) Act 1985 (as amended), Statement of Insolvency Practice 9 (Scotland) issued to all authorised insolvency practitioners, and the Corporate Provisions of the Enterprise Act 2002. The Rules noted in the margin apply to administrations on or after 15 September 2003.

2. MEMBERSHIP

2.1 General

2.1.1 The committee must consist of at least three, and not more than five, creditors. Any creditor of the company is eligible to be a member of the committee, so long as his claim has not been rejected for the purpose of his entitlement to vote. **(r.3.4)**

2.1.2 It is the creditors themselves who are the members of the committee, not the individuals who represent them. Thus a company which is a creditor may be a member of the committee but can only act through a representative appointed in accordance with paragraphs 2.2.1 to 2.2.3 below. **(r.3.4)**

2.2 Representatives

2.2.1 A member of the committee may be represented by another person duly authorised by him. Such representative must hold a letter of authority entitling him so to act (either generally or specially) signed by and on behalf of the committee member, and for this purpose any proxy or any authorisation under section 375 of the Companies Act 1985 in relation to any meeting of creditors of the company shall, unless it contains a statement to the contrary, be treated as such a letter of authority to act generally signed by or on behalf of the committee member. The chairman at any meeting of the committee may call on a person claiming to act as a committee member's representative to produce his letter of authority, and may exclude him if it appears that his authority is deficient. **(r.3.4(3), r.7.20)**

2.2.2 No member may be represented by – **(r.4.48(4)r)**

- a body corporate,
- an undischarged bankrupt, or
- a person who grants a trust deed for the benefit of creditors or makes a composition with his creditors.
- a disqualified director

2.2.3 No person may act as representative of more than one committee member. **(r.4.48)**

2.2.4 Where the representative of a committee member signs any documents on the member's behalf, the fact that he so signs must be stated below his signature.

2.3 Resignation and termination of membership

2.3.1 A member of the committee may resign by notice in writing delivered to the administrator. A person's membership of the committee is automatically terminated if – **(r.4.49, r.4.50)**

(a) he becomes bankrupt or grants a trust deed for the benefit of his creditors or makes a composition or arrangement with his creditors, or

(b) at three consecutive meetings of the committee he is neither present nor represented (unless at the third of those meetings it is resolved that this rule is not to be applied in his case), or

(c) he ceases to be, or is found never to have been, a creditor, or

(d) he becomes disqualified to act as a director.

2.3.2 However, if the cause of termination is the member's bankruptcy, his trustee in bankruptcy replaces him as a member of the committee.

2.3.3 A member of the committee may be removed by resolution at a meeting of creditors, provided at least 14 days' notice has been given of the intention to move that resolution.

2.4 Vacancies

If there is a vacancy in the membership of the committee it need not be filled if the administrator and a majority of the remaining committee members so agree provided the number of members does not fall below three. The administrator may appoint any creditor qualified to be a member of the committee to fill the vacancy provided a majority of the other members of the committee agree and the creditor consents to act. **(r.4.52)**

3. ESTABLISHMENT OF COMMITTEE

3.1 Formalities of establishment

The committee does not come into being, and accordingly cannot act, until the administrator has issued a certificate of its due constitution. **(r.4.42(1))**

The administrator will not issue the certificate until at least three of the persons who are to be members of the committee have agreed to act. Such agreement may be given by the creditor's proxy-holder or representative under section 375 of the Companies Act 1985 present at the meeting establishing the committee, unless the proxy or authorisation specifically precludes such agreement being given. **(r.4.42(3))**

3.2 Formal defects

The acts of the committee are valid notwithstanding any defect in the appointment election or qualifications of any committee member or the representative of any committee member or in the formalities of its establishment. **(r.4.59A)**

4. PROCEEDINGS

4.1 Chairman

Subject to paragraph 4.5.3 below, the chairman at any meeting of the committee will be the administrator, or a person nominated by him in writing to act. A person so nominated must be either – **(r.4.45 as applied)**

(a) one who is qualified to act as an insolvency practitioner in relation to the company, or

(b) an employee of the administrator or his firm who is experienced in insolvency matters.

4.2 Quorum

A meeting of the committee is duly constituted if due notice of it has been given to all members and at least two members are present or represented. **(r.4.47)**

4.3 Meetings

4.3.1 General

The committee will meet where and when determined by the administrator, subject as follows: **(r.4.45 as applied)**

4.3.2 First meeting

The administrator must call the first meeting of the committee not later than three months after its first establishment. **(r.4.45(2))**

4.3.3 Subsequent meetings

Subsequent meetings of the committee must be called by the administrator –

(a) if so requested by a member of the committee or his representative - the meeting must then be held within 21 days of the request being received by the administrator – and

(b) for a specified date, if the committee has previously resolved that a meeting be held on that date.

4.4 Notice of venue

The administrator must give 7 day's notice in writing of the venue of any meeting to every member of the committee (or his representative designated for that purpose), unless this requirement has been waived by or on behalf of any member. Such waiver may be signified either at or before the meeting.

4.5 Information from administrator

4.5.1 Where the committee resolves to require the attendance of the administrator under section 26(2) of the Insolvency Act 1986, he must be given at least 7 days' notice. The notice to him must be in writing, signed by a majority of the current members of the committee. A member's representative may sign for him. **(Sch B1, para 57(3))**

4.5.2 The meeting at which the administrator's attendance is required must be fixed by the committee for a business day, and shall be held at such time and place as the administrator determines.

4.5.3 Where the administrator attends such a meeting, the members of the committee may elect any one of their number to be chairman of the meeting in place of the administrator or his nominee.

4.6 Voting rights and resolutions

At any meeting of the committee each member (whether present himself or by his representative) has one vote, and a resolution is passed when a majority of the members present or represented have voted in favour of it. **(r.4.54)**

4.7 Records of meetings

Every resolution passed must be recorded in writing, either r.4.54(4) as separately or as part of the minutes of a meeting. The record applied must be signed by the chairman and placed in the company's minute book. **(r.4.54(4) as applied)**

4.8 Postal resolutions

4.8.1 It is possible for resolutions to be passed by post. The r.4.55 administrator must send to every member (or his representative

Previous page

Next page

designated for the purpose) a copy of the proposed resolution on which a decision is sought, which must be set out in such a way that agreement with, or dissent from, each separate resolution may be indicated by the recipient on the copy so sent.

4.8.2 However, any member of the committee may, within 7 business days from the date of the administrator sending out a resolution, require the administrator to summon a meeting of the committee to consider the matters raised by the resolution. In the absence of such a request, the resolution is deemed to have been passed by the committee if and when the administrator is notified in writing by a majority of the members that they concur with it.

4.8.3 A copy of every resolution so passed, and a note that the concurrence of the committee was obtained, must be placed in the company's minute book.

5. ADMINISTRATOR'S REMUNERATION

5.1 The administrator's remuneration may be determined by reference to the value of the company's property with which he has to deal. **(r.2.39 r.4.32)**

5.2 In arriving at its determination the committee must consider the following matters – **(B(S)A S53(4) r.2.39 SIP9 (Scot))**

(a) the work which, having regard to that value, was reasonably undertaken by him;

(b) the extent of his responsibilities in administering the company's assets;

Although not specifically stated in the rules, the normal basis for determining the remuneration will be that of the time costs properly incurred by the administrator and his staff.

5.3 When seeking agreement to his fees the administrator should provide sufficient supporting information to enable the committee to form a judgement as to whether the proposed fee is reasonable having regard to all the circumstances of the case. The administrator should always make available an up to date receipts and payments account. Where the fee is to be charged on a time basis the administrator should be prepared to disclose

the amount of time spent on the case and the charge- out value of the time spent, together with such additional information as may be reasonably required having regard to the size and complexity of the case. Where the fee is charged on a commission based on the value of the company, the administrator should provide details of any work which has been or is intended to be contracted out which would normally be undertaken by a administrator or his staff directly. (**SIP 9 (Scot))**

5.4 If the committee does not make the requisite determination, the remuneration may be fixed by a resolution of a meeting of creditors on the basis set out in paragraph 5.1 above. If not fixed in any of these ways, the administrator's remuneration shall, on his application, be fixed by the court. **(r.4.33)**

5.5 If the administrator's remuneration has been fixed by the committee and he considers it to be insufficient, he may request that it be increased by resolution of the creditors. If he considers that the remuneration fixed by the committee or the creditors is insufficient, he may apply to the court for an order increasing its amount or rate. The administrator must give at least 14 days' notice of his application to the members of the committee, and the committee may nominate one or more members to appear or be represented and to be heard on the application. The court may, if it appears to be a proper case, order the costs of the administrator's application, including the costs of any member of the committee appearing or being represented on it, to be paid as an expense of the administration. **(r.4.33)**

5.6 SIP 9 (Scot) provides guidance on the recommended provision of information in support of remuneration and outlays. (**SIP 9 (Scot))**

5.7 The basis (see 5.1) on which remuneration is to be drawn should be agreed at an early stage in the case. The quantum of remuneration may then be the subject of a subsequent application to creditors, the committee or the court. Applications for fees should comprise a sufficient explanation of what the insolvency practitioner has achieved, how it was achieved and why it was undertaken to enable the value of the exercise to be assessed. That assessment by the committee should have regard to the matters listed in paragraph 5.2 above. The guidance indicates that the level of detail supplied by the insolvency practitioner will depend upon the size and complexity of the case and suggests five areas of activity - administration

Previous page

Next page

and planning, investigation, realisation of assets, trading and creditors - as the basis for the analysis of time spent. The explanation of what has been done can be expected to include an outline of the nature of the assignment and the insolvency practitioner's own initial assessment of the assignment, including the anticipated return to creditors. To the extent applicable, having regard to the size of the case, it should also explain: **(SIP 9 (Scot))**

- Any significant aspects of the case, particularly those that affect the amount of time spent and the staffing and management of the assignment.
- The reasons for any change in strategy.
- The steps taken to establish the views of the creditors or their committee, particularly in relation to agreeing the strategy for the assignment, budgeting, time recording, fee drawing, or fee agreement.
- Any existing agreement about fees.
- Details of how other professionals, including subcontractors, were chosen, how they were contracted to be paid, and what steps have been taken to review their fees.
- Any further comments that the insolvency practitioner wishes to make.

Creditors should, however, be aware that the insolvency practitioner must fulfil certain statutory obligations that might be seen to bring no added value for creditors.

5.8 Finally, it is also suggested that the insolvency practitioner should disclose all amounts paid or payable to his lawyers and the review of these fees should be evidenced. The explanation should be sufficient to support a decision (if one is necessary) to have them taxed (that is, determined by the court).

6. EXPENSES AND DISBURSEMENTS

6.1 General

The approval of the committee is not required for the administrator to recover his expenses and disbursements. However, where the administrator makes, or proposes to make, a separate charge by way of expenses or disbursements to recover the cost of facilities provided by his own firm, he should disclose those charges to the committee when seeking approval of his fees, together with an

explanation of how those charges are made up and the basis on which they are arrived at. Payments to outside parties in which the office holder or his firm or any associate has an interest should be treated in the same way as payments to his own firm. (**SIP 9 (Scot)**)

6.2 Taxation of costs

6.2.1 Where any costs, charges or expenses are payable out of the company's assets (for example, agent's or legal fees), the administrator may agree them with the person entitled to payment. However, if the committee resolves that any such costs, charges or expenses should be taxed (that is, determined by the court), the administrator must require the person entitled to payment to deliver his bill of costs for taxation. **(r.4.32 B(S)A S.53 (2))**

6.2.2 Where such costs, charges or expenses are to be taxed, this does not preclude the administrator from making payments on account against an undertaking from the payee to repay any amount which proves, on taxation, to have been overpaid.

7. REVIEW OF ADMINISTRATOR'S SECURITY OR CAUTION

The administrator is required to have in place security or caution for the proper performance of his functions (see Appendix). It is the duty of the committee to review the adequacy of the administrator's security or caution from time to time. **(r.7.28)**

8. RESIGNATION OF ADMINISTRATOR

If the administrator intends to resign or to apply to the Court for leave to resign and there will be no continuing administrator in office, he must give the committee at least seven days' notice of his intention to do so. **(r.2.50)**

9. CONFIDENTIALITY OF DOCUMENTS

9.1 Where the administrator considers that any document forming part of the record of the administration -

(a) should be treated as confidential, or

(b) is of such a nature that its disclosure would be calculated to be injurious to the interests of the creditors,

Previous page

Next page

he may decline to allow it to be inspected by a person who may otherwise be entitled to inspect it.

9.2 A person refused inspection may apply to the court for the refusal to be overruled.

10. CHARGES FOR COPY DOCUMENTS

Where the administrator is requested by a member of the committee to supply copies of any documents, he is entitled to make a charge. **(r.7.26)**

11. EXPENSES OF COMMITTEE MEMBERS

11.1 Any reasonable travelling expenses directly incurred by committee members or their representatives either in attending meetings of the committee or otherwise on the committee's business will be paid by the administrator as an expense of the administration. **(r.4.57)**

11.2 However, such expenses will not be paid in respect of any meeting of the committee held within three months of a previous meeting, unless the meeting in question is summoned at the instance of the administrator.

12. COMMITTEE MEMBERS' DEALINGS WITH THE COMPANY

12.1 A member of the Committee shall not enter into a transaction whereby he;

- receives out of the company assets any payment for services given or goods supplied in connection with the administration; or
- obtains a profit from the administration; or
- acquires any part of the companies assets;

unless he

- obtains prior leave of the Court; or
- as a matter of urgency and then obtains leave of the Court; or
- obtains the prior sanction of the creditors committee where the transaction is on normal commercial terms.

12.2 The court may, on the application of any interested party, set aside any transaction which appears to it to be contrary to the above requirement, and may give directions for compensating the company for any loss incurred in consequence.

12.3 Circumstances may occasionally arise where a legal action or dealing involving a member of the committee or a person connected with him make it inappropriate for him to attend discussions on the subject in the committee. In such circumstances the member may be asked not to attend a meeting, or part of a meeting, at which the matter is discussed.

APPENDIX

Administrator's Security or Caution (s.390(3))

The administrator is required to have in place security for the proper performance of his functions. The reg.12 & sch 2, IP Regs security takes the form of a bond which provides that -

- a surety undertakes to be jointly and severally liable with the administrator for losses caused by the fraud or dishonesty of the administrator whether acting alone or in collusion with one or more persons, or the fraud or dishonesty of any person committed with the connivance of the administrator;
- the liability of the surety and the administrator is to be in both a general penalty sum and a specific penalty sum in respect of the individual case;
- any claims are to be paid first out of the specific penalty sum, then, if that is insufficient, out of the general penalty sum;
- a cover schedule containing the name of the insolvent and the value of the insolvent's assets is to be submitted to the surety within a specified period.

The general penalty sum must be £250,000 and the specific penalty sum must be at least equal to the estimated value of the company's assets, but ignoring the value of any assets charged to a third party to the extent of any amount which would be payable to that party, or held on trust to the extent that any beneficial interest in those assets does not belong to the company.

. The minimum specific penalty sum is £5,000 and the maximum £5,000,000. If, at any time, the administrator forms the opinion that the value of the assets is higher than the penalty sum under the current specific penalty he must obtain a further specific penalty to bring the penalty sum equal to that value (subject to the maximum limit of £5,000,000).

Where two or more persons are appointed jointly to act as administrator, the above provisions apply to each of them individually. **(Reg 12(2) IP Regs)**

GUIDANCE FOR MEMBERS OF CREDITORS' COMMITTEES IN RECEIVERSHIPS

ANNEXE B

CONTENTS

1. GENERAL

1.1 Receivership is a remedy available to a creditor holding security created before 15 September 2003, which includes a floating charge, over all (or substantially all) the assets of a company. A receiver is appointed by the holder of the security but normally acts as agent of the company over whose assets he is appointed. The primary duty of a receiver is to his appointor. Whilst he also owes certain duties to the company and is required to provide information to the unsecured creditors, neither the creditors nor any committee appointed by them have any authority to sanction any of his actions.

1.2 The receiver must (unless the court directs otherwise) convene a meeting of the unsecured creditors within three months of his appointment and lay before it a report on matters relating to the receivership. The meeting convened to receive the report may also establish a creditors' committee. The function of the committee is to represent to the receiver the views of the unsecured creditors, and to act in relation to him in such manner as may be agreed from time to time. The committee may also require the receiver to attend before it at any reasonable time and furnish it with such information relating to the carrying out by him of his functions as it may reasonably require. **(S.68, r.3.5, S.68)**

1.3 The margin references are to the Insolvency Act 1986, the Insolvency (Scotland) Rules 1986 (both as amended), the Insolvency Practitioner Regulations 2005, and the Receivers (Scotland) Regulations 1986, and Statement of Insolvency Practice 9 (Scotland) issued to all authorised insolvency practitioners.

2. MEMBERSHIP

2.1 General

The committee must consist of at least three, and not more than five, creditors. Any creditor of the company who has lodged a claim is eligible to be a member of the committee, so long as his claim has not been rejected for the purpose of his entitlement to vote. **(r.3.4)**

2.1.2 It is the creditors themselves who are the members of the committee, not the individuals who represent them. Thus a company or partnership which is a creditor may be a member of the committee but can only act through a representative appointed in accordance with paragraphs 2.2.1 to 2.2.3 below.

2.2 Representatives

2.2.1 A member of the committee may, in relation to the business of the committee, be represented by another person duly authorised by him for that purpose. Such representative must hold a mandate entitling him so to act (either generally or specially) signed by or on behalf of the committee member, and for this purpose any proxy or any authorisation under section 375 of the Companies Act 1985 in relation to any meeting of creditors of the company shall, unless it contains a statement to the contrary, be treated as a letter of authority to act generally signed by or on behalf of the committee member. The chairman at any meeting of the committee may call on a person claiming to act as a committee member's representative to produce his mandate, and may exclude him if it appears that his mandate is deficient. **(2.2.1 r.4.48 as applied by r.3.6)**

2.2.2 No member may be represented by -

- a body corporate,

- a partnership,

- an undischarged bankrupt, or

- a disqualified director.

2.2.3 No person may act as representative of more than one committee member, or as both a member and a representative of another member, on the same committee.

2.2.4 Where the representative of a committee member signs any document on the member's behalf, the fact that he so signs must be stated below his signature.

2.3 Resignation and Termination of membership

2.3.1 A member of the committee may resign by notice in writing delivered to the receiver. A person's membership of the committee is automatically terminated if - **(r.4.49 and r4.50 as applied by r.3.6)**

(a) his estate is sequestrated or he becomes bankrupt or grants a trust deed for the benefit of or makes a composition with his creditors, or

(b) at three consecutive meetings of the committee he is neither present nor represented (unless at the third of those meetings it is resolved that this rule is not to be applied in his case), or

(c) he ceases to be, or is found never to have been, a creditor, or

(d) he becomes disqualified to act as a director.

A member of the committee may be removed by resolution at a meeting of creditors.

2.4 Vacancies

2.4.1 If there is a vacancy in the membership of the committee it need not be filled if the receiver and a majority of the remaining committee members so agree, provided the number of members does not fall below three. The receiver may appoint any creditor qualified to be a member of the committee to fill the vacancy, provided a majority of the other members of the committee agree and the creditor consents to act. **(r.4.52 as applied by r.3.6)**

2.4.2 Alternatively, a meeting of creditors may resolve that a creditor be appointed (with his consent) to fill the vacancy. 14 days notice must have been given of the resolution to make such an appointment (whether or not of a person named in the notice). Where the vacancy is filled by an appointment made by a creditors meeting at which the receiver is not present, the chairman of the meeting shall report to the receiver the appointment which has been made.

3. ESTABLISHMENT OF COMMITTEE

3.1 Formalities of Establishment

3.1.1 The committee does not come into being, and accordingly cannot act, until the receiver has issued a certificate of its due constitution. **(r.4.42 as applied by r.3.6)**

3.1.2 The receiver will not issue the certificate until at least three of the persons who are to be members of the committee have agreed to act but he shall issue it forthwith thereafter. Such agreement may be given by the creditor's proxy-holder or representative under section 375 of the Companies Act 1985 present at the meeting establishing the committee, unless the proxy or authorisation specifically precludes such agreement being given.

3.1.3 If the chairman of the meeting which resolves to establish the committee is not the receiver, he shall forthwith give notice of the resolution to the receiver and inform him of the names and addresses of the committee members.

3.2 Formal defects

The acts of the committee are valid notwithstanding any defect in the appointment, election or qualifications of any committee member or the representative of any committee member, or in the formalities of its establishment. **(r.4.59A as applied by r.3.6)**

4. PROCEEDINGS

4.1 Chairman

Subject to paragraph 4.5.3 below, the chairman at any meeting of the committee will be the receiver, or a person nominated by him in writing to act. A person so nominated must be either- **(r.4.46 as applied by r.3.6)**

(a) one who is qualified to act as an insolvency practitioner in relation to the company, or

(b) an employee of the receiver or his firm who is experienced in insolvency matters.

Previous page

Next page

4.2 Quorum

A meeting of the committee is duly constituted if due notice of it has been given to all members and at least two members are present or represented. **(r.4.47 as applied by r.3.6)**

4.3 Meetings

4.3.1 General

The committee will meet where and when determined by the receiver, subject as follows:

4.3.2 First meeting

The receiver must call the first meeting of the committee within three months of its establishment.

4.3.3 Subsequent meetings

Subsequent meetings of the committee must be called by the receiver -

(a) if so requested by a member of the committee or his representative - the meeting must then be held within 21 days of the request being received by the receiver - and

(b) for a specified date, if the committee has previously resolved that a meeting be held on that date.

4.4 Notice of venue

The receiver must give 7 days written notice of the time and place of any meeting to every member of the committee (or his representative designated for that purpose), unless this requirement has been waived by or on behalf of any member. Such waiver may be signified either at or before the meeting. **(r.4.45 as applied by r.3.6)**

4.5 Information from receiver

4.5.1 Where the committee resolves to require the attendance of the receiver under section 68(2) of the Insolvency Act 1986, he must be given at least 7 days' notice. The notice to him must be in writing, signed by a majority of the current members of the committee or their representatives.

4.5.2 The meeting at which the receiver's attendance is required must be fixed by the committee for a business day, and held at such time and place as the receiver determines.

4.5.3 Where the receiver so attends, the members of the committee may elect any one of their number to be chairman of the meeting in place of the receiver or his nominee.

4.6 Voting rights and resolutions

At any meeting of the committee each member (whether present himself or by his representative) has one vote, and a resolution is passed when a majority of the members present or represented have voted in favour of it. **(r.4.54(1) as applied r.3.6)**

4.7 Records of meetings

Every resolution passed must be recorded in writing, either separately or as part of the minutes of the meeting. The record must be signed by the chairman and kept as part of the sederunt book. **(r.4.54(4) as applied by r.3.6)**

4.8 Postal Resolutions

4.8.1 It is possible for resolutions to be passed by post. The receiver must send to every member (or his representative designated for the purpose) a copy of the proposed resolution on which a decision is sought, which must be set out in such a way that agreement with, or dissent from, each separate resolution may be indicated by the recipient on the copy so sent. **(r.4.55 as applied by r.3.6)**

4.8.2 However, any member of the committee may, within 7 business days from the date of the receiver sending out a resolution, require the receiver to summon a meeting of the committee to consider the matters raised by the resolution. In the absence of such a request, the resolution is deemed to have been passed by the committee if and when the receiver is notified in writing by a majority of the members that they concur with it.

4.8.3 A copy of every resolution so passed, and a note that the concurrence of the committee was obtained, must be kept in the sederunt book.

Previous page

Next page

5. REVIEW OF RECEIVER'S SECURITY OR CAUTION

The receiver is required to have in place security or caution for the proper performance of his functions (see Appendix). It is the duty of the committee to review from time to time the adequacy of the receiver's security or caution. **(r.7.28)**

6. INFORMATION TO BE PROVIDED TO THE COMMITTEE

6.1 Receiver's Receipts and Payments Account

The receiver must send to each member of the committee an account of his receipts and payments:

- within 2 months after the end of 12 months from the date of his appointment, and of every subsequent period of 12 months, and
- within 2 months after he ceases to act as receiver.

6.2 Resignation of Receiver

If the receiver intends to resign he must give the committee at least seven days' notice of his intention to do so.

6.3 Death of Receiver

If the receiver dies, the holder of the floating charge by which he was appointed must, as soon as he becomes aware of the death, give notice of it to the members of the committee.

6.4 Vacation of Office

When the receiver vacates office he must give notice to the members of the committee within 14 days of having done so.

7. CONFIDENTIALITY OF DOCUMENTS

7.1 Where the receiver considers that any document forming part of the record of the receivership-

(a) should be treated as confidential, or

(b) is of such a nature that its disclosure would be calculated to be injurious to the interests of the creditors,

he may decline to allow it to be inspected by a person (including a member of the committee) who would otherwise be entitled to inspect it.

7.2 A person refused inspection may apply to the court for the refusal to be overruled.

8. EXPENSES OF COMMITTEE MEMBERS

8.1 Any reasonable travelling expenses directly incurred by committee members or their representatives either in attending meetings of the committee or otherwise on the committee's business will be paid by the receiver as an expense of the receivership. **(r.4.57 as amended by r.3.6(4))**

8.2 However, such expenses will not be paid in respect of any meeting of the committee held within three months of a previous meeting, unless the meeting in question is summoned at the instance of the receiver.

9. COMMITTEE MEMBERS' DEALINGS WITH THE COMPANY

9.1 Membership of the committee does not prevent a person from dealing with the company while the receiver is acting, provided that any transactions in the course of such dealings are entered into on normal commercial terms. **(r.3.8)**

9.2 The court may, on the application of any interested party, set aside any transaction which appears to it to be contrary to the above requirement, and may give directions for compensating the company for any loss incurred in consequence.

9.3 Circumstances may occasionally arise where a legal action or dealing involving a member of the committee or a person connected with him make it inappropriate for him to attend discussions on the subject in the committee. In such circumstances the member may be asked not to attend a meeting, or part of a meeting, at which the matter is discussed.

APPENDIX

Receiver's Security or Caution

The receiver is required to have in place security for the proper performance of his functions. The security takes the form of a bond which provides that – **(s.390(3) reg.12 & sch.2, IP Regs**)

- a surety undertakes to be jointly and severally liable with the receiver for losses caused by the fraud or dishonesty of the receiver whether acting alone or in collusion with one or more persons, or the fraud or dishonesty of any person committed with the connivance of the administrative receiver;
- the liability of the surety and the receiver is to be in both a general penalty sum and a specific penalty sum in respect of the individual case;
- any claims are to be paid first out of the specific penalty sum, then, if that is insufficient, out of the general penalty sum;
- a cover schedule containing the name of the insolvent and the value of the insolvent's assets is to be submitted to the surety within a specified period.
- The general penalty sum must be £250,000 and the specific penalty sum must be at least equal to the estimated value of the company's assets, but ignoring the value of any assets charged to a third party to the extent of any amount which would be payable to that party, or held on trust to the extent that any beneficial interest in those assets does not belong to the company.

The minimum specific penalty sum is £5,000 and the maximum £5,000,000. If, at any time, the receiver forms the opinion that the value of the assets is higher than the penalty sum under the current specific penalty he must obtain a further specific penalty to bring the penalty sum equal to that value (subject to the maximum limit of £5,000,000).

Where two or more persons are appointed jointly to act as receiver the above provisions apply to each of them individually. **(Reg 12(2) IP Regs)**

GUIDANCE FOR COMMISSIONERS IN SEQUESTRATIONS

ANNEXE C

CONTENTS

1. INTRODUCTION

1.1 General

1.1.1 This guide has been produced to help Commissioners be aware of

- their duties and functions
- their rights
- the procedural rules

1.1.2 This introduction gives a brief description of the role of the Permanent Trustee and summarises the principal functions of Commissioners and the Permanent Trustee's duties in relation to them. Detailed provisions are set out in the remaining sections of the guide.

1.1.3 The margin references are to the Insolvency Act 1986, the Insolvency (Scotland) Rules 1986 (both as amended), the Insolvency Practitioner Regulations 2005, the Bankruptcy (Scotland) Act 1985 (as amended), Statement of Insolvency Practice 9 (Scotland) issued to all authorised Insolvency Practitioners and Notes for Guidance of Interim Trustees, Permanent Trustees and Agents – issued by the Accountant in Bankruptcy.

1.2 The Permanent Trustee

Sequestration is the administration of the estate of insolvent individuals, partnerships, (including dissolved and limited partnerships but not limited liability partnerships), trusts and incorporated or unincorporated bodies other than companies registered under the Companies Acts/unregistered companies by a Trustee in the interests of his creditors generally. The Permanent Trustee has wide powers which are set out in the Bankruptcy (Scotland) Act 1985 (as amended). He may use these powers at his discretion, except where the exercise of any power specifically requires sanction, as explained in paragraph 2.1.1.

1.3 The Commissioners

1.3.1 A general meeting of the debtor's creditors may appoint Commissioners. Two classes of creditor are not entitled to vote at the election of commissioners: **(S.30, S.24(3))**

(a) anyone who acquires his debt, otherwise than by succession, after the date of sequestration, and

(b) a postponed creditor

The purpose of Commissioners is to represent the interests of the creditors as a whole, not just their own interests. The principal functions are to supervise the exercise of certain of the Trustee's powers and to fix his remuneration. In addition to their statutory functions, the Commissioners may also serve to assist the Permanent Trustee generally and act as a sounding board for him to obtain views on matters pertaining to the sequestration.

1.3.2 The Permanent Trustee is to have regard to advice offered to him by the commissioners, where acting. However, the Permanent Trustee is not obliged to follow such advice. In such a case the Commissioners, could obtain the Permanent Trustee's compliance only through the intervention of the court, i.e. by making an application to the Sheriff in terms of section 39 (1) of the Act.

1.3.3 Commissioners are not entitled to remuneration, and cannot be reimbursed for expenses. **(Notes for Guidance)**

1.3.4 Although the Permanent Trustee should normally have regard to the views of the Commissioners, he may always refer matters of contention to the Accountant in Bankruptcy. **(S. 1A(1))**

2. FUNCTIONS OF THE COMMISSIONERS

2.1 Control of Permanent Trustee's powers

2.1.1 The Permanent Trustee may, with the consent of the Commissioners, the creditors or the Court, exercise any of the following powers if beneficial for the administration of the estate: **(S. 39 (2))**

(a) Carry on any business of the debtor;

(b) Bring, continue or defend any action or legal proceedings relating to the estate of the debtor;

Note: Where legal proceedings are proposed the Commissioners should consider the probable benefit to the estate before giving

Previous page

Next page

permission. If permission is given, the Commissioners should ensure they are kept informed of the progress of the proceedings in case it should become necessary to consider their discontinuance.

(c) Create a security over any part of the estate;

(d) Where any right, option or other power forms part of the debtor's estate, make payment or incur liabilities with a view to obtaining, for the benefit of the creditors, any property which is the subject of the right, option or power;

(e) Approve an offer of composition from the debtor under Schedule 4.

2.1.2 The Commissioners are required to grant their consent to the Permanent Trustee before he pays the preferred debts. **(S.52(4)(b))**

2.1.3 The Commissioners may request the Permanent Trustee to make application to the Sheriff for an order for the public examination of the debtor or of other relevant person. **(S.45(1)(b))**

If the Permanent Trustee wishes to submit any matter to arbitration or to make a compromise with regard to any claim he must first obtain the consent of the Commissioners. **(S.65(1))**

The Commissioners may make application to the Sheriff for the removal from office of the Permanent Trustee. The Sheriff may grant the order or he may make an alternative order, in which case there is a right of appeal by the Commissioners.**(S.29(1)(b)(ii), S29(4))**

In the event of removal from office of the Permanent Trustee the Commissioners are required to call a meeting of the creditors for the election of a new Permanent Trustee not more than 28 days after the removal. (**S.29(5))**

2.2 Trustee's remuneration

2.2.1 The basis for fixing the amount of the remuneration payable to the Permanent Trustee may be a Commission calculated by reference to the value of the debtor's estate which has been realised by the Permanent Trustee, but there shall in any event be taken into account – (**S. 53(4), SIP 9 (Scot))**

(a) the work which, having regard to that value, was reasonably undertaken by him; and

(a) the extent of his responsibilities in administering the debtor's estate

2.2.2 In fixing the amount of such remuneration in respect of any accounting period, the Commissioners or, as the case may be, the Accountant in Bankruptcy may take into account any adjustment which the commissioners or the Accountant in Bankruptcy may wish to make in the amount of the remuneration fixed in respect any earlier accounting period.

2.2.3 When seeking agreement to his fees the Permanent Trustee must provide sufficient supporting information to enable the Commissioners to form a judgement as to whether the proposed fee is reasonable having regards to all the circumstances of the case. The Permanent Trustee must submit a six monthly receipts and payments account for audit. Where the fee is to be charged on a time basis the Permanent Trustee should disclose the amount of time spent on the case and the charge-out value of the time spent, together with such additional information as may be reasonably required having regard to the size and complexity of the case.
Where the fee is charged on a percentage basis, the Trustee should provide details of any work which has been or is intended to be contracted out which would normally be undertaken by a Permanent Trustee or his staff directly. **(SIP 9 (Scot))**

2.2.4 If the Commissioners do not make the requisite determination, the remuneration may be fixed by the Accountant in Bankruptcy. **(S53 (6))**

2.2.5 Where the Trustee realises an asset on behalf of a secured creditor and receives remuneration out of the proceeds, he should disclose the amount of that remuneration to the Commissioners. **(SIP 9 (Scot))**

2.2.6 If the Permanent Trustee's remuneration has been fixed by the Commissioners and he considers it to be insufficient, he may appeal against the determination to the Accountant in Bankruptcy and ultimately to the Sheriff, whose decision is final. **(S53 (6))**

2.2.7 Applications for fees should comprise a sufficient explanation of what the Permanent Trustee has achieved. The guidance indicates that the level of detail supplied by the insolvency practitioner will depend upon the size and complexity of the case and suggests five areas of activity - administration and planning, investigation, realisation of assets, trading and creditors - as the basis for the analysis of time spent. The explanation of what has been done can be expected to include an outline of the nature of the assignment and the Insolvency Practitioner's own initial assessment of the assignment, including the anticipated return to creditors. To the extent applicable, having regard to the size of the case, it should also explain:

- Any significant aspects of the case, particularly those that affect the amount of time spent and the staffing and management of the assignment.
- The reasons for any change in strategy.
- The steps taken to establish the views of the creditors or the Commissioners, particularly in relation to agreeing the strategy for the assignment, budgeting, time recording, fee drawing, or fee agreement.
- Any existing agreement about fees.
- Details of how other professionals, including subcontractors, were chosen, how they were contracted to be paid, and what steps have been taken to review their fees.
- Any further comments that the insolvency practitioner wishes to make.

Commissioners should, however, be aware that the Insolvency Practitioner must fulfil certain statutory obligations that might be seen to bring no added value for creditors.

2.2.8 Finally, it is also suggested that the insolvency practitioner should disclose all amounts paid or payable to his lawyers and the review of these fees should be evidenced. The explanation should be sufficient to support a decision (if one is necessary) to have them taxed (that is, determined by the Court). **(SIP 9 (Scot))**

2.3 Expenses and disbursements

The approval of the Commissioners is required for the Permanent Trustee to recover his outlays. Where the Permanent Trustee makes, or proposes to make, a separate charge by way of expenses or disbursements to recover the cost of facilities provided by his own firm, he should disclose those charges to the Commissioners when seeking approval of his fees, together with an explanation of how those charges are made up and the basis on which they are arrived. Payments to outside parties in which the office holder or his firm or any associate has an interest should be treated in the same way as payments to his own firm.**(SIP 9 (Scot))**

2.4 Taxation of costs

2.4.1 Where any costs, charges or expenses are payable out of a debtor's estate (for example agent's or legal fees), the Permanent Trustee may agree them with the person entitled to payment. However, if the Commissioner resolves that any such costs, charges or expenses should be taxed (that is, determined by the Court), the Permanent Trustee must require the person entitled to payment to deliver their account for taxation. **(S.53 (2A))**

2.4.2 Where such costs, charges or expenses are to be taxed, this does not preclude the Trustee from making payments on account against an undertaking from the payee to repay any amount which proves, on taxation, to have been overpaid.

2.5 Review of permanent trustee's security or caution

The Trustee is required to have in place security or caution for the proper performance of his functions (See Appendix). (**IPR Part III(12))**

3. PERMANENT TRUSTEE'S OBLIGATIONS TO COMMISSIONERS

3.1 The Permanent Trustee need not comply with any request for information where it appears to him that the request is frivolous or unreasonable, or the cost of complying would be excessive having regard to the relative importance of the information, or there are insufficient funds in the estate to enable him to comply.

3.2 Nothing in these provisions disentitles Commissioners access to the Permanent Trustee's Sederunt Book, or from seeking an explanation of any matter within the Commissioners' responsibility. **(S.62)**

3.3 The Permanent Trustee shall, as soon as possible after his confirmation in office consult with the Commissioners regarding the exercise of his functions. This Consultation should take place at the first meeting of the Commissioners which will normally be held immediately after the meeting of creditors at which they are elected. He should also discuss with Commissioners at that meeting the types of matters which they wish to have reported to them so that matters of particular concern to them are identified. **(S.39)**

4. PERMANENT TRUSTEE'S ACCOUNTS

4.1 The Permanent Trustee must prepare and keep financial records in relation to the sequestration, and such supporting documents as are necessary to explain the receipts and payments entered in the records, including an explanation of the source of any receipts and the destination of any payments, and must obtain and keep the bank statements relating to any local bank account in the name of the debtor.**(SIP 7 (Scot))**

4.2 The Commissioners may inspect the accounts of the Permanent Trustee at all reasonable times.

4.3 If the debtor's business is carried on, the Trustee must also keep a separate trading account including, where appropriate, details of all bank account transactions. The total weekly amounts of trading receipts and payments must be incorporated into the financial records. **(SIP 7 (Scot))**

4.4 The Permanent Trustee must, within two weeks of the end of the accounting period, submit his six monthly receipts and payments account to the Commissioners, or if there are no Commissioners, to the Accountant in Bankruptcy. When the accounts are sent to the Commissioners a copy must also be sent to the Accountant in Bankruptcy. **(S53.1)**

4.5 Vouchers for all income and expenditure should be submitted to the Commissioners when auditing the Permanent Trustee's accounts. The Commissioners should satisfy themselves that funds have been properly deposited in interest bearing accounts with a duly approved bank.

5 APPOINTMENTS

5.1 General

5.1.1 The Commissioners must consist of not less than one, and not more than five. All Commissioners must be creditors of the debtor or mandatories and any creditor (other than one whose debt is fully secured) may be appointed, so long as – **(S. 30)**

(a) he has lodged a claim of his debt

(b) his claim has neither been wholly disallowed for voting purposes nor wholly rejected for the purposes of distribution or dividend, and

(c) he has agreed to act as Commissioner

5.1.2 The following are not qualified to act as Commissioners **(S. 30 (2))**

(a) the debtor

(b) persons holding interests opposed to the general interests of creditors

(c) persons who reside outwith the jurisdiction of the Court of Session

(d) a person who is an associate of the debtor or of the Permanent Trustee

(e) disqualified directors.

5.2 Resignation and removal of commissioners

5.2.1 A Commissioner may resign office at any time. The resignation must be recorded in the Sederunt Book. **(S. 30 (3))**

5.2.2 A Commissioner may be removed from office in the following circumstances: **(S. 30 (4), S. 1A(2))**

(a) if he is a mandatory of a creditor by the creditor recalling the mandate and intimating in writing its recall to the Permanent Trustee

(b) by the creditors at a meeting called for the purposes, and

(c) by the Court after a report by the Accountant in Bankruptcy

Previous page

Next page

5.3 Vacancies

If a Commissioner dies, resigns or is removed from office, the Permanent Trustee may convene a meeting of the creditors to appoint a replacement. If there has only been one Commissioner and he is not replaced, the Accountant in Bankruptcy acts as Commissioner. **(S. 30(1))**

6. PROCEEDINGS

6.1 Chairman

The Chairman at any meeting shall be the Permanent Trustee unless the Commissioners elect one of their number to act as Chairman in his place. The Permanent Trustee shall preside over such an election. **(Sch 6 Para 7 (1))**

6.2 Quorum

The Quorum of meeting of Commissioners shall be one Commissioner, provided seven day's notice has been given of the meeting unless the Commissioners decide that they do not require such notice. **(Sch 6 (22))**

6.3 Meetings

General

The Commissioners will meet where and when determined by the Permanent Trustee.

The Permanent Trustee must call a meeting of creditors;

(a) on being required to do so by an Order of the Court

(b) on being requested to do so by the Accountant in Bankruptcy or any Commissioner

If the Permanent Trustee fails to call a meeting of Commissioners within fourteen days of being required or requested to do so, a Commissioner may call a meeting of Commissioners.

6.4 Notice of venue

The Trustee shall give the Commissioners at least seven day's notice of meeting called by him, unless the Commissioners decide that they do not require such notice.

6.5 Voting rights and resolutions

Each Commissioner has one vote and a resolution is passed if a majority of the Commissioners have voted in favour of it.

6.6 Records of meetings

The Permanent Trustee shall act as clerk at meetings and shall insert a minute of the meeting in the Sederunt Book. If the Commissioners are considering the performance of the functions of the Permanent Trustee he shall withdraw from the meeting, if requested to do so by the Commissioners, and in such case a Commissioner shall act as clerk and shall transmit a minute to the Permanent Trustee for insertion in the Sederunt Book. **(Sch 6 (20)(21))**

6.7 Postal resolutions

Any matter may be agreed by the Commissioners without a meeting, if such agreement is unanimous and is subsequently recorded in a minute signed by the Commissioners. The minute must be inserted in the Sederunt Book by the Permanent Trustee. **(Sch 6 (23))**

7. CONFIDENTIALITY OF DOCUMENTS

The Permanent Trustee is not bound to insert in the Sederunt Book, any document of a confidential nature and is not bound to exhibit to any person other than a Commissioner or the Accountant in Bankruptcy, any such document in his possession. **(S. 62(4)(5))**

8. EXPENSES OF COMMISSIONERS

Commissioners act gratuitously and cannot recover their expenses.
(S. 51 (Notes for Guidance))

9. DEALINGS BY COMMISSIONERS

The position of Commissioners is fiduciary and they must be careful not to expose themselves to a conflict between their duty as Commissioners and their personal interest. Accordingly, no Commissioners can enter into a transaction whereby they -

(a) receive out of the debtor's estate any payment for services given or goods supplied in connection with the administration of the sequestration, or

(b) obtain any profit from the administration of the sequestration, or

(c) acquire any asset forming part of the estate.

APPENDIX

Trustee's Security or Caution

The trustee is required to have in place security for the proper performance of his functions. The security takes the form of a bond which provides that – **(s.390(3) reg.12 & sch 2, IP Regs)**

- a surety undertakes to be jointly and severally liable with the trustee for losses caused by the fraud or dishonesty of the trustee whether acting alone or in collusion with one or more persons, or the fraud or dishonesty of any person committed with the connivance of the trustee;
- the liability of the surety and the trustee is to be in both a general penalty sum and a specific penalty sum in respect of the individual case;
- any claims are to be paid first out of the specific penalty sum, then, if that is insufficient, out of the general penalty sum;
- a cover schedule containing the name of the insolvent and the value of the insolvent's assets is to be submitted to the surety within a specified period.

The general penalty sum must be £250,000 and the specific penalty sum must be at least equal to the estimated value of the bankrupt's assets, but ignoring the value of any assets charged to a third party to the extent of any amount which would be payable to that party, or held on trust to the extent that any beneficial interest in those assets does not belong to the bankrupt.

The minimum specific penalty sum is £5,000 and the maximum £5 million. If at any time, the trustee forms the opinion that the value of the assets is higher than the penalty sum under the current specific penalty he must obtain a further specific penalty to bring the penalty sum equal to that value (subject to the maximum limit of £5m).

Where two or more persons are appointed jointly to act as trustee the above provisions apply to each of them individually. **(Reg 12(2) IP Regs)**

GUIDANCE FOR MEMBERS OF LIQUIDATION COMMITTEES (SCOTLAND)

ANNEXE D

CONTENTS

1. INTRODUCTION

1.1 General

1.1.1 This guide has been produced to help members of liquidation committees to be aware of:

- the duties and functions of the committee
- their rights as members of the committee
- the procedural rules relating to committee business.

1.1.2 This introduction gives a brief explanation of the liquidation procedure, and summarises the principal functions of the committee and the liquidator's main duties in relation to it. Detailed provisions are set out in the remaining sections of the guide.

1.1.3 The margin references are to the Insolvency Act 1986, the Insolvency (Scotland) Rules 1986 (both as amended), the Insolvency Practitioners Regulations 2005 the Bankruptcy (Scotland) Act 1985 (as amended), and Statement of Insolvency Practice 9 (Scotland) issued to all authorised insolvency practitioners.

1.2 Liquidation

1.2.1 Liquidation (also termed 'winding up') is the formal winding up of a company's affairs, entailing the realisation of its assets and the distribution of the proceeds in a prescribed order of priority. Liquidation may be either court, when it is instituted by order of the court, or voluntary, when it is instituted by resolution of the shareholders. An insolvent voluntary liquidation is known as a 'creditors' voluntary liquidation' because its conduct is primarily under the control of the creditors. A solvent voluntary liquidation is known as a 'members' voluntary liquidation', because its conduct is primarily under the control of its members. Members' voluntary liquidations are not covered further in this guidance as there is no committee in such proceedings.

1.2.2 The guidance which follows applies to both court liquidations and creditors' voluntary liquidations unless otherwise indicated.

1.3 The liquidator

The liquidator appointed to conduct the winding up has wide powers which are set out in the Insolvency Act 1986. He may use these powers at his discretion, except where the exercise of any power specifically requires sanction, as explained in paragraphs 2.2.1 and 2.2.2 below.

1.4 The liquidation committee

1.4.1 The committee in liquidations is known as the 'liquidation committee'. In most cases the liquidation committee will consist entirely of creditors of the insolvent company. Past or present members (shareholders) of the company may also be members of the committee in certain circumstances, but this is extremely rare. Appendix B sets out the special rules which apply where there are such members.

1.4.2 The purpose of the liquidation committee is to represent the interests of the creditors as a whole, not just the interests of its individual members. The principal functions of the committee are to sanction the exercise of certain of the liquidator's powers and to fix his remuneration. In addition to its statutory functions the committee may also serve to assist the liquidator generally and act as a sounding board for him to obtain views on matters pertaining to the liquidation.

1.4.3 The liquidator is required to report to the committee on matters relating to the liquidation and to submit copies of his accounts when required. Meetings are generally held when determined by the liquidator, and voting is by majority in number. Votes may also be taken by post.

1.4.4 Committee members are not entitled to remuneration, but they may be reimbursed for reasonable travelling expenses incurred on committee business.

1.4.5 Although the liquidator should normally have regard to the views of

* In this context the preferential debts do not constitute a separate class of creditor, and accordingly sanction is not required for the payment of preferential claims in full.

the liquidation committee, he may always refer matters of contention to a general meeting of creditors or to the court. It has been held - in England - that the court has a residual discretion not to follow the wishes of a committee where the special circumstances of the case warrant it. **(Re BCCI (No 3), [1993] BCLC 1490)**

2. THE FUNCTIONS OF THE COMMITTEE

2.1 Control of directors' powers

Generally speaking, the directors' powers cease on liquidation. In creditors' voluntary liquidations, however, there is provision for them to continue to the extent that the liquidation committee (or if there is no committee, the creditors) sanction their continuance. **(S.103)**

2.2 Control of liquidator's powers

2.2.1 The extent to which the exercise of the liquidator's powers requires sanction (approval) varies slightly between creditors' voluntary and Court liquidation.

In both types of liquidation the liquidator needs the sanction of the committee or the court, to exercise any of the following powers under sch.4: **(S.165, S.167)**

(a) Pay any class of creditors in full*.

(b) Make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company, or whereby the company may be rendered liable.

(c) Compromise on such terms as may be agreed -

- all calls and liabilities to calls, all debts and liabilities capable of resulting in debts, and all claims (present or future, certain or contingent, ascertained or sounding only in damages)

subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and

- all questions in any way relating to or affecting the assets or the winding up of the company, and
- take any security or caution for the discharge of any such call, debt, liability or claim and give a complete discharge in respect of it.

2.2.2 The following powers require sanction in a court liquidation but not in a creditors' voluntary liquidation:

(d) Bring or defend any action or other legal proceedings in the name and on behalf of the company.

Note: Where legal proceedings are proposed the committee should consider the probable benefit to the liquidation before giving permission. If permission is given, the committee should ensure that it is kept informed of the progress of the proceedings in case it should become necessary to consider their discontinuance.

(e) Carry on the business of the company so far as may be necessary for its beneficial winding up.

Note: The company's business may only be carried on if the liquidator bona fide and reasonably forms the opinion that this is necessary (in other words, highly expedient) for a beneficial winding up, for example to achieve a higher price for the assets used in the business.

2.3 Acceptance of shares etc for sale of company property

In a creditors' voluntary liquidation, where the whole or part of the business or property of the liquidating company is proposed to be transferred or sold to another company, the liquidator may receive, in payment or part payment for the transfer, shares, policies or other like interests in the transferee company for distribution among the members (shareholders) of the transferer company, subject to the sanction of the liquidation committee or the court. **(S.110)**

Previous page

Next page

2.4 Acts requiring notice to the committee

Where the liquidator -

(a) disposes of any property of the company to a person who is connected with the company, or

(b) in the case of a court liquidation, employs a solicitor,

he must give notice to the committee of that exercise of his powers. **(S.165(6), S.167(2))**

2.5 Expenses of preparing statement of affairs and convening creditors' meeting

In a creditors' voluntary liquidation, any reasonable and necessary expenses of preparing the statement of affairs and convening the creditors' meeting held under section 98 of the Insolvency Act may be paid out of the company's assets as an expense of the liquidation. Such payment may be made either before or after the commencement of the liquidation, but where it is made after the commencement the following provisions apply: **(r.4.14A)**

- If the liquidator appointed at the section 98 meeting intends to make such a payment, he must give the liquidation committee at least 7 days' notice of his intention to do so, and
- he may not make such a payment to himself or any associate of his otherwise than with the approval of the liquidation committee, the creditors or the court.

2.6 Liquidator's remuneration

2.6.1 Within 2 weeks after the end of an accounting period, the liquidator shall submit to the liquidation committee or, if none, the court his claim for outlays reasonably incurred and for his remuneration. Where there is a liquidation committee, copies of the documents shall be sent to the court. **(SIP 9 (Scot), B(S)A S.53(1) r.4.32)**

2.6.2 Within 6 weeks after the end of an accounting period, the liquidation committee or, as the case may be, the court shall issue a determination fixing the liquidator's outlays and remuneration. **(B(S)A S.53(3) r.4.32)**

2.6.3 The basis for fixing the amount of the remuneration payable to the liquidator may be a commission calculated by reference to the value of the company's estate realised by the liquidator, but there shall in any event be taken into account – **(SIP 9 (Scot))**

(a) the work which, having regard to that value, was reasonably undertaken by him; and

(b) the extent of his responsibilities in administering the company's estate. **(B(S)A S.53(5) r.4.32)**

2.6.4 When seeking agreement to his fees the liquidator should provide sufficient supporting information to enable the committee to form a judgement as to whether the proposed fee is reasonable having regards to all the circumstances of the case. Where the fee is to be charged on a time basis the liquidator should be prepared to disclose the amount of time spent on the case and the charge-out value of the time spent, together with such additional information as may be reasonably required having regard to the size and complexity of the case. Where the fee is charged on a percentage basis, the liquidator should provide details of any work which has been or is intended to be contracted out which would normally be undertaken by a liquidator or his staff directly. **(SIP 9 (Scot))**

2.6.5 In fixing the amount of such remuneration in respect of any accounting period, the liquidation committee or, as the case may be, the court may take into account any adjustment which the liquidation committee or the court may wish to make in the amount of the remuneration fixed in respect of any earlier accounting period. **(B(S) A S.53(5) r.4.32)**

2.6.6 Not later than 8 weeks after the end of an accounting period, the liquidator, the company or any creditor may appeal against a determination fixing the amount of the outlays and the remuneration payable to the liquidator –

(a) where it is a determination of a liquidation committee, to the

court and thereafter to a higher court; and

(b) where it is a determination of the court, to a higher court.

2.6.7 If the liquidator's remuneration has been fixed by the liquidation committee and he considers the amount to be insufficient, he may request that it be increased by resolution of the creditors. **(r.4.33)**

2.6.8 If the liquidator considers that the remuneration fixed for him by the liquidation committee, or by resolution of the creditors, is insufficient, he may apply to the court for an order increasing its amount or rate. The liquidator shall give at least 14 days' notice of his application to the members of the liquidation committee; and the committee may nominate one or more members to appear or be represented, and to be heard, on the application. The court may, if it appears to be a proper case, order the expenses of the liquidator's application, including the costs of any member of the liquidation committee appearing or being represented on it, to be paid as an expense of the liquidation. **(r.4.34)**

2.6.9 If the liquidator's remuneration has been fixed by the liquidation committee or by the creditors, any creditor or creditors of the company representing in value at least 25 per cent of the creditors may apply to the court for an order that the liquidator's remuneration be reduced, on the grounds that it is, in all the circumstances, excessive. If the court considers the application to be well founded, it shall make an order fixing the remuneration at a reduced amount or rate. Unless the court orders otherwise, the expenses of the application shall be paid by the applicant, and are not payable as an expense of the liquidation. **(r.4.35)**

2.6.10 Where the liquidator sells assets on behalf of a secured creditor, he is entitled to be remunerated out of the proceeds of sale. This is a matter between the liquidator and the secured creditor providing that it has no impact on any other creditor or class of creditor. **(SIP 9 (Scot))**

2.6.11 Where the liquidator realises an asset on behalf of a secured creditor and receives remuneration which has an impact on the funds

available to non-secured creditors, he should ensure that such fees are approved in accordance with the appropriate provisions of this guidance. **(SIP 9 (Scot))**

2.6.12 Where there are joint liquidators, it is for them to agree between themselves as to how the remuneration payable should be apportioned. Any dispute arising between them may be referred to the court or to the liquidation committee or a meeting of creditors for settlement.

2.6.13 Finally, it is also suggested that the insolvency practitioner should disclose all amounts paid or payable to his lawyers and the review of these fees should be evidenced. The explanation should be sufficient to support a decision (if one is necessary) to have them taxed (that is, determined by the court).

2.7 Expenses and disbursements

Where the liquidator makes, or proposes to make, a separate charge by way of expenses or disbursements to recover the cost of facilities provided by his own firm, he should disclose those charges to the committee when seeking approval of his fees, together with an explanation of how those charges are made up and the basis on which they are arrived at. **(SIP 9 (Scot))**

2.8 Taxation of legal accounts

Where any account in respect of legal services incurred by the liquidator is payable as an expense of the liquidation, the liquidator shall, before payment, submit it for taxation to the appropriate auditor of court. However, if such account has been agreed with the liquidator and the payee is not an associate of his, the liquidator may pay such account without submitting it for taxation – if the liquidation committee does not determine to the contrary. **(B(S)A S.53(2) r.4.68)**

2.9 Review of liquidator's security or caution

The liquidator is required to have in place security or caution for the proper performance of his functions (see Appendix A). It is the duty of the committee to review the adequacy of the liquidator's security or caution from time to time. **(r.7.28)**

2.10 Death of liquidator

In a creditors' voluntary liquidation where the liquidator has died, notice of the fact and of the date of death must be given to the liquidation committee. The persons who may give the notice are: **(r.4.36)**

- the liquidator's executors;
- a partner in his firm;
- any person if he produces a copy of the death certificate to the Court and registrar.

3. LIQUIDATOR'S OBLIGATIONS TO COMMITTEE

3.1 The liquidator has a duty to report to the committee all such matters as appear to him to be, or as they have indicated to him as being, of concern to them with respect to the liquidation. **(r.4.44)**

3.2 The liquidator need not comply with any request for information where it appears to him that the request is frivolous or unreasonable, or the cost of complying would be excessive having regard to the relative importance of the information, or there are insufficient assets to enable him to comply.

3.3 Where the committee has come into being more than 28 days after the appointment of the liquidator, he must report to the members in summary form what actions he has taken since his appointment and answer such questions as they may put to him regarding the conduct of the proceedings. A person who becomes a member of the committee at any time after its first establishment is not entitled to require a report to him by the liquidator, otherwise than in summary form, of any matters previously arising.

3.4 Nothing in these provisions disentitles the committee or any member of it from access to the liquidator's cash book and sederunt book, or from seeking an explanation of any matter within the committee's responsibility.

3.5 However, documents passing between the liquidator and the Department of Trade and Industry concerning possible disqualification of directors are not documents which are within any of the statutory rights of the liquidation committee to inspect, or in respect of which the committee can put questions to the liquidator and ask him to report to them. (Note – English Decision).

* A contributory is a past or present member of the company who is liable to contribute to the assets of the company in its winding up.

(Re W&A Glaser Ltd, [1994] BCC 199)

3.6 The liquidator must, as and when directed by the committee (but not more than once every two months), send a written report to every member of the committee setting out the position generally as regards the progress of the liquidation, and matters arising in connection with it, to which the liquidator considers the committee's attention should be drawn. In the absence of such directions by the committee the liquidator must send such a report not less than once every six months. **(r.4.56)**

3.7 The liquidator should, at their first meeting with him, discuss with committee members their requirements for reports and obtain their directions. He should also discuss with committee members at that meeting the types of matters which they wish to have reported to them so that matters of particular concern to them are identified.

4. LIQUIDATOR'S ACCOUNTS

4.1 Within 2 weeks after the end of an accounting period, the liquidator shall submit to the liquidation committee or, if there is no liquidation committee, to the court his accounts of his intromissions and a claim for outlays and remuneration. Where there is a liquidation committee, copies of the documents shall be sent to the court. **(B(S)A S.53(1), r.4.68)**

4.2 Within 6 weeks after the end of an accounting period, the liquidation committee or, as the case may be, the court shall audit the accounts. **(B(S)A S.53(3))**

5. ESTABLISHMENT OF THE COMMITTEE

5.1 Court liquidation

5.1.1 In a Court liquidation not preceded by an administration the committee will be established by general meetings of the company's creditors and contributories*. The committee must consist of at least three, and not more than five, creditors, and in cases where the winding up is on grounds other than insolvency it may also have

up to three contributory members. **(S.142, r.4.41)**

5.1.2 Where the winding-up order is made immediately on the r.4.61 discharge of an administration order and the court orders that the person acting as administrator be appointed liquidator, then any committee established for the purposes of the administration continues in being as the liquidation committee and there is no need to establish another committee. However, this provision does not apply if the number of members at the date of the winding-up order is less than three. Furthermore, any creditor who was a member of the committee immediately before the winding-up order ceases to be a member if his debt is fully secured. Where the winding-up order is made on grounds other than insolvency, the liquidator must convene a meeting of contributories to give them the opportunity to appoint contributory members of the committee. **(r.4.61, r.4.62)**

5.2 Creditors' voluntary liquidation

In a creditors' voluntary liquidation the creditors in a general meeting may appoint a committee of not more than five persons. If such a committee is appointed, the shareholders of the company may in a general meeting appoint up to a further five persons to the committee. The creditors may, however, resolve to exclude any of the shareholders' nominees from the committee unless the court directs otherwise. The court may appoint someone other than the rejected nominee to the committee in his stead. The minimum number of members of the committee is three. **(S.101, r.4.41)**

5.3 Formalities of establishment

5.3.1 The committee does not come into being, and accordingly cannot act, until the liquidator has issued a certificate of its due constitution. **(r.4.42)**

5.3.2 The liquidator will not issue the certificate until the minimum number of persons required to be members of the committee have agreed to act. Such agreement may be given by the creditor's proxy-holder or representative under section 375 of the Companies Act 1985 present at the meeting establishing the committee, unless the proxy or authorisation specifically precludes such agreement being given.

5.4 Formal defects

The acts of the committee are valid notwithstanding any defect in the appointment, election or qualifications of any committee member or the representative of any committee member, or in the formalities of its establishment. **(r.4.59A)**

6. MEMBERSHIP

6.1 General

6.1.1 It is the creditors or contributories themselves who are the members of the committee, not the individuals who represent them. Thus a company which is a creditor may be a member of the committee but can only act through a representative appointed in accordance with paragraphs 6.2.1 to 6.2.3 below. **(r.4.41)**

6.1.2 Any creditor (other than one whose debt is fully secured) may be a member of the committee, so long as -

(a) he has lodged a proof of his debt,

(b) his proof has neither been wholly disallowed for voting purposes nor wholly rejected for the purposes of distribution or dividend, and

(c) he has agreed to act as a member of the committee.

No person may be a member as both a creditor and a contributory. **(r.4.41, r4.42(3))**

If the company being wound up is a recognised bank, a representative of the Deposit Protection Board can exercise the right to be a member of the committee and, if he does so, the Board is to be regarded as an additional creditor member of the committee. **(r.4.41(6))**

6.2 Representatives

6.2.1 A member of the committee may be represented by another person duly authorised by him. Such representative must hold a letter of authority entitling him so to act (either generally or specially) signed by or on behalf of the committee member, and for this purpose any

Previous page

Next page

proxy or any authorisation under section 375 of the Companies Act 1985 in relation to any meeting of creditors of the company shall, unless it contains a statement to the contrary, be treated as such a letter of authority to act generally signed by or on behalf of the committee member. The chairman at any meeting of the committee may call on a person claiming to act as a committee member's representative to produce his letter of authority, and may exclude him if it appears that his authority is deficient.

6.2.2 No member may be represented by -

- a body corporate,
- a partnership,
- an undischarged bankrupt, or
- a disqualified director.

6.2.3 No person may act as representative of more than one committee member, or both as a member and as a representative of another member, on the same committee.

6.2.4 Where the representative of a committee member signs any document on the member's behalf, the fact that he so signs must be stated below his signature.

6.3 Resignation and termination of membership

6.3.1 A member of the liquidation committee may resign by notice in writing delivered to the liquidator. A person's membership of the committee is automatically terminated if - **(r.4.49)**

(a) his estate is sequestrated or he becomes bankrupt or grants a trust deed for the benefit of or makes a composition with his creditors, or

(b) at three consecutive meetings of the committee he is neither present nor represented (unless at the third of those meetings it is resolved that this rule is not to be applied in his case), or

(c) he ceases to be, or is found never to have been, a creditor, or

(d) he becomes disqualified to act as a director.

6.3.2 A creditor member of the committee may be removed by resolution at a meeting of creditors; 21 days' notice must be given of the meeting called to consider the intention to move the resolution. **(r.4.51)**

6.4 Vacancies

If there is a vacancy among the members of the committee it need not be filled if the liquidator and a majority of the remaining members so agree, provided the number of members does not fall below three. If another creditor is to be appointed he can be appointed either by the liquidator (provided the majority of the remaining committee members agree to the appointment and the creditor consents to act) or by a resolution passed at a duly convened meeting of creditors, after at least 14 days' notice of the resolution has been given. **(r.4.52)**

6.5 Composition of committee when creditors paid in full

If the liquidator issues a certificate that the creditors of the company have been paid in full with interest, the creditor members of the committee cease to be members of the committee.

7. PROCEEDINGS

7.1 Chairman

The chairman at any meeting of the committee will be the liquidator, or a person nominated by him to act. A person so nominated must be either -

(a) one who is qualified to act as an insolvency practitioner in relation to the company, or

(b) an employee of the liquidator or his firm who is experienced in insolvency matters. **(r.4.46)**

7.2 Quorum

A meeting of the committee is duly constituted if due notice of it has been given to all members and, in the case of a creditors' voluntary liquidation, at least two members are present or represented, and, in the case of a court liquidation, at least two creditor members are present or represented. **(r.4.47)**

Previous page

Next page

7.3 Meetings

7.3.1 General

The committee will meet where and when determined by the liquidator, subject as follows:

7.3.2 First meeting

The liquidator must call the first meeting to take place within 3 months of his appointment or of the committee's establishment (whichever is the later).

7.3.3 Subsequent meetings

Subsequent meetings of the committee must be called by the liquidator -

(a) if so requested by a creditor member of the committee or his representative - the meeting must then be held within 21 days of the request being received by the liquidator - and

(b) for a specified date, if the committee has previously resolved that a meeting be held on that date.

7.4 Notice of venue

The liquidator must give 7 days' notice in writing of the venue of any meeting to every member of the committee (or his representative, if designated for that purpose), unless this requirement has been waived by or on behalf of any member. Such waiver may be signified either at or before the meeting. **(r.4.45)**

7.5 Voting rights and resolutions

At any meeting of the committee each member (whether present himself or by his representative) has one vote, and a resolution is passed when a majority of the members present or represented have voted in favour of it. **(r.4.54)**

7.6 Records of meetings

Every resolution passed must be recorded in writing, either separately or as part of the minutes of the meeting. The record must be signed by the chairman and kept as part of the sederunt book. **(r.4.54)**

7.7 Postal resolutions

7.7.1 It is possible for resolutions to be passed by post. The liquidator must send to every member (or his representative designated for the purpose) a copy of any proposed resolution on which a decision is sought, which must be set out in such a way that agreement with, or dissent from, each separate resolution may be indicated by the recipient on the copy so sent. **(r.4.54)**

7.7.2 However, any member of the committee may, within 7 business days from the date of the liquidator sending out a resolution, require the liquidator to summon a meeting of the committee to consider the matters raised by the resolution. In the absence of such a request, the resolution is deemed to have been passed by the committee if and when the liquidator is notified in writing by a majority of the members (creditor members, in the case of a court liquidation) that they concur with it.

7.7.3 A copy of every resolution so passed, and a note that the concurrence of the committee was obtained, must be kept in the sederunt book.

8. CONFIDENTIALITY OF DOCUMENTS

8.1 Where the liquidator considers that any document forming part of the record of the liquidation -

(a) should be treated as confidential, or

(b) is of such a nature that its disclosure would be calculated to be injurious to the interests of the creditors,

he may decline to allow it to be inspected by a person (including a member of the committee) who would otherwise be entitled to inspect it. **(r.7.27)**

8.2 A person refused inspection may apply to the court for the refusal to be overruled.

Previous page

Next page

9. CHARGES FOR COPY DOCUMENTS

Where a liquidator is requested by a member of the committee to supply copies of any documents, he is entitled to make a charge. **(r.7.26))**

10. EXPENSES OF COMMITTEE MEMBERS

Any reasonable travelling expenses directly incurred by committee members or their representatives either in attending meetings of the committee or otherwise on the committee's business will be paid by the liquidator as an expense of the liquidation.**(r.4.57)**

11. DEALINGS BY COMMITTEE MEMBERS AND OTHERS

11.1 The position of all committee members is fiduciary and they must be careful not to expose themselves to a conflict between their duty as members of the committee and their personal interest. Accordingly, no member of the committee, or his representative, or any person who is an associate of a committee member or his representative, or any person who has been a committee member at any time in the previous twelve months, can enter into a transaction whereby he –

(a) receives out of the company's assets any payment for services given or goods supplied in connection with the administration of the liquidation, or

(b) obtains any profit from the administration of the liquidation, or

(c) acquires any asset forming part of the estate,

unless –

(a) he first obtains the leave of the court to the transaction, or

(b) he enters into the transaction as a matter of urgency or by way of performance of a contract in force before the date of the winding-up order or resolution to wind up and he obtains the leave of the court, having applied for such leave without undue delay, or

(c) he enters into the transaction with the prior sanction of the committee where the committee is satisfied (after full disclosure of the circumstances) that the transaction will be on normal commercial terms.

11.2 Where a resolution is proposed in the committee that sanction be given to such a transaction, no member of the committee, and no representative of a member, can vote on the resolution if he is to participate directly or indirectly in the transaction.

11.3 The costs of obtaining the leave of the court are not payable as an expense of the liquidation unless the court so orders.

11.4 Circumstances may occasionally arise where a legal action or dealing involving a member of the committee or a person connected with him make it inappropriate for him to attend discussions on the subject in the committee. In such circumstances the member may be asked not to attend a meeting, or part of a meeting, at which the matter is discussed.

Previous page

Next page

APPENDIX A

Liquidator's Security or Caution

The liquidator is required to have in place security for the proper performance of his functions. The security takes the form of a bond which provides that - **(s.390(3) reg.12 & sch 2, IP Regs)**

- a surety undertakes to be jointly and severally liable with the liquidator for losses caused by the fraud or dishonesty of the liquidator whether acting alone or in collusion with one or more persons, or the fraud or dishonesty of any person committed with the connivance of the liquidator;
- the liability of the surety and the liquidator is to be in both a general penalty sum and a specific penalty sum in respect of the individual case;
- any claims are to be paid first out of the specific penalty sum, then, if that is insufficient, out of the general penalty sum;
- a cover schedule containing the name of the insolvent and the value of the insolvent's assets is to be submitted to the surety within a specified period.

The general penalty sum must be £250,000 and the specific penalty sum must be at least equal to the estimated value of the company's assets, but ignoring the value of any assets charged to a third party to the extent of any amount which would be payable to that party, or held on trust to the extent that any beneficial interest in those assets does not belong to the company.

The minimum specific penalty sum is £5,000 and the maximum £5 million. If at any time, the liquidator forms the opinion that the value of the assets is higher than the penalty sum under the current specific penalty he must obtain a further specific penalty to bring the penalty sum equal to that value (subject to the maximum limit of £5m).

APPENDIX B

Shareholder and contributory members of the committee

Where there are shareholder or contributory members of the committee the following special rules apply. References are to the section headings of the guide. The term 'contributory' is used to refer to any contributory or shareholder member of the committee.

Resignation and termination of membership

A contributory member of the committee may be removed by a resolution of a meeting of contributories; 21 days' notice must be given of the meeting called to consider the intention to move the resolution. **(r.4.51)**

Vacancies

If there is a vacancy among the contributory members of the committee it need not be filled if the liquidator and a majority of the remaining contributory members so agree, provided that, in the case of a committee of contributory members only, the total number of members does not fall below three. The liquidator may appoint any contributory to fill the vacancy if the other contributory members agree and the contributory concerned consents to act. **(r.4.53)**

Alternatively, a meeting of contributories may resolve that a contributory be appointed (with his consent) to fill the vacancy. In this case at least 14 days' notice must have been given of the resolution to make such an appointment.

Where a meeting of contributories makes such an appointment in a creditors' voluntary liquidation the creditor members of the committee may, if they think it fit, resolve that the person appointed ought not to be a member of the committee. If so–

- that person is not qualified to be a member of the committee unless the court directs otherwise, and
- on any application to the court for directions the court may appoint another contributory to fill the vacancy.

Composition of committee when creditors paid in full

If there are at least two contributory members, the committee continues in

Previous page

Next page

being until a meeting of contributories decides to abolish it.

If the number of contributory members is below two, the committee will cease to exist 28 days after the issue of the liquidator's certificate of payment in full; but at any time when the committee consists of less than two contributory members it is suspended and cannot act.

Contributories may be co-opted by the liquidator, or appointed by a contributories' meeting, to be members of the committee, up to a maximum of five members.

All the other rules relating to the functioning of the liquidation committee continue to apply (with necessary modifications) as if all the members of the committee were creditor members. **(r.4.59)**

Voting rights and resolutions

In a court liquidation, where a committee consists of both creditor and contributory members, the votes of the contributory members do not count towards the number required for passing a resolution, but the way in which they vote on any resolution must be recorded.

However, where the only members of the committee are contributories, the committee is treated for voting purposes as if all its members were creditors. **(r.4.54)**

GUIDANCE FOR MEMBERS OF COMMITTEES IN VOLUNTARY ARRANGEMENTS (SCOTLAND)

ANNEXE E

1. LEGISLATION

1.1 The margin references in this guide are to the Insolvency Act 1986, the Insolvency (Scotland) Rules 1986 (both as amended), the Insolvency Practitioners Regulations 2005, and the Statement of Insolvency Practice 9 (Scotland) issued to all authorised insolvency practitioners.

2. MORATORIUM COMMITTEE FOR ELIGIBLE COMPANIES

2.1 A company in financial difficulties may, if it meets certain eligibility criteria, obtain a moratorium on creditor action while the directors put forward a proposal for a voluntary arrangement. The person proposed as supervisor of the arrangement is called the nominee, and he has a responsibility to monitor the company's affairs during the moratorium.

2.2 Initially the maximum period for a moratorium is 28 days, during which time meetings of creditors and shareholders must be held to consider the proposal. These meetings (or the creditors' meeting if the two meetings cannot agree) may resolve to extend the moratorium for a maximum of a further two months. Where this happens the meetings may also establish a committee with the nominee's consent. Apart from the duty to review the nominee's security mentioned below, there are no statutory rules about the functions of the committee, which will depend entirely on what functions are conferred on it by the meeting at which it was set up. The committee will cease to exist when the moratorium comes to an end. **(r7.28(2)(c))**

3. COMMITTEE IN APPROVED ARRANGEMENTS

3.1 A committee of creditors may be established under an agreed proposal for a company. However, the insolvency legislation makes no provision for the establishment of such a committee, nor (save for the duty to review the supervisor's security mentioned below) for its functions. The rules pertaining to its establishment, membership, functions, powers and procedures will

therefore derive wholly from the terms of the arrangement itself.

4. REVIEW OF NOMINEE'S OR SUPERVISOR'S SECURITY

4.1 The one statutory obligation laid on a committee in a voluntary arrangement is the duty to review, from time to time, the adequacy of the nominee's or supervisor's security. **(r.7.28(2)(c))**

4.2 The nominee or supervisor is required to have in place security for the proper performance of his functions. The security takes the form of a bond which provides that – **(s390(3) Sch2 IP Regs)**

- A surety undertakes to be jointly and severally liable with the nominee or supervisor for losses caused by the fraud or dishonesty of the nominee or supervisor whether acting alone or in collusion with one or more persons, or the fraud or dishonesty of any person committed with the connivance of the nominee or supervisor;
- The liability of the surety and the nominee or supervisor is to be in both a general penalty sum and a specific penalty sum in respect of the individual case;
- Any claims are to be paid first out of the specific penalty sum, then, if that is insufficient, out of the general penalty sum;
- A cover schedule containing the name of the insolvent and the value of the insolvent's assets is to be submitted to the surety within a specified period.; and

The general penalty sum must be £250,000 and the specific penalty sum must be at least equal to the estimated value of the company's assets, but ignoring the value of any assets charged to a third party to the extent of any amount which would be payable to that party, or held on trust to the extent that any beneficial interest in those assets does not belong to the company.

The minimum specific penalty sum is £5,000 and the maximum £5 million. If at any time, the nominee or supervisor forms the opinion that the value of

the assets is higher than the penalty sum under the current specific penalty he must obtain a further specific penalty to bring the penalty sum equal to that value (subject to the maximum limit of £5m).

Where two or persons are appointed jointly to act as nominee or supervisor the above provisions apply to each of them individually. **(Reg 12(2) IP Regs)**

If the terms of the arrangement give the committee power to approve the supervisor's remuneration, reference should be made to the explanatory note, 'Voluntary Arrangements – a Creditors' Guide to Insolvency Practitioners' Fees', which is appended to Statement of Insolvency Practice 9 (Scotland) (Remuneration and Disbursements) and should be provided by the supervisor. **(SIP 9)**

2.17 STATEMENT OF INSOLVENCY PRACTICE 16 (SCOTLAND) PRE-PACKAGED SALES IN ADMINISTRATIONS

INTRODUCTION

[Not reproduced. Superseded by SIP1 with effect from 02 May 2011.]

STATEMENT OF INSOLVENCY PRACTICE

1. In this Statement of Insolvency Practice the term 'pre-packaged sale' (or 'pre-pack') refers to an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator, and the administrator effects the sale immediately on, or shortly after, his appointment.

2. Practitioners who are party to a pre-packaged sale, whether as adviser to the company before the appointment, as the appointed administrator, or both, should bear in mind the duties which they, and those who act on their advice, owe to parties who might be affected by the arrangement, and should have regard to the associated risks. They should keep a detailed record of the reasoning behind the decision to undertake a pre-packaged sale, and should be able to explain and justify why such a course of action was considered appropriate.

The legal authority for pre-packaged sales

3. In a series of cases[1] the courts have held that, where the circumstances of the case warrant it, an administrator has the power to sell assets without the prior approval of the creditors or the permission of the court. However, it should be borne in mind that reliance on such authority does not protect administrators from potential challenges to their conduct under paragraph 74, or claims for misfeasance under paragraph 75, of Schedule B1 to the Insolvency Act 1986. In order to avoid the risk of such exposure, care should be taken to ensure that such power is only exercised in genuine furtherance of the purpose of administration.

1 T&D Industries Plc [2001] 1 WLR 646; Transbus International Ltd [2004] EWHC 932 (Ch), [2004] All ER 911; DKLL Solicitors [2007] EWHC 2067 (Ch)

Preparatory work

4. The preparation for a pre-packaged sale highlights a number of issues which arise in other contexts, but which are thrown into sharper focus in the particular circumstances of a pre-pack.

5. Practitioners should be clear about the nature and extent of their role and their relationship with the directors in the pre-appointment period. Where they are instructed to advise the company, they should make it clear that their role is to advise the company and not to advise the directors on their personal position. The directors should be encouraged to take independent advice. This is particularly important if there is a possibility of the directors acquiring an interest in the assets in the pre-packaged sale.

6. Practitioners should bear in mind the duties and obligations which are owed to creditors in the pre-appointment period. They should be mindful of the potential liability which may attach to any person who is party to a decision that causes a company to incur credit and who knows that there is no good reason to believe it will be repaid. Such liability is not restricted to the directors.

7. When considering the manner of disposal of the business or assets, administrators should bear in mind the requirements of paragraphs 3(2) and 3(4) of Schedule B1 to the Insolvency Act 1986. These provide that:

   - the administrator must perform his functions in the interests of the company's creditors as a whole, and
   - where the objective is to realise property in order to make a distribution to secured or preferential creditors, the administrator has a duty to avoid unnecessarily harming the interests of the creditors as a whole.

   Administrators engaged in a pre-packaged sale should therefore be able to demonstrate that they have considered the above.

Disclosure

8. It is in the nature of a pre-packaged sale in an administration that unsecured creditors are not given the opportunity to consider the sale of the business or assets before it takes place. It is important, therefore, that they are provided with a detailed explanation and justification of why a pre-packaged sale was undertaken, so that they can be satisfied that the administrator has acted with due regard for their interests.

9. The following information should be disclosed to creditors in all cases where there is a pre-packaged sale, as far as the administrator is aware after making appropriate enquiries:

- The source of the administrator's initial introduction
- The extent of the administrator's involvement prior to appointment
- Any marketing activities conducted by the company and/or the administrator
- Any valuations obtained of the business or the underlying assets
- The alternative courses of action that were considered by the administrator, with an explanation of possible financial outcomes
- Why it was not appropriate to trade the business, and offer it for sale as a going concern, during the administration
- Details of requests made to potential funders to fund working capital requirements
- Whether efforts were made to consult with major creditors
- The date of the transaction
- Details of the assets involved and the nature of the transaction
- The consideration for the transaction, terms of payment, and any condition of the contract that could materially affect the consideration
- If the sale is part of a wider transaction, a description of the other aspects of the transaction

- The identity of the purchaser
- Any connection between the purchaser and the directors, shareholders or secured creditors of the company
- The names of any directors, or former directors, of the company who are involved in the management or ownership of the purchaser, or of any other entity into which any of the assets are transferred
- Whether any directors had given guarantees for amounts due from the company to a prior financier, and whether that financier is financing the new business
- Any options, buy-back arrangements or similar conditions attached to the contract of sale

10. This information should be provided in all cases unless there are exceptional circumstances, and if this is the case, the reason why the information is not provided should be stated. If the sale is to a connected party it is unlikely that considerations of commercial confidentiality would outweigh the need for creditors to be provided with this information.

11. Unless it is impracticable to do so, this information should be provided with the first notification to creditors. In any case where a pre-packaged sale has been undertaken, the administrator should hold the initial creditors' meeting as soon as possible after his appointment. Where no initial creditors' meeting is to be held and it is impracticable to provide the information in the first notification to creditors it should be provided in the statement of proposals of the administrator which should be sent as soon as practicable after his appointment.

12. The Insolvency Act 1986 permits an administrator not to disclose information in certain limited circumstances. This Statement of Insolvency Practice will not restrict the effect of those statutory provisions.

Effective from 1 January 2009

Previous page

Next page

2.18 STATEMENT OF INSOLVENCY PRACTICE 17 (SCOTLAND) A RECEIVER'S RESPONSIBILITY FOR THE COMPANY'S RECORDS

This document was issued as SIP 1 (Scotland) in February 1998. It was re-numbered as SIP 17 (without updating of the text) with effect from 2 May 2011.

1. INTRODUCTION

1.1 This statement of Insolvency Practice is to be read in conjunction with the Explanatory Foreword.

1.2 This statement has been prepared to summarise what is considered to be the best practice in circumstances where receivers are approached by liquidators or directors seeking access to or custody of a company's books and records. The best practice is considered below both with regard to company records maintained prior to the appointment of a receiver and with regard to those records prepared after the receiver's appointment.

2. COMPANY RECORDS MAINTAINED PRIOR TO APPOINTMENT OF A RECEIVER

2.1 The records which a company maintains prior to the appointment of a receiver may be classified under two main headings.

2.2 The first comprises the non-accounting records which the directors are required to maintain by the Companies Act 1985 (as amended) (the statutory records). These consist of various registers (e.g. of members) and minute books (e.g. of directors' meetings).

2.3 The second category of records maintained by a company prior to the appointment of a receiver includes accounting records required by statute and all other non-statutory records of the company (statutory accounting and other non-statutory records). Taking each in turn:-

3. STATUTORY RECORDS

3.1 The company's statutory records should be kept at its registered office or other permitted place (see paragraph 3.6 below) having regard to the provisions of the Companies Act 1985, Sections 288, 353, 383 and 411 (registers of directors, members, minute books and charges).

3.2 Directors' powers to cause entries to be made in these statutory records do not cease on the appointment of a receiver. Indeed, the directors' statutory duties to maintain them are unaffected by his appointment.

3.3 A receiver would have the power to inspect the statutory records as part of his right to take possession of, collect and get in the property of the company (cf. schedule 2, paragraph 1 of the Insolvency Act 1986). He is not, however, placed under an obligation to maintain those records after his appointment and should not normally do so.

3.4 The abolition by Section 130 of the Companies Act 1989 of the requirement for a company formed under the Companies Acts to have a common seal means that in many cases the company in receivership will have no common seal. Provided that an appropriately worded attestation clause is used, deeds can be executed without the use of the common seal. Given that the common seal may still be used for the execution of deeds by the company, however, it is considered best practice for the receiver to take possession of it.

3.5 On appointment, a receiver has two possible options:-

i) To leave the statutory records in the custody of the directors so that they are in a position to continue to carry out their statutory duties to maintain them.

ii) To take possession of the statutory records for safe keeping. In such circumstances, the receiver should remind the directors of their statutory responsibilities to maintain the records and allow them free access for this purpose. It would also be advisable for the receiver to prepare a detailed receipt for all the records taken into his possession. This should be signed by a director or other responsible official of the company in receivership.

3.6 The receiver may change the company's registered office to that of his own firm, in which case, the statutory records should also be transferred to the new registered office and the procedure outlined in paragraph 3.5. (ii) above followed.

3.7 Any statutory records (and if applicable any seals) taken into a receiver's possession (see paragraphs 3.3 and 3.4) should be returned to the directors (or liquidator) on the receiver's ceasing to act.

4. STATUTORY ACCOUNTING AND NON-STATUTORY RECORDS

4.1 All such records as are necessary for the purposes of a receivership should be taken into the receiver's possession and/or control and any which he will definitely not require may be left with the directors. If the receiver encounters difficulty in obtaining possession of the records, the provisions of Sections 234 - 236 of the Insolvency Act 1986 may be of assistance. These are the provisions allowing a receiver to apply to the court for an order for property in the control of any party to be handed to him, placing officers and others under a statutory obligation to co-operate with the receiver and allowing him to apply to the court for an order summoning officers of the company in receivership and others before it for questioning.

4.2 A receiver is under no statutory duty to bring these records up to date to the date of his appointment although for practical purposes (such as to give prospective purchasers some indication of the financial state of the business) it may be necessary for him to do so.

4.3 If a receiver does not take possession of all the records it would be advisable for him to make a list of all those not taken into his custody with a note of their whereabouts.

4.4 When making sales of certain assets (e.g. book debts or plant and machinery) it may be necessary for the receiver to hand over to the purchaser company records (e.g. debtors' ledger or plant registers) relating to those assets. In such circumstances, the receiver should ensure that the relevant asset sale agreement specifies the need for these records to be made available to the company on request. Although this will invariably be a matter of negotiation between the receiver and his purchaser, it would be preferable for him to retain the originals of such records. He may make copies available to the purchaser or allow the purchaser to retain them for a short time for the purpose of making copies. Once again, appropriate provision should be made in the asset sale agreement as to the particular circumstances and as to whom is to bear the costs.

4.5 If a receiver transfers the business of the company to a third party as a going concern, Section 49 and paragraph 6 of Schedule 11 to the Value Added Tax Act 1994 place the obligation of preserving any records relating to the business upon the transferee. This applies unless the Commissioners of Customs & Excise, at the request of the transferor, otherwise direct.

4.6 This is a wide-ranging obligation. It applies regardless of whether the VAT registration is itself transferred or whether the transfer is treated as supply of neither goods nor services.

4.7 The categories of records covered by Schedule 11 paragraph 6 are wide-ranging. They include orders and delivery notes, purchase and sale records, annual accounts, VAT accounts and credit and debit notes.

5. ENTITLEMENT OF LIQUIDATOR TO RECORDS

5.1 The case of *Engel -v- South Metropolitan Brewing & Bottling Company [1892] 1 Ch 442* is authority under English law to the effect that a liquidator becomes entitled to possession of all books and records relating to the "management and business" of the company which are not necessary to support the title of the chargeholder as against a court-appointed receiver. The court held that a court-appointed receiver can be compelled to deliver such documents to the liquidator against the liquidator's undertaking to produce them to the receiver on request. While there is no equivalent authority with respect to a receiver appointed by the holder of a floating charge, general practice supports the proposition that delivery up of records in return for an undertaking and subsequent production on request should occur *(Lightman & Moss, Law of Receivers of Companies, 2nd Edition paragraph 11 - 17).*

5.2 A receiver has no statutory authority to destroy pre-appointment records and in due course these must be returned to the company's directors or, if the company is in liquidation, to its liquidator.

6. POST APPOINTMENT RECORDS

6.1 Statutory accounting records

Relating to the period prior to the appointment of a liquidator

6.1.1 The receiver should establish appropriate accounting records as from the date of his appointment. The English case of *Smiths Limited -v- Middleton [1979] 3 A11 ER 842* shows that he has a duty to render full and proper records to the company in order that the company (and its directors) may comply with the duties imposed by Sections 221, 226, 227 and 241 Companies Act 1985 (preparation and approval of accounts).

Previous page

Next page

6.1.2 A receiver is also under obligation to make returns of his receipts and payments pursuant to Rule 3.9 of the Insolvency (Scotland) Rules 1986. The statutory requirements and the best practice to be followed in the preparation of insolvency practice entitled "Preparation of Insolvency Office Holders' Receipts and Payments Accounts", to which members are referred to further information.

6.1.3 When a liquidator is appointed, the Engel case would seem to apply so that the liquidator becomes entitled to possession of records (see paragraph 5.1. above).

6.1.4 Receivers have no statutory authority to destroy such records and on ceasing to act must hand these over to the company's directors or, if it is in liquidation, to the liquidator.

Relating to the period after the appointment of a liquidator

6.1.5 The receiver's obligation to make returns of receipts and payments and to maintain accounting records (paragraph 6.1.2. above) remains in force after the appointment of a liquidator.

6.1.6 Section 69 Insolvency Act 1986 allows any member, creditor, the Registrar of Companies or the liquidator to enforce these duties.

7. OTHER RECORDS

7.1 The remaining records, books and papers relating to a receivership may be subdivided between "company records", "chargeholder's records" and "receiver's personal records".

7.2 Company records

7.2.1 Company records will include as a minimum all those records which exist as a result of carrying on the company's business and dealing with the assets. These records fall in the same category as the non-statutory records mentioned in paragraphs 4.1 to 5.2 above. They should be treated in the same way, being returned to the company's directors or if it is in liquidation, to its liquidator when the receiver ceases to act.

7.2.2 In the English case of *Gomba Holdings UK Limited -v- Minories Finance Limited [1989] 5BCC 27* consideration was given to precisely which records fall within the definition of "company records". It was held that an administrative receiver acts in several capacities during the course of a receivership. In addition to being agent of the company, he owes fiduciary obligations to his appointor and to the company. It is only documents generated or received pursuant to his duty to manage the company's business or dispose of its assets which belong to the company.

7.3 Chargeholder's records

7.3.1 As explained above, in the Gomba case quoted in paragraph 7.2.2. above it was held that documents containing advice and information to the appointor and "notes, calculations and memoranda" prepared to enable the receiver to discharge his professional duty to his appointor or to the company belong either to the appointor (if he wishes to claim them) or to the receiver. They do not belong to the company.

7.4 Receiver's personal records

7.4.1 A receiver's personal records are those prepared by him for the purpose of better enabling him to discharge his professional duties. They will include, for instance, his statutory record which he is required to maintain by Regulation 17 of the Insolvency Practitioners' Regulations 1990 ("the Regulations"). The record must take the form set out in Schedule 3 to the Regulations.

8. BEST PRACTICE

8.1 It is considered best practice that all records mentioned above, with the exception of the chargeholder's records (paragraph 7.3. above) and a receiver's personal records (paragraph 7.4. above) should be made available on request to the company acting by its directors or, if it is in liquidation, its liquidator, unless the receiver is of the opinion that disclosure at that time would be contrary to the interests of the appointor, for instance because of current negotiations for the sale of assets *(Gomba Holdings UK Limited -v- Homan [1986] 3 All ER 94)*. Subject to the interests of the chargeholder, it appears from this case that directors are entitled to such information as they need to enable them to exercise their residual powers and to perform their residual statutory duties considered above.

Previous page

Next page

8.2 Disclosure of the receiver's personal records is a matter for his discretion, although in any legal action brought against him productions may be ordered by the Court.

8.3 Where there is no liquidator and the directors cannot be traced (or the receiver has reason to suppose that they are not reliable) he will need to consider whether he feels it necessary to present a petition for the company to be wound up using his powers under Schedule 2 to the Insolvency Act 1986. Whether or not a liquidator is appointed, the receiver has no statutory power to destroy a company's records even after the expiry of the statutory period for which the company would need to retain them (usually 6 years). Thus, if he does so without the authority of the company or the liquidator, he does so at his peril. Note also that the record a receiver is required to keep by the Regulations must be preserved for a period of 10 years from the later of the date upon which the receiver ceases to hold office or any security or caution maintained in respect of the company ceases to have effect (Regulation 20).

Issued February 1998, Re-issued 2 May 2011

Section 3

Insolvency Bulletins (Scotland)

CONTENTS

3.1 INSOLVENCY BULLETIN 5 NON-PREFERENTIAL CLAIMS BY EMPLOYEES DISMISSED WITHOUT PROPER NOTICE BY INSOLVENT EMPLOYERS

Formerly Statement of Insolvency Practice 5 (Scotland)

To: *All Insolvency Permit Holders*

Introduction

1. This Insolvency Bulletin has been prepared for the use of insolvency practitioners (IPs) in dealing with the treatment of employees' non-preferential claims in insolvencies in Scotland. The purpose of this Bulletin is to harmonise members' practice and try to ensure that it is acceptable to the Redundancy Payments Service (RPS) of the Department of Trade and Industry in processing claims under the Employment Rights Act 1996 (ERA). It has been approved in draft form by the RPS but no liability attaches to the RPS in respect of such approval nor is the RPS in any way bound by any statement contained in this Insolvency Bulletin.

Payment in Lieu of Notice - Basis of Calculation

2. Payments in lieu of notice are a liability of the employer and depend on the terms of the relevant contract of employment, subject to the minimum periods of notice laid down by s86 ERA. The amount of the claim, calculated as below, is payable by the RPS out of the National Insurance Fund in the case of an insolvent employer under s184(1)(b) ERA, only insofar as it relates to the minimum statutory period of notice (but not any additional contractual period) up to the current statutory weekly maximum and subject to the definition of 'a week's pay'. Payment by the RPS does not prejudice the right of an employee to seek recovery of any other debts, or debts in excess of the statutory limits, from the insolvent employer in the usual way. Nor does payment by the RPS imply that the IP is bound to admit a claim, whether by the employee or by the RPS in subrogation, which the IP does not agree is legally valid.

3. The basis on which the RPS' liability under s184(1)(b) ERA has been interpreted by the courts is that the amount payable should be computed on a similar basis to damages for wrongful dismissal at common law.

Previous page

Next page

The essential principle is that the employee's income (as limited by the definition of a week's pay in s221 ERA (formerly Sch 14 Employment Protection (Consolidation) Act 1978 (EPCA)) should be restored during the notice period to that which would have been received if proper notice had been given, but that the employee should take reasonable steps to mitigate the damage suffered by the employer's failure to give proper notice.

4. The guidance below gives, in the light of existing case law, the approach approved by the RPS's and SPI's legal advisers. The case law is, however, not definitive in all respects and, if on particular points an IP proposes an alternative approach which does not conflict with established precedent, and provides a sensible and equitable assessment, it is likely to be accepted by the RPS.

5. The starting point for the calculation is a (gross) week's pay as defined in s221 ERA. The case of *Secretary of State v Haynes [1980] ICR 371* is authority that only the loss of remuneration payable under ss86-91 and 220-9 ERA (formerly Sch 3 and 14 EPCA) is to be taken into account by the RPS in calculating the putative 'damages'. Thus fringe benefits, even where they are a contractual entitlement, are disregarded by the RPS except where, like luncheon vouchers, they are sufficiently close to pay to form part of a week's pay. Any benefit in kind (e.g. free accommodation) is also disregarded *(S & U Stores Limited v Wilkes [1974] ITR 425)*. The Haynes case is also regarded by the RPS as authority for excluding payments such as holiday credits, and by analogy employers' pension contributions, which do not form part of the remuneration payable to the employee in respect of the week or weeks in question.

6. In effect, it was held by the Employment Appeal Tribunal (EAT) in the Haynes case that the RPSs liability under ERA s184(1)(b) is somewhat narrower than the employer's common law liability, in that the RPS is concerned only with 'remuneration'. Thus, in that case, the purchase of holiday stamps was not regarded as pay in respect of the week in which they would have been purchased, partly because the employee would have lost his rights entirely if he had not taken the holiday by a certain date. In the Wilkes case, it was held that an additional weekly sum of expenses which was a genuine pre-estimate of anticipated expenditure by the employee was not 'remuneration', although any profit element would have been. It is accepted that use of a company car could not be classified as 'remuneration', but it does not

Previous page

Next page

necessarily follow that the employer's pension contributions can similarly be excluded and it is submitted that the Haynes case is not authority for excluding them. Thus, there are certain items, such as the value of use of a company car, which the employee could possibly claim against the employer (non-preferential) but not against the RPS.

Irrelevant Factors

7. The following factors should be disregarded in assessing the employee's claim:

(a) Redundancy Pay

The decision in *Basnett v J & A Jackson Limited [1976] ICR 63* provides that redundancy pay is not a mitigating factor in assessing the amount of a claim for damages or pay in lieu of notice, on the basis that the redundancy entitlements are not founded on or connected with a breach of contract. This view has been adopted by the RPS and is thought to be the correct approach despite an earlier contrary decision in *Stocks v Magna Merchants Limited [1973] 2 All ER 329* and the acceptance of the decision in that case in *Aspden v Webbs Poultry and Meat Group (Holdings) Limited [1996] IRLR 521*. In *Wilson v National Coal Board, New Law Journal 4/12/80 p1146*, a personal injuries case, the House of Lords confirmed the general principle here expressed, although they decided in that particular case, on its special facts, that redundancy pay should be deducted. (Gross damages were assessed on the basis that the employee would have continued in employment for the rest of his working life but for the injury, so it would be unreasonable not to make the deduction in such a case).

(b) Discretionary Social Security Benefits

See para 11(c) below regarding non-discretionary benefits.

(c) National Insurance Contributions (NIC)

Despite the first instance decision in *Cooper v Firth Brown Limited [1963] 2 All ER 31* (a personal injuries case), it is considered that NIC of the employee should not be deducted from any payment of salary in lieu of notice. There are two reasons for this. First, the individual may lose the benefits which he would otherwise have obtained from these NIC and would thus be penalised twice if he lost the amount of the NIC themselves as well as the benefits.

Previous page

Next page

Secondly, if the individual is employed for at least one day during the week of his notice period, his NIC for that week will have already been paid.

(d) Retirement Pension

It is clear from the Court of Appeal decision in *Hopkins v Norcros Plc [1994] ICR 11* that a pension payable under an employer's scheme should be treated as purchased by the employee's past work and is not deductible. As regards state pensions, the Pensioners' Earnings Rule was abolished in the 1989 Finance Act. It is no longer appropriate to deduct retirement pension monies from payment in lieu of notice claims. However, see para 8(b) below regarding possible additional claims for loss of pension benefit.

(e) Protective Awards (possibly)

Previous practice was to deduct from pay in lieu of notice the amount of any protective award insofar as it related to the same period. Indeed s190(3) Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA) specifically provided for mutual deduction between the two amounts and the practice was upheld by the Court of Appeal in *Potter v Secretary of State for Employment [1997] IRLR 21* (subject to appeal to the House of Lords). However, it was held in *EC Commission v UK [1994] IRLR 412* that this power of deduction was not compatible with EC law in that its effect was that UK law provided no sufficient deterrent to encourage employers to comply with the consultation requirements of s188 TULCRA and s190(3) was accordingly repealed as from 30 August 1993. Therefore, it is now the RPS's practice not to reduce pay in lieu of notice by reference to a protective award or vice versa, where the first dismissal covered by the award was after 28 November 1993.

The textbooks seem to have assumed that the right of deduction has been effectively removed but it is submitted that this is highly doubtful. A protective award is an award ordering the employer to pay 'remuneration' for the protected period, that is, a period commencing on the date when the first relevant dismissal takes effect (or of the award, if earlier). Pay in lieu of notice relates to remuneration over, in many cases, precisely the same period. The repeal, without more, of an express provision for mutual deduction does not take away a right of deduction which may well be implicit by reference to s190 as it now remains. There is also an argument that the rule against double proof would prevent an office holder from

admitting proofs under both heads, though this is likely to apply only if, not withstanding the view of the RPS, the employer itself remains entitled to apply the deduction.

In view of the risk of duplicated claims, IPs should be more inclined than in the past to defend protective award cases and may refer to the RPS in cases of doubt.

(f) Other Benefits

Any benefits payable to an employee which arise from a private contract, as opposed to the State scheme, should not be set off in mitigation. Examples of these might include, as well as an occupational pension (see para 7(d) above), unemployment pay from a welfare scheme administered by a trade union.

Additional Claims

8. The following factors may be required to be taken into account so as, where appropriate, to increase a person's claim:

(a) Fringe Benefits

Fringe benefits, such as a company car and car fuel, medical insurance subscriptions or rentfree accommodation, are likely to give rise to an additional claim where these are a contractual entitlement. A claim from an employee may well arise even though the RPS cannot consider fringe benefits under the ERA.

The value of a company car was considered in *Shove v Downs Surgical Plc [1984] ICR 532*, where the loss of use of a 4,200 cc Daimler over two and a half years, including petrol for 5,000 miles pa private motoring, was assessed at £10,000. On the other hand, in *Clark v BET plc, [1997] IRLR 348*, Timothy Walker J assessed entitlement to a chauffeur-driven car for business and private use including all running expenses, which was in fact used privately only for visits to the opera, theatre and dinner, and in essence placed at nil for tax purposes, apart from travel to and from work, at £2,000 pa.

The Inland Revenue for the 1994/95 tax year revised the basis on which the taxable benefit of a car is taxed. These rules were introduced to reflect more accurately the true value of a company car and the taxable benefit charge also provides a useful indicator of the value of the benefit. The Automobile Association also produces annual tables giving up-to-date information on

Previous page

Next page

the costs of running cars of various sizes and these are a more accurate, if more favourable to the employee, method of assessing the value of a company car to an employee.

(b) Lost Pension Scheme Benefits

The employer's likely contributions to a pension scheme in respect of the employee and/or any additional benefits expected to accrue to the employee during the contractual period of notice are likely to be claimed. Of course, the contributions will not necessarily fairly reflect the benefit and in many cases an actuarial calculation will be required. It is normally only in cases of fixed-term contracts where the pension scheme is determinable within the contract period that pension entitlements may to some extent be excluded from the calculations: see *Beach v Reid Corrugated Cases Limited [1956] 1 WLR 807*.

Mitigation

9. The principle of mitigation applies to payments in lieu of notice since the claim of an employee dismissed with no, or short, notice is in essence one for damages for breach of contract and an insolvent employer must apply all possible reductions. Mitigation is particularly difficult to apply since it may be notional as well as actual (what would the employee have earned if he had made the effort to find a job?). To facilitate accurate calculation of mitigation, the amount of the payment cannot normally be calculated until after the notice period has expired.

10. Mitigation does not apply where the contract itself provides for pay in lieu as an alternative to notice since there is then no breach of contract and the pay in lieu is a contractual entitlement: see *Abrahams v Performing Rights Society [1995] IRLR 486*. This is most likely to arise in the contracts of senior executives.

11 The different elements that may come into the calculation of mitigation are discussed separately as follows:

(a) Remuneration

Any income earned or received by the employee during the notice period, which would not have been earned or received if the contract of employment had not been terminated, should be deducted from the payment in lieu of notice. The authority for this is *Secretary of State for Employment v Wilson* [1978] ICR 200.

(b) Notional Earnings

A deduction for notional earnings because of the employee's failure to mitigate his loss may be made in those relatively rare circumstances where the notice period is substantial and/or it is sufficiently clear that the employee had the opportunity to obtain other income in the notice period and unreasonably failed to take that opportunity. It is reasonable, where notice of less than, say, three months is involved, not to pursue the question of notional, as opposed to actual, mitigation in respect of alternative earnings very far. The objective must be to produce a figure which is not over-generous but which genuinely compensates the employee for his loss over the notice period and therefore should not lead to litigation. The EAT confirmed in the case of *Secretary of State v Jobling [1980] ICR 380* that the duty to mitigate does not drive an employee to unreasonable lengths, even though in that particular case they did decide that deduction for notional earnings should be made, because Mr Jobling deliberately chose not to draw a salary that was readily available.

(c) Non-discretionary Benefits

Any social security benefits or allowances which are not discretionary received by the employee during the period of notice, such as sickness pay, invalidity pay and maternity allowance should be deducted. The House of Lords in the case of *Westwood v Secretary of State for Employment* [1985] ICR 209 held, following *Parsons v BNM Laboratories Limited* [1964] 1 QB 95, that unemployment benefit (now replaced by Jobseeker's Allowance (JSA)) should mitigate the claim. Further authority in support of this is *Lincoln v Hayman* [1982] 2 All ER 819, where the Court of Appeal held that supplementary benefit as well as unemployment benefit should be deducted from special damages in a personal injury case.

The question of mitigation of notional JSA in cases where the employee has failed to claim JSA does not arise (except in rare cases where it is income-based) because no JSA is paid where pay in lieu is due, whether or not it has been received, pursuant to The Jobseeker's Allowance Regulations 1996 (SI 1996 No 207) reg 105(6).

(d) Unfair Dismissal

Any compensation for unfair dismissal awarded by an industrial tribunal

should be deducted only to the extent that it represents loss of earnings in the notice period. It was held in *Berry v Aynsley Trust Limited* [1976] BLT No. 394 New Law Journal 27/10/77 p1052 and more recently in *Aspden v Webbs Poultry & Meat Group (Holdings) Limited* [1996] IRLR 521 that a deduction should be made in respect of a tribunal award of compensation for unfair dismissal. However, it is submitted that the basic award should not be taken into account and any compensatory award should only be taken into account to the extent that it reflects loss of earnings in the notice period, if it can be apportioned in this way. The Court of Appeal held in *O'Laiore v Jackel International Limited* (No 2) [1991] ICR 718 that a Tribunal's maximum award (then £8,000) was not deductible because it could not be allocated specifically to the notice period so the employer could not establish double recovery for the same loss. It may be worth noting, however, that the basic award should be taken into account in the rare case where it is payable on the particular dismissal but would not have been if full notice had been given at the time of the short notice, eg, if the employee would have reached 65 in the meantime: see *Shove v Downs Surgical Plc* (para 8(a) above).

(e) Protective Awards (possibly)

See para 7(e) above.

(f) Tax

(i) Amounts below £30,000. The full amount of tax which would have been payable by the employee if the amount in question had been paid as salary may be deducted from the amount due by the company and retained by the employer. In certain cases, it may seem that the cost of calculating the deduction would not be justified in view of the small amount of assets available in the liquidation. However, the RPS insist on a basic rate notional deduction being made on the notice payment which they pay under the ERA.

(ii) Amounts exceeding £30,000. The correct principle is, it is submitted, to start by estimating the net amount which would have been received by the employee after the deduction of tax from his gross income (i.e. his actual loss) and then to take into account his liability to tax on the damages, so that the net amount payable to him should, as far as possible, equal the net loss suffered.

The tax position is considered more fully in the Appendix.

APPENDIX

Tax on Pay in Lieu of Notice

1. The following paragraphs set out, at the time of issue, what is understood to be the tax position on payments in lieu of notice. IPs should note that this is an area where there has been considerable professional comment and discussion. They are therefore advised to obtain their own detailed guidance.

2. In *British Transport Commission v Gourley* [1956] AC 185, the House of Lords decided that damages awarded in a personal injuries action for loss of earnings should be reduced by such amount as the plaintiff would have paid in tax had he in fact received those damages in the form of taxable income. If this reduction were not made, then clearly the plaintiff would be over-compensated for his loss, to the extent that the damages themselves were not subject to tax. This principle has been extended to damages awarded for wrongful dismissal by the EAT case of *Secretary of State for Employment v Cooper and Vinning* [1987] ICR 766 and must, it is submitted, also apply to payments in lieu of notice as these are similarly compensatory in nature. However, it should be noted that pay in lieu of notice is itself taxable where the employer is entitled to make such a payment under the contract instead of giving the full period of notice (see para 11 above).

3. The Inland Revenue has recommended that notional tax be assessed at the basic rate rather than using the individual's last known code number, since most employees should recover the tax allowances lost during the notice period, either as a direct refund or in subsequent employment.

4. Sometimes an employee (usually one who has remained unemployed) feels that he has still, at the end of the tax year(s) to which his notice payment relates, had too much notional tax deducted, because he has not used up his personal allowance from his total taxable income for the whole tax year(s). In these circumstances an employee may apply for a refund direct to the RPS and should request form RP13.

Previous page

Next page

5. Where a notice period includes the date of a change in Basic Rate Income Tax, the balance remaining after any mitigation should be divided by the number of days (including Saturdays, Sundays and/or any other day on which the employee did not normally work) and then multiplied by the number of days before and after the date of change to give two sums on which the appropriate percentages can be calculated. It is also acceptable for the two tax calculations to be rounded down to the nearest pound.

6. In the case of payments in lieu of notice, the position is complicated by the fact that payments will be taxable to the extent that they exceed £30,000 (unless they are wholly taxable because there is a contractual entitlement to make a cash payment in lieu of notice (see App para 2 above)). The Income and Corporation Taxes Act 1988 ss 148 and 188 provide that any payment made in consideration of, or in connection with, the termination of the holding of an office or employment is (except as provided in Section 188) taxable on such portion (if any) as exceeds £30,000. There have been a number of interpretations as to how the Gourley principle should be applied in the light of the predecessors of Sections 148 and 188 but the correct method of calculating damages exceeding £30,000 would appear to be that adopted in *Shove v Downs Surgical Plc* (see para 8(a) above). This approach involves taking into account the tax to be paid on the payment so that the net amount received by an employee reflects the actual (net) loss suffered by him.

Previous page

Next page

For Example

Entitlement to one year's notice or damages in lieu. Annual Salary £60,000 plus benefits. 1999/2000 tax bands.

			£	£	£
Gross salary				60,000	60,000
Benefits in kind (life assurance, medical cover, car etc) (a) (say)				10,000	10,000
				70,000	70,000
Personal allowance			4,335	(4,335)	
Taxable amount				65,665	
	£	£			
10% on	1,500	150			
23% on	26,500	6,095			
40% on	37,665	15,066			
	65,665	21,311		21,311	(21,311)
Tax Relief for married couples - £1,970 @ 10%				(197)	197
(allowance) (abolished 6/4/2000)				21,114	
Net loss - 12 months' salary					48,886
after tax (£70,000 - £21,114)					
Less net mitigation (b)		say		(5,000)	(5,000)
Total net damages (c)					43,886
To receive a net receipt of £43,886:					
Total net damage			43,886		
Tax free slice			(30,000)		30,000
			13,886		
Gross up £13,886 x 100/77(d)					18,034
Amount to be awarded					48,034

Notes to example

(a) The value of any benefits in kind provided (eg the provision of cars and health cover) will need to be ascertained. Strictly speaking the value of benefits in kind should be added to the gross salary to determine total remuneration.

(b) It will be noted that mitigation has been taken into account after the tax calculation. This was the method adopted in the Shove case. The RPS take the view that notional tax should be assessed after mitigation in order to ensure that an individual does not suffer financial loss from the failure to be given notice, even though an assessment before mitigation might in particular cases give more precise results. However, it is submitted that the employee is not adversely affected provided that the mitigation figure is itself a net one. Nevertheless, when calculating an ERA s184(1)(b) payment, IPs need to understand the RPS's method of making a notional deduction for tax after all other mitigating items which have been dealt with gross. It remains the responsibility of the IP to agree such claims submitted by the RPS.

(c) No amount has been deducted from the net damages for accelerated receipt.

(d) In this particular example, grossing up is at the standard rate because the total income, which is subject to tax (being the excess over £30,000) is less than (£28,000 + £4,335 = £32,335). In any event the employer is not concerned with higher rate tax where a form P45 has already been issued.

7. The fact that the payment will not in any event be paid in full because the employer is insolvent, and thus that the tax payable on the full sum will be reduced or not payable at all, should not be used so as further to reduce the claim.

8. In arriving at the reduction to be made under the Gourley principle, the Courts would, when assessing a damages claim with the benefit of hindsight, work on the basis of the ex-employee's actual liability to Income Tax during the year in question. Any deductions made by the employer in respect of payments in lieu of notice must of necessity be based on an

estimated Income Tax liability and the most obvious and practical solution is to base the deduction upon the basic rate as that will in most cases be the employee's marginal rate of tax and it is the marginal rate which is appropriate. It may well be that the employee can show just cause why the notional deduction should be reduced because of an actual or expected change in circumstances but the obligation must rest on him to do so.

9. Where amounts over £30,000 are paid and a form P45 has already been issued, basic rate Income Tax must be deducted by the employer in respect of the excess over £30,000 and paid over to the Revenue. If form P45 has not yet been issued, the PAYE code should be applied and tax charged using the appropriate tax table rates. The employee will receive a tax credit in respect of this deduction to set against his liability to Income Tax.

Previous page

Next page

3.2 INSOLVENCY BULLETIN NUMBER 6 TREATMENT OF DIRECTORS' CLAIMS AS 'EMPLOYEES' IN INSOLVENCIES

Formerly Statement of Insolvency Practice 6 (Scotland)

To: All Insolvency Permit Holders

Introduction

1. This Insolvency Bulletin gives guidance to insolvency practitioners on the approach to be adopted when dealing with the assessment of claims from directors as 'employees' of insolvent companies in a manner acceptable to the Redundancy Payments Service (RPS) of the Department of Trade and Industry. It has been approved in draft form by the RPS but no liability attaches to the RPS in respect of such approval nor is the RPS in any way bound by any statement contained in this Insolvency Bulletin. Practitioners are also referred to the Insolvency Bulletin No.5 entitled 'Non- Preferential Claims of Employees Dismissed Without Proper Notice by Insolvent Employers'.

What Constitutes an 'Employee'?

2. The Employment Rights Act 1996 (ERA) provides for payment from the National Insurance Fund of some arrears of wages, holiday pay, pay in lieu and redundancy pay owed to the employees of insolvent companies.

3. Section 230(1) of the ERA defines an 'employee' as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'.

4. Section 230(2) of the ERA defines 'contract of employment' as a 'contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.

The Position of Directors

5. In law, a company director is an office-holder. However, a director can also be an employee and this matter has to be considered on the basis of the evidence concerning the director's relationship with the company. It is essentially a matter of fact in each individual case.

6. The Employment Appeal Tribunal (EAT) in the case of *Eaton v Robert Eaton Limited* [1988] IRLR 83, gave guidance on the factors to be considered as follows:

   (a) Did the director have a descriptive title (eg managing director or technical director)?

   (b) Was there an express contract of employment? If not, was there a board minute or memorandum in writing constituting an agreement to employ the director as an employee as required by section 318 of the Companies Act 1985?

   (c) Was remuneration paid by way of salary or director's fees?

   (d) Was remuneration fixed in advance or paid on an 'ad hoc' basis?

   (e) Was remuneration by way of entitlement or, in effect, gratuitous?

   (f) Did the director merely act in a directorial capacity or was he/she under the control of the board of directors in respect of the management of his/her work?

7. Another factor to be considered is whether the director paid Schedule E (PAYE) Income Tax and Class 1 National Insurance Contributions (NIC). As the working conditions of office-holders are more related to those of 'employed earners' than those of 'self-employed earners', they are treated for NIC and Tax purposes as 'employed earners'. However, payment of Tax and NIC as an 'employed earner' does not of itself confer employee status for the purposes of employment legislation: see *Wilson v Trenton Service Station Limited* EAT/100/87 23 June 1987. Indeed, this factor was considered to be 'neutral' in *Fleming v Secretary of State for Trade and Industry* (SSTI) [1997] IRLR 682, though it was taken into account in *SSTI v Bottrill* (below). Equally, deductions at the 'self-employed' rate do not necessarily preclude entitlement under the redundancy and insolvency provisions.

8. Where a director has forgone or postponed payment of 'salary' for a period, that may be evidence that his relationship with the company is not one of employment, since it is normally a fundamental term of a contract of employment that, in return for services, an employee will receive remuneration. The fact that a director is an investor in the company, guaranteeing a loan to it will also point against his being an employee: see *McQuisten v Secretary of State for Employment* (SSE) EAT/1298/95 11 June 1996.

Previous page

Next page

9. In *Buchan v SSE and Ivey v SSE* [1997] IRLR 80, the EAT suggested the following questions:

   (a) Is the director under the control of another?

   (b) Is the director an integral part of another's organisation?

   (c) Is the director in effect in business on his own account?

   (d) What is the economic reality of the relationship between the director and the 'employer'?

   (e) Is there mutuality of obligation between them?

   (f) What is their respective bargaining power?

The decision-making body has to consider the relevance of all the factors, decide what weight to give to each of them, evaluate them and balance one against the other in order to arrive at a conclusion.

Directors with Controlling Shareholdings

10. Particular difficulties may arise in relation to a director who holds 50% or more of the voting shares in a company. In Buchan v SSE above, the EAT went on to hold that:

> *'If the claimant is able, by reason of a beneficial interest in the shares of the company, to prevent his dismissal from his position in the company, he is outside the class of persons intended to be protected by the provisions of the [ERA] and is not an employee within the meaning of that Act.'*

The EAT concluded in that case that a director owning 50% or more of the issued shares of the company could virtually never be its employee for the purposes of the ERA.

11. On the other hand, in *SSTI v Bottrill* [SLT 1998] IRLR 120, the EAT found that the reasoning behind the above rule laid down by *Buchan v SSE* was unsound. The position was rather that:

> *'The shareholding of a person in the company by which he alleges he was employed is a factor to be taken into account, because it might tend to establish either that the company was a mere simulacrum or that the contract under scrutiny was a sham.'*

Previous page

Next page

12. In the *Bottrill* case, a managing director who was also, temporarily, 100% shareholder was nevertheless held to be an employee on the facts as a whole. There was one other director and two other employees. The intention was that 80% of the shares should go to the US supplier, which in any event had 'real control'. Facts indicating employment were:

    (a) he paid tax and NIC on that basis;

    (b) he had no other employment;

    (c) his contract of employment was signed and dated and indicated that he was an employee;

    (d) he was entitled to holidays and sick pay;

    (e) he worked every day from 8.30 am to 5.30 pm;

    (f) he was paid by salary and not director's fees.

    Against that were:

    (g) his theoretical control over the company;

    (h) the fact that he has taken only 8 out of 16 days' holiday in the last year;

    (i) he had not received pay for the last month (because the cheque book was not available).

13. The *Bottrill* case subsequently went to the Court of Appeal ([1999] IRLR 326). The Court of Appeal upheld the decision of the EAT and stated that:

    ' ... whether or not an employer/employee relationship exists can only be decided by having regard to all the relevant facts. If an individual has a controlling shareholding that is certainly a fact which is likely to be significant in all situations and in some cases it may prove to be decisive. However, it is only one of the factors which are relevant and certainly it is not to be taken as determinative without considering all the relevant circumstances.'

Previous page

Next page

14. Counsel for the SSTI requested further guidance on the subject generally and the Court of Appeal responded as follows: 'We are anxious not to lay down rigid guidelines for the factual enquiry which the tribunal of fact must undertake in the particular circumstances of each case, but we hope that the following comments may be of assistance.

> *'The first question which the tribunal is likely to wish to consider is whether there is or has been a genuine contract between the company and the shareholder. In this context how and for what reasons the contract came into existence (for example, whether the contract was made at a time when insolvency loomed) and what each party actually did pursuant to the contract are likely to be relevant considerations.*
>
> *'If the tribunal /*
>
> *'If the tribunal concludes that the contract is not a sham, it is likely to wish to consider next whether the contract, which may well have been labelled a contract of employment, actually gave rise to an employer/ employee relationship. In this context, of the various factors usually regarded as relevant (see, for example, Chitty on Contracts 27th ed. (1994) para. 37 - 008), the degree of control exercised by the company over the shareholder employee is always important. This is not the same question as that relating to whether there is a controlling shareholding. The tribunal may think it appropriate to consider whether there are directors other than or in addition to the shareholder employee and whether the constitution of the company gives that shareholder rights such that he is in reality answerable only to himself and incapable of being dismissed. If he is a director, it may be relevant to consider whether he is able under the Articles of Association to vote on matters in which he is personally interested, such as the termination of his contract of employment. Again, the actual conduct of the parties pursuant to the terms of the contract is likely to be relevant. It is for the tribunal as an industrial jury to take all relevant factors into account in reaching its conclusion, giving such weight to them as it considers appropriate.'*

15. Thus, no single factor is likely to be conclusive and the RPS looks at all the factors to establish whether the director was an employee for the purposes of the ERA, as will an Employment Tribunal if necessary, and as too must the insolvency practitioner. The ERA provides for a right to refer

Previous page

Next page

to an Employment Tribunal in the event of disagreement with a decision made by the RPS or the insolvency practitioner. It is very difficult to appeal successfully against a decision of an Employment Tribunal on this question because appeals are permitted only on matters of law and the decision on this point is usually treated as one of fact.

Dividends

16. The principles are equally applicable to admitting a claim for dividend purposes. The effect of such claims, or the entitlement to claim, will affect not only the direct claim by the director, but also those by banks or other creditors making subrogated claims.

17. In marginal cases, IPs are requested to liaise and consult with the RPS as suggested in their booklet *Guidance for Employers' Representatives*.

18. The IP has no authority to accept or reject claims on behalf of the RPS; nor is the RPS's view in a particular case binding on the IP.

Previous page

Next page

Section 4

Insolvency Guidance Papers

CONTENTS

INTRODUCTION

Insolvency Guidance Papers (IGPs) are issued to insolvency practitioners to provide guidance on matters that may require consideration in the conduct of insolvency work or in an Insolvency Practitioner's practice. Unlike Statements of Insolvency Practice, which set out required practice, IGPs are purely guidance and practitioners may develop different approaches to the areas covered by the IGPs. IGPs are developed and approved by the Joint Insolvency Committee, and adopted by each of the insolvency authorising bodies:

AUTHORISING BODIES

Recognised professional bodies

The Association of Chartered Certified Accountants

Insolvency Practitioners Association

The Institute of Chartered Accountants in England and Wales

Chartered Accountants Regulatory Board for the Institute of Chartered Accountants in Ireland

The Institute of Chartered Accountants of Scotland

Solicitors Regulation Authority for the Law Society

The Law Society of Northern Ireland

The Law Society of Scotland

Competent authorities

The Insolvency Service (for the Secretary of State for Business, Innovation and Skills)

Department of Enterprise, Trade and Investment (for Northern Ireland)

4.1 INSOLVENCY GUIDANCE PAPER CONTROL OF CASES

Approved by the Joint Insolvency Committee and Issued by the RPBs and The Insolvency Service

1. INTRODUCTION

Insolvency appointments are personal to an individual insolvency practitioner, who has an obligation to ensure that cases are properly controlled and administered at all times. However, issues can arise when an Insolvency Practitioner delegates work to others, or takes appointments jointly with other practitioners. In such circumstances, a practitioner's planning and administrative arrangements will need to consider how best to ensure that cases are properly controlled at all times, and that proper regard is paid to the interests of creditors and other affected parties

2. DELEGATION

2.1 Given the wide variation in the size of firms dealing with insolvency work, each practitioner will have different case loads and resources and thus a different requirement to delegate work. Delegation can take on a number of forms, including:

- delegation of work to staff in the practitioner's own office, or to sub-contractors;
- delegation of work to staff within a firm but in another location;
- taking a reduced role on an appointment taken jointly with an insolvency practitioner in the practitioner's office;
- taking a reduced role on an appointment taken jointly with an insolvency practitioner within the same firm but in another location;
- allowing a specialist insolvency practitioner within a firm to take responsibility for all work of a specific type;
- allowing a specialist within a firm to handle work of a specific type (e.g.tax);

- sharing work on an agreed basis on an appointment taken jointly with a practitioner from another firm;
- employing another firm to give specialist advice (e.g. tax), or to undertake specific work (e.g. an investigation); and
- allowing a practitioner in a former firm (following either the practitioner's move to another firm or retirement) to take responsibility for appointments for a short time pending the transfer of cases.

2.2 For each of the above examples (and in other circumstances where delegation takes place), the practitioner must be satisfied at all times that work is being carried out in a proper and efficient manner, appropriate to the case.

3. CONTROL

3.1 In determining the procedures to be put in place to ensure that an appropriate level of control can be established in relation to delegated work, it is recommended that a practitioner have regard to the following matters:

- the structure within a firm, and the qualifications and experience of staff;
- the need for the practitioner to be involved in setting case strategy at the outset, depending on the nature, size and complexity of the case;
- the procedures within a firm to ensure consultation by joint appointees, other practitioners, and staff;
- the extent to which levels of responsibility are defined, and the circumstances in which a reference to, or approval by, the practitioner is required;
- whether there are clear guidelines within a firm to deal with the administration of cases at locations remote from the practitioner;
- the ways in which compliance and case progress are monitored, and then reported to the practitioner;
- the frequency of case reviews, and who carries them out;

- the systems for dealing with correspondence received and, in particular, complaints;
- the process by which work is allocated on a joint appointment with a practitioner from another firm, the rationale for that split, and the controls to be put in place, subject always to statutory requirements; and
- the way in which specialist advisers (including agents and solicitors) and sub-contractors are chosen and engaged, and how their work is monitored.

3.2 Insolvency Practitioners are aware that they may be required to justify their decisions and demonstrate that appropriate levels of control have been established. It is recommended that for firm wide procedures, guidance is set out in writing, and that on a case by case basis, contemporaneous working papers or file notes are prepared.

4. FIRMS

In this Paper, reference to 'firm' includes, as appropriate, a company, a partnership, a sole practitioner, and a practitioner working in association with other 'firms' or practitioners in other 'firms'.

IPA July 2005

Previous page

Next page

4.2 INSOLVENCY GUIDANCE PAPER SUCCESSION PLANNING

Approved by the Joint Insolvency Committee and Issued by the RPBs and The Insolvency Service

1. INTRODUCTION

Insolvency appointments are personal to an insolvency practitioner, who has an obligation to ensure that cases are properly managed at all times, and to have appropriate contingency arrangements in place to cover a change in the Insolvency Practitioner's circumstances. The over-riding principle is that the interests of creditors and other stakeholders should not be prejudiced.

2. CONTINUITY

It is important for insolvency practitioners to consider on a regular basis the arrangements in place to ensure continuity in the event of death, incapacity to act, retirement from practice, or the practitioner otherwise retiring from a firm.

3. SOLE PRACTITIONERS

3.1 A sole practitioner should consider the steps necessary to put a workable continuity agreement in place, although there may well be considerations as to whether a sole practitioner's cases would be accepted by another insolvency practitioner. The full consequences, both practical and financial, of the relationship with another Insolvency Practitioner have to be recognised by both the office holder and the nominated successor, so that continuity can be achieved and the interests of creditors and other stakeholders safeguarded. In particular, the nominated successor would have to consider whether the obligations arising from a successor arrangement can be discharged properly and expeditiously, having regard to the number and nature of the cases to be taken over.

3.2 A retiring office holder should normally make arrangements for the transfer of cases (including, where appropriate, an application to Court) in sufficient time to ensure that the cases are transferred before the retirement takes place.

3.3 The nominated successor may need to make an application to Court for the transfer of cases as soon as possible after the other office holder's death, incapacity or, if no other arrangements have been made, retirement.

3.4 The arrangements with the nominated successor will need to be reviewed as circumstances dictate, but preferably at least annually.

3.5 The principal matters that might routinely be dealt with in a continuity agreement are set out in the Appendix.

4. FIRMS

4.1 Every insolvency practitioner in a firm (whether a principal or an employee) should consider the comments made above regarding sole practitioners, and should discuss with the firm the arrangements for succession planning, to cover death, incapacity to act, retirement, or leaving the firm. It is recommended that this is reflected in the partnership agreement or in a separate insolvency practice agreement.

4.2 In a firm with other insolvency practitioners, it is likely that the arrangements would include, at the least, an understanding that another Insolvency Practitioner will take over open cases, and make an application to court for the transfer of those cases, if the office holder is unable to do so. It will be the professional responsibility of the remaining partners (as insolvency practitioners) to take prompt action to safeguard the interests of creditors and other stakeholders.

4.3 When an office holder retires from a firm, it may be acceptable for the office holder to remain in office for a short period, with an insolvency practitioner in the firm dealing with the administration of cases. However, where the office holder needs to receive appropriate information on the progress of cases, and be consulted when decisions are to be made; the office holder is likely to require unrestricted access to case files. Such an arrangement, however, is unlikely to be appropriate other than for cases that are clearly in their closing stages. In normal circumstances, the retiring office holder should be replaced within a reasonable period, likely to be within 12 months of retirement.

4.4 Where there are no other insolvency practitioners in a firm, and in the absence of any contractual arrangements to deal with death, incapacity to act, or retirement, the remaining partners (presumably themselves members of professional bodies) should consider their own professional obligations to ensure the proper management of their practice, including making arrangements for another insolvency practitioner to step in as

office holder. The firm may have to procure an application to court for the transfer of cases as soon as possible after the office holder's death, incapacity or retirement.

4.5 The principal matters that might routinely be dealt with in an insolvency practice agreement (or a partnership agreement) are set out in the Appendix.

5. DISPUTES

5.1 There can be disputes between firms and partners (and employees who are office holders) who leave the firm, principally arising from the personal nature of insolvency appointments. However, commercial disputes should not be allowed to obscure the over-riding principle set out at the beginning of this paper – that the interests of creditors and other stakeholders should not be prejudiced.

5.2 It is important, therefore, that the contractual arrangements referred to above should provide for the (essentially) mechanistic and financial consequences of an office holder leaving the firm (or upon incapacity to act). There will be similar considerations when an office holder (either partner or employee) is suspended by a firm, or is otherwise excluded from the firm's offices.

5.3 Where there are no contractual arrangements, or where a dispute arises, both parties should consider their professional obligations, and the standard of conduct required by their professional bodies. Further, an office holder must have regard to the statutory obligations of the office held.

5.4 If there is a dispute, it is for the office holder to decide how best to ensure that the obligations of office can be discharged; an application to court may be the only means of finding a solution. It is always open to an office holder to consult with his or her authorising body.

5.5 As noted above, there may be professional obligations on remaining partners to arrange for the proper management of their practice, and so ensure that they do not bring their own professional bodies into disrepute.

APPENDIX

Principal matters that might be dealt with in a continuity agreement

1. A clear statement of the circumstances upon which the agreement would become operative, and also the circumstances in which the nominated successor can decline to act.
2. The extent and frequency of disclosure to the nominated successor of case details and financial information.
3. Detailed provisions to provide for:
    - the steps to be taken by the nominated successor when the agreement becomes operative;
    - ownership of, or access to, case working papers;
    - access to practice records; and
    - financial arrangements.

Principal matters that might be dealt with in an insolvency practice agreement (or in a partnership agreement)

1. Clear statements of what happens in the event of an Insolvency Practitioner (whether partner or employee):
    - dying, or being otherwise incapable of acting as an Insolvency Practitioner;
    - retiring from practice;
    - being suspended or otherwise excluded from the firm's offices; or
    - leaving the firm.

2. Where the agreement provides for another Insolvency Practitioner (whether in the firm or in another firm) to take over appointments:

   - the time within which transfer of cases will take place, and the arrangements for the interim period, including provisions for access to information and files;
   - the obligations placed on the practitioner, the firm and the successor practitioner, both in the interim period and thereafter;
   - professional indemnity insurance arrangements; and
   - financial arrangements.

3. Where the Insolvency Practitioner is to remain as office holder following retirement or leaving the firm:

   - ownership of, or access to, case working papers;
   - access to practice records;
   - professional indemnity insurance arrangements; and
   - financial arrangements.

Previous page

Next page

4.3 INSOLVENCY GUIDANCE PAPER BANKRUPTCY – THE FAMILY HOME

Approved by the Joint Insolvency Committee and Issued by the RPBs, The Insolvency Service and The Insolvency Service for Northern Ireland

1. INTRODUCTION

It is in the interests of the debtor and the creditors, and in the wider public interest, that a family home, and any other residential property available for use by the debtor or the debtor's immediate family, are dealt with fairly and expeditiously in a bankruptcy. This can happen only if the debtor and others who may have an interest in the properties have sufficient information to understand how the bankruptcy affects them, and the options available to them. Failure by a trustee to provide information and explanations can prolong the realisation process, cause unnecessary distress to those involved, and also give rise to complaints.

2. AFFECTED PARTIES

2.1 Where the debtor has an interest in a property falling within the estate, the trustee should consider at an early stage whether the property is or has been the home of any person other than the debtor, and if that person could be affected by the bankruptcy and the sale of the property.

2.2 Those potentially affected include:

- the debtor's spouse, former spouse, or unmarried partner;
- members of the debtor's immediate family;
- a joint legal owner;
- anyone who has contributed towards the purchase of a property (including making mortgage payments);
- anyone in occupation of the property other than under a formal tenancy agreement; and
- a trustee under a previous bankruptcy.

2.3 A trustee will make enquiries of the debtor to establish the properties within the estate and whether any other persons may have an interest in them. It is recommended that a trustee should write to the debtor and any other affected parties as soon as possible, after the appointment or of becoming aware of the property or the third party interest. An initial communication may give a broad explanation of the process and timescales to be followed in the proceedings with further, more specific information provided as it becomes available. This is in addition to the trustee's statutory obligations.

3. INFORMATION TO BE PROVIDED

3.1 A trustee should provide the debtor and any other affected parties with sufficient information at appropriate times to enable them to understand the possible consequences of the bankruptcy, so that they can make an informed decision or seek advice. The information to be provided might include (as appropriate to the circumstances):

- an explanation of the trustee's interest, and why that interest may continue after discharge from bankruptcy;
- the circumstances in which the property will revert to the debtor, and why it may not revert;
- an explanation of why the trustee needs to realise the property;
- the way in which the property and the trustee's interest would be valued;
- an explanation of how any changes in the value of the property, and payments under a mortgage, may be treated;
- how any mortgage, or other security for the repayment of any loan, may be treated;
- details of the steps that the trustee can take, and any timetable, for realising the property; and
- a copy of the Insolvency Service leaflet "What will happen to my home".

3.2 It is also recommended that a trustee:

- seeks offers from affected parties as appropriate, giving sufficient time for responses and explaining any deadlines;

- be prepared, in appropriate circumstances, to meet the debtor and other affected parties to discuss any problems that may arise; and
- advises that affected parties should take independent advice.

4. TIMING OF COMMUNICATIONS

After the initial communications outlined above, it is recommended that a trustee writes regularly to the debtor and other affected parties pending realisation of the property. Whilst such communications should be as circumstances dictate, it is recommended that this should be normally every 12 months. The matters to be dealt with might include (as appropriate to the circumstances):

- whether the trustee's intentions have changed, and the effect on the likely timetable for realisation;
- any changes in the value of the property and the trustee's interest;
- any changes to the positions of the affected parties; and
- whether the trustee is seeking offers for the estate's interest in the property.

5. DEALING WITH OFFERS

5.1 A trustee has a duty to obtain a proper price for the benefit of the estate, but the bankruptcy should not be unnecessarily protracted and account should be taken of the effect of future costs. It is recommended that the consequences of any action, or delay, in respect of a property should be explained to affected parties and where appropriate, to creditors.

5.2 If an affected party makes an offer to purchase the trustee's interest in the property the trustee should deal expeditiously with the offer. If the offer is rejected, the trustee should normally provide an explanation of why the offer was regarded as inadequate.

6. GUIDANCE FOR AFFECTED PARTIES

As noted above, it is recommend that a trustee advises the debtor and other affected parties to take independent advice in relation to the property. It may be appropriate for the trustee to recommend, in the first instance, contact with a solicitor or Citizens' Advice Bureau. The Insolvency Service leaflet "What will happen to my home" is available via www.insolvency.gov.uk

7. DUTY OF CARE

Nothing in this Paper imposes or implies any duty of care by an insolvency practitioner to a debtor, or any person with an interest in a property, over and above what may be imposed by legislation or case law.

IPA October 2005

Previous page

Next page

4.4 INSOLVENCY GUIDANCE PAPER SYSTEMS FOR CONTROL OF ACCOUNTING AND OTHER BUSINESS RECORDS

Approved by the Joint Insolvency Committee and Issued by the RPBs, The Insolvency Service and The Insolvency Service Northern Ireland

1. INTRODUCTION

1.1 The existence and accuracy of an insolvent's accounting and other business records will affect the efficient realisation and distribution of an insolvent's assets; and may also be relevant in other circumstances, for example in disqualification proceedings or the prosecution of criminal offences. An insolvency practitioner will also need to take account of the various statutory requirements for businesses to retain certain categories of records.

1.2 Insolvency practitioners should have satisfactory systems in place to record the receipt of, and to control access to, movement of and eventual disposal of, records. This Guidance looks at the parameters of these systems: each case will need to be considered on its own merit: some cases may need significantly more detail than is suggested here.

1.3 Formal recording systems can also assist an insolvency practitioner in the effective management of storage costs.

2. CONTROL OF RECORDS

2.1 It is likely that any system implemented by an insolvency practitioner would record:

- the practitioner's initial enquiries to establish the nature and location of records;
- the steps taken to safeguard records;
- requests made of directors and others to deliver up records;
- what records have been taken under the practitioner's control, and when and how this was done;

- the location of the records;
- whether third parties have had access to the records, and for what purpose; and
- the eventual disposal of the records, and when and how this was done.

2.2 It will be particularly important in cases where the insolvent's records are referred to in legal proceedings (whether for the purpose of civil asset recovery or in other circumstances) that a formal recording process has been followed. Accordingly, an insolvency practitioner should be able to show that any system is applied consistently and that staff are trained in its use.

3. RECORDS IN ELECTRONIC FORM

An insolvency practitioner will need to consider how to deal with information held in electronic form. Retrieval and storage of such information may include, as appropriate, securing servers and personal computers (or hard drives), copying information from those sources, or obtaining hard copies. The system of control is likely to follow the principles set out above.

4. JOINT APPOINTMENTS

Where an insolvency practitioner is appointed jointly with a practitioner from a different firm, responsibility for records should be included within the agreed division of duties. Where both practitioners receive records, each should implement a system of control.

IPA 14 March 2006

4.5 INSOLVENCY GUIDANCE PAPER DEALING WITH COMPLAINTS

Approved by the Joint Insolvency Committee and Issued by the RPBs, The Insolvency Service and The Insolvency Service Northern Ireland

INTRODUCTION

It is in the interest of complainants and insolvency practitioners, and in the wider public interest, that complaints directed at practitioners are dealt with professionally and expeditiously. Failures to do so can only exacerbate any problem, prolong any sense of grievance felt by a complainant, and undermine confidence in the insolvency profession. As a result, practitioners, their firms and the profession may be brought into disrepute.

This paper is intended to remind insolvency practitioners of their duty to deal properly with complaints, and to suggest some matters that insolvency practitioners might usefully consider. The rules of some authorising bodies (and the rules which apply to the holders of standard consumer credit licences) impose requirements additional to, and which override, the suggestions in this guidance paper,

STEPS TO BE TAKEN

It is likely that the following steps will be appropriate:

- A complaint should be acknowledged promptly.
- The insolvency practitioner should ascertain the background facts as quickly as possible and seek additional information from the complainant as required.
- If the insolvency practitioner concludes that a complaint is unjustified, the complainant should be provided with a full and clear explanation of the reasons for that conclusion.
- If an error has been made, the insolvency practitioner should rectify the error promptly and offer an apology.
- The complainant should always be notified that a complaint can be referred to the insolvency practitioner's authorising body at any time.

The complainant should be kept aware of the steps that are being taken by the insolvency practitioner to review and respond to the complaint, the likely timetable for the response, and the reasons for any delay.

THE DUTIES OF INSOLVENCY OFFICE HOLDERS

It is a feature of the work of insolvency practitioners that complaints may arise because of an incomplete understanding of the legislation under which insolvency office holders are required to act. In many cases, actions or outcomes that are obvious to insolvency practitioners may be seen as wrong or unfair by complainants, as the duties of the office holder may be misunderstood.

When responding to a complaint, an insolvency practitioner should provide where appropriate a clear explanation of the matters affecting the duties of an office holder, including the relevant legislation.

OTHER MATTERS TO CONSIDER

The matters that an insolvency practitioner should consider in relation to complaints include:

- The desirability of establishing a formal complaints procedure within the firm, set out in writing, which can be communicated to complainants.
- Whether complaints should be reviewed by another principal in the firm (where possible) or by an independent practitioner.
- Early resolution of complaints by telephone conversations and meetings. Guidance on what constitutes a good complaints procedure is issued by certain of the authorising bodies.

PROFESSIONAL INDEMNITY INSURANCE

A complaint may, in some circumstances, have to be notified to an insolvency practitioner's professional indemnity insurer. In such cases, any action or response by the practitioner will necessarily be subject to any conditions imposed by the insurer.

IPA 1 October 2009

Section 5

Personal Debtors (Scotland)

CONTENTS

5.1 OFFICE OF FAIR TRADING DEBT MANAGEMENT GUIDANCE

CONTENTS Chapter Page

Previous page

Next page

1. INTRODUCTION

1.1 The Office of Fair Trading (OFT) issued general guidance to holders of, and applicants for, consumer credit licences in February 2001[1]. In so doing, OFT indicated its aim to follow this by further guidance for specific market sectors where problems have been identified or where a more detailed consideration of particular market circumstances would be helpful. This Debt Management Guidance (DMG) is the first of the series of sector-specific guidance and this version updates the DMG issued in December 2001 by taking account of the reforms introduced by the Consumer Credit Act 2006 (CCA06).

Scope of the guidance

1.2 Advice to consumers (also referred to as 'clients') about debt problems has for many years been provided free by Citizens Advice Bureau, independent money advisers, the Consumer Credit Counselling Service, National Debtline and others. Since the mid 1990s, fee-charging debt management companies (DMCs) have also entered the market. A number of concerns about the conduct of some DMCs have been brought to the attention of OFT by consumers, consumer bodies, the credit industry and others. For this reason guidance for this business sector was identified as a priority.

1.3 The debt management services covered by this guidance consist of all or any of the following when provided to debtors who are individuals as defined by the Consumer Credit Act 1974 and these include consumers (that is, those acting for purposes outside their business) and some small businesses, for example partnerships of 2 or 3 people:

- advising on how to restructure debts, how to alter debt repayments or how to achieve early resettlement of debts
- contacting creditors and/or negotiating with creditors, on behalf of the debtor, in order to make any of the above arrangements (whether that contact amounts to 'negotiation' or not)
- providing a facility for the debtor to make a single repayment which is then distributed on his behalf to his creditors

[1] Do you need a credit licence? (OFT147) was updated in July 2008

Previous page

Next page

- undertaking reviews of the debtors' financial circumstances and/or making payments on his behalf, including ascertaining whether a credit information agency as defined by the Consumer Credit Act 1974 ('an agency') holds information relevant to the financial standing of the debtor
- ascertaining the contents of such information so held
- advising individuals on how they might take steps to secure the correction of, the omission of anything from, or the making of any other kind of modification to, information relevant to their financial standing
- advising individuals on how they might take steps to secure that an agency which holds such information about them stops holding it or does not provide it to another person
- taking steps on behalf of an individual with a view to securing the correction of, the omission of anything from, or the making of any other kind of modification to, information relevant to the financial standing of that individual and
- taking steps on behalf of an individual to secure that an agency which holds such information stops holding it or does not provide it to another person.

Application of guidance to Individual Voluntary Arrangement (IVA) providers (Protected Trust Deeds (PTD) (Scotland)) and providers of Credit Information Services[2] (including credit repair)

1.4 The guidance has been developed and written with DMCs in mind. For the avoidance of doubt the OFT considers that the activities of licensees who market, sell and advise on IVAs and PTDs fall within the definition of the services as outlined in the first and fourth bullets of paragraph 1.3. For this reason, all licence holders involved in the provision of advice on restructuring debts, including those offering advice and assistance with IVAs and PTDs should fully comply with the guidance.

1.5 From October 2008, companies providing credit information services will require a consumer credit licence. The OFT considers that the activities of all licensees which provide credit information services fall within the

[2] Licence category as from 1 October 2008

Previous page
Next page

definitions outlined in the fourth to seventh bullets of paragraph 1.3, and the activities of those which provide credit information services including credit repair additionally fall within the definitions outlined in the eighth and ninth bullets. The OFT will consider failures to meet the minimum standards outlined in the guidance relevant to the fitness of those providing such services.

Application of debt management guidance to CAB and other independent advice agencies

1.6 The principles that underlie its content, for example, the need for transparency about the service that is being provided, keeping the consumer informed and giving advice which is in the consumer's best interests, apply equally to those who provide advice on a noncommercial basis that is, no charge is levied or remuneration otherwise received in connection with the provision of such advice and/or in the course of carrying on any consumer credit or ancillary credit business.[3]

1.7 Where any advice agency gives assistance, on a non commercial basis, in one or more of the ways outlined in clause 1.3 to consumers in debt, it will be expected to meet relevant parts of the minimum standards set out in the guidance. Elements of the guidance are relevant where they set out the principles or deal with actions or circumstances that are a feature of the relationship between the advice agency and the client.

Purpose of the guidance

1.8 All who provide debt management services, whether on a noncommercial basis or not, are required to be licensed under the Consumer Credit Act 1974 (the Act). Free (non-commercial) provision of some debt management services is made by a number of organisations, some of whom operate under individual standard licences and some of whom operate under the cover of a group consumer credit licence. This guidance is relevant to the activities of all such providers.

1.9 The OFT has a duty under the Act to ensure that applicants for licences are fit to engage in the activities for which they wish to be licensed, and to monitor the continuing fitness of those to whom licences have

[3] A licensee or applicant will require a 'commercial' category on its licence if it or any of its associates provide any consumer credit or ancillary credit services on a commercial basis.

been granted. In considering fitness the OFT is able to take account of any circumstances which appear to be relevant, and in particular, any evidence that an applicant or licensee, or any of its employees, agents or associates, has engaged in business practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper (whether unlawful or not). Where the OFT has evidence of unfair practices, action can be taken to refuse or revoke the consumer credit licence of those concerned.

1.10 The new credit licensing provisions introduced by the CCA06 require OFT to have regard to the skills, knowledge and experience in relation to consumer credit, and the practices and procedures implemented in connection with the licensed business, of applicants and existing licensees, in considering their fitness to engage in regulated consumer credit activities. This means that new applicants operating in high risk[4] credit sectors, such as providers of commercial debt-adjusting, commercial debt counselling and, from October 2008, commercial credit information services (including credit repair)[5], will be subject to greater scrutiny at the application stage to ensure compliance with the DMG.

1.11 CCA06 introduced the power for the OFT to be able to impose requirements on licensees where the OFT is dissatisfied with any matter in connection with the licensed business. Any failure to comply with such a requirement could result in the imposition of a financial penalty[6] (up to £50,000).

1.12 The OFT also has powers to take enforcement action under Part 8 of the Enterprise Act 2002 in respect of domestic or Community infringements. This includes unfair business practices for the purposes of the Act. Our approach to the use of these powers is detailed in our Enterprise Act Guidance.[7] We also co-ordinate such actions undertaken by other enforcers.

1.13 The OFT has both civil and criminal enforcement powers following the transposition of the Unfair Commercial Practices Directive (UCPD) into the Consumer Protection from Unfair Trading Regulations 2007 (CPRs)[8]. The scope of the CPRs means that it overlaps with other existing UK consumer protection legislation.

[4] See Consumer Credit Licensing – General guidance for licensees and applicants on fitness and requirements (OFT 969) for more information on OFT's categorising of- and approach to- 'credit risk'
[5] Licence category 'H1'
[6] See Consumer credit licensing – Statement of policy on financial penalties (OFT971)
[7] Enforcement of consumer protection legislation: Guidance on Part 8 of the Enterprise Act (OFT512)
[8] CPRs came into force on 26 May 2008

Debt management services

1.14 The OFT has no objection to DMCs charging for, or consumers choosing to pay for, debt management services. The consumers using these services will, however, often be vulnerable because of the nature of their financial problems and, almost by definition, have the least available financial resources. It is, therefore, particularly important that the services provided by DMCs are carried out with due care, skill and fairness.

1.15 The purpose of this guidance is to set out minimum standards to be met by DMCs if they are to be judged fit to hold a consumer credit licence. The guidance does not, however, set out a comprehensive checklist. Not all of its elements will apply to every DMC, it is not exhaustive and conduct or omissions not included in the guidance may be taken into account by the OFT in determining fitness. DMCs are expected to abide by the spirit as well as the letter of the Guidance.

1.16 Some of the practices highlighted here are clearly unfair or improper, and in those cases DMCs should have been aware, even before the issue of this Guidance, of the risk of licensing action if they engaged in such practices or allowed their employees, agents or associates to do so. In other cases the position might have been less clear, and this Guidance is intended to be helpful in outlining the kinds of business practice to which the OFT is likely to object.

DMC acting as an agent for a consumer debtor

1.17 During the original consultation on this guidance the OFT was told that some creditors have a blanket policy of refusing to enter into negotiations with some DMCs or even refusing to accept payments sent by DMCs on behalf of consumers. The OFT is concerned at these reports, especially those suggesting payments are refused.

1.18 Where a consumer appoints a representative to negotiate on their behalf, it is an unfair and improper business practice on the part of the creditor to operate a policy, without reason, of refusing to consider such requests.

1.19 Where a creditor wishes to refuse to negotiate with a particular representative, it must make its position known to the representative and also immediately inform any consumer on whose behalf the creditor is approached by that representative.

1.20 Where payments are tendered, not by the debtor personally, but by someone acting on his/her behalf, it is a principle of law that creditors cannot refuse to accept those payments. The practice of creditors returning payments, or not crediting payments to consumers' accounts, purely because they are received through a DMC, therefore, is not acceptable and is a matter which the OFT regards as seriously detrimental to the fitness of the creditor. This is so even in circumstances where a creditor has indicated that it will not negotiate with a DMC acting as a representative of a debtor.

Referrals to DMCs

1.21 It also emerged in the consultation that some lenders and credit brokers refer consumers to DMCs as potential clients. There is no objection to this provided it is done with the informed, prior consent of the consumer. Referrals made without this consent will affect the fitness of the lender or credit broker.

2. THE GUIDANCE

2.1 The following guidance sets out minimum standards for debt management companies in the marketing of their services, pre-contract contact, the provision of pre-contract information, contract terms, advice and the nature of the debt management service provided.

Advertising, marketing and promotion

2.2 Advertisements and other promotional material, whether written[9] or on television or radio, must be accurate and clear and must not mislead, either expressly or by implication or omission.

2.3 Where printed advertisements are used, they must be easily legible and, where this Guidance requires warnings and caveats, these must be accorded similar prominence to the material in the advertisement which they are intended to qualify.

2.4 Advertising of debt management services should not:

- state or imply that the service will free the consumer of the need to meet their debts

[9] This includes information, statements and other promotional materials on web-sites, Teletext etc.

Previous page
Next page

- emphasise the 'savings' to be made by rescheduling debts (for example, by means of a reduction in monthly payments) without making it equally clear that this will usually lead to an increase in the size of the sum to be repaid and that rescheduling the debt may impair the consumers' credit record. Where specific 'savings' (for example, the amount by which outgoings per month can be reduced) are quoted there must be a similar indication of the likely increase in the total amount of sum to be repaid and/or the period of repayment, and the fee that will be charged and

- claim or imply that the DMC can guarantee an outcome favourable to the consumer in negotiations with creditors.

2.5 Where the arrangements with the DMC will lead to a period in which contractual payments are not made by the consumer (for example, because the first payment is a deposit or up front fee or because of a delay in distributing payments to creditors), the consumer must be warned of this in the marketing literature.

2.6 Advertising of credit information services (including credit repair services)[10] should not:

- state or imply that unfavourable information, such as county court judgements, can be removed from credit files without making it equally clear that this can only be the case where the information is incorrectly recorded or the matter to which the information relates has been discharged, and

- state or imply that advice can be provided on how to make successful applications for credit without making it equally clear that supplying false information on a credit application form could amount to fraud and constitute a criminal offence

Contact with consumers

2.7 There must be no cold calling of debt management services by personal visit. The Act makes it an offence to canvass 'debt adjusting' and 'debt counselling' services during visits to consumers' homes, unless the visit is requested by the consumer (section 154). 'Debt adjusting', 'debt

[10] For further information see Credit Explained, published by the Information Commissioner's Office

Previous page

Next page

counselling' and 'credit information services'[11] are defined in the Act and cover most if not all of the services described as 'debt management services' in this guidance.

2.8 Visits not covered by section 154 may be subject to the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, commonly called the Doorstep Selling Regulations. Where the Doorstep Selling Regulations apply, they must be strictly adhered to.

2.9 DMCs must not accept referrals from credit brokers or lenders unless the consumer has given informed prior consent to the credit broker or lender for such a referral.

Pre-contract information

2.10 Consumers must be provided with adequate information about the service to be provided, and the consequences and costs of it prior to entering into an agreement. All documentation must be clear and in plain language and must state clearly the implications of entering a debt management programme. In particular:

- where the DMC contacts a potential client after a referral from a credit broker or lender, the DMC must disclose at the outset of the conversation how they have obtained the consumer's details, what service they offer and that they cannot themselves provide a loan
- where a DMC operates by means of any distance communication it must comply with the requirements in the Consumer Protection (Distance Selling) Regulations 2000 to provide (among other things) certain information to the consumer before the contract is concluded. In particular the consumer must be told that it has a cooling off period of seven days during which the contract may be cancelled. The DMC cannot contract out of this cooling off period unless
  - it has given a clear warning in writing (or other durable form) which is delivered before the contract is entered into and,

[11] 'Credit information services' consists of providing services as defined by section 145 (7B) and (7D) of the Act, where the applicant will take steps with a view to any of the outcomes mentioned in section 145 (7C) (a) to (d) of the Act. 'Credit repair' consists of providing credit information services as defined by section 145 (7B) and (7D) of the Act, where the applicant will take steps specifically with a view to the outcomes mentioned in section 145(7C)(c) or (d) of the Act.

Previous page
Next page

- it has, with the clients' agreement, begun to perform the contract in that period.

- information must be given as to the nature of the service that is being offered; the total cost to the consumer of the service including any initial or fixed charge fee or deposit, the periodic management fee to be paid to the DMC multiplied by the estimated length of the contract; the amount to be repaid; and the likely duration of the contract must be clearly explained at the outset

- where it is not possible to establish at the pre-contract stage the cost or duration of the contract, the consumer must be given a realistic estimate of cost and the duration of the contract. This should be accompanied in close proximity by a clear warning that it is an estimate. The assumptions on which the estimate is based should be set out. If during the pre-contractual stage it becomes clear that the estimate does not adequately reflect the consumer's circumstances, a revised estimate must be given.

2.11 If an initial up front fee or deposit is payable, the consumer must be given a clear explanation of:

- what aspect of the service is covered by the fee or (as the case may be) what the deposit is held for

- the manner in which it is to be calculated and,

- whether it is refundable, with due regard to the principles of contract law in relation to deposits and part payments.

2.12 The consumer must also be advised that he will be given the opportunity to withdraw from the contract if, when he is informed of the total cost of the service, he decides that the service is unsuitable (see clause 2.22).

2.13 Consumers must be clearly warned in writing:

- where the first payment goes to the DMC and not to the creditors (whether as an initial up front fee, as a deposit or for some other reason) that they will miss a payment to their creditors and will therefore go into arrears or further into arrears

- that creditors are not obliged to accept reduced repayments or to freeze interest and that, unless they do so, repaying the same debt over a longer period of time will lead to an increase in the total amount to be paid
- that collection actions, including default notices and litigation, can ensue and that there is no guarantee that any existing or threatened proceedings will be suspended or withdrawn. The possibility of default notices – including that they may incur costs that are added to the debt – must be made clear
- of the likely impact of the debt management programme on the consumer's credit rating. In particular it should be stated that they might not be able to obtain credit in the short term and that there is some likelihood that they will not be able to do so in the medium to long term either. Consumers must not be misled into thinking that their credit rating will improve earlier than when the payment of their debts is completed, or even immediately thereafter: records are retained by credit reference agencies for a further six years
- of the importance of meeting debts such as mortgage, rent and utility payments and,
- not to ignore correspondence or other contact from creditors or those acting on behalf of creditors.

2.14 The nature of those commitments that will, and especially importantly those that as a matter of the DMC's own decision, will not be included within the repayment plan, must be made clear to potential clients. The DMC must exercise all due care to ensure that debts that it says it cannot deal with are not included in programmes by mistake.

2.15 Where a DMC is aware that a particular creditor refuses to deal with it, (for whatever reason and whether or not the DMC regards this refusal as justified), the consumer must be told of this as soon as the DMC is aware that the consumer has an account with that creditor.

Contract terms

2.16 Contract terms and conditions should be fair, written in plain, intelligible language and easily legible.

Cost and duration of contract

2.17 The contract should set out the:

- nature of the services that are being supplied (including the kinds of debt that will and will not be covered)
- total cost to the consumer of the service, including any initial or fixed charge fee or deposit and the periodic management fee to be paid to the DMC multiplied by the estimated length of the contract
- the amount to be repaid and,
- the duration of the contract.

2.18 Where it is not possible to state firmly the cost or duration of the contract, the contract must include realistic estimates of cost and the duration of the contract. This should be accompanied in close proximity by a clear warning that it is an estimate. The assumptions on which the estimate is based should be set out.

2.19 The contract should set out the circumstances in which the consumer may withdraw and receive a refund of any monies paid to the DMC.

2.20 Under the Distance Selling Regulations (referred to in clause 2.10) where a consumer enters into a contract before he has received any written information, he has both

- a cooling-off period of at least seven working days during which he can withdraw from the contract with a full refund and,
- a right to be informed that he has that cooling off period (see Regulations 8(2) and (3) and 12(3)).

2.21 The contract must not include any term which says or implies that there are no circumstances in which a client is entitled to refund. For example a refund (and in some cases a full refund) may be due to a dissatisfied client if:

Previous page

Next page

- the DMC has promised more than it can deliver. This may be the case even where the DMC's contract is appropriately worded, if (for example) its written or oral marketing is over-optimistic or
- the DMC has failed to conduct negotiations with the reasonable care and skill required by section 13 of the Supply of Goods and Services Act or
- there has been a total failure of consideration.

2.22 The contract should allow the client to withdraw from the contract where, following signing of the contract the total fee differs significantly from the estimate given prior to the contract (for example, because a full investigation of the client's circumstances reveals that the monthly payment must be larger than first thought).

Handling money

2.23 Any monies held on behalf of consumers must be kept in a client account not usable by the DMC for the purposes of its own business. This includes, in particular, any deposit which under the contract may be returned to the client at any date in the future and any monies received by the company for payment to creditors. Any interest earned on this account should accrue to the benefit of the client, not the company.

2.24 The contract must specify a period within which payments received from the client will normally be passed on. Delay that adversely affects the individual consumer's financial position and which exceeds five working days from receipt of cleared funds is unacceptable. If the DMC fails to disburse payments to creditors in accordance with the contract, it should accept responsibility and inform the client of the delay, together with the reason for it. The law does not impose liability where the reason for delay is beyond the control of the supplier. But where the delay is not beyond its control the DMC should take appropriate action to put the consumer in the position they would have been had the contract been fulfilled. This includes, for example making good any additional interest which has accrued and any default charges that have been applied to the account as a result of the delay. In this respect, the DMC must have appropriate systems in place to deal with foreseeable problems and to minimize delays, even when the initial cause is not its fault. As the consumer relies on the DMC to be made aware of any delay, DMCs should take reasonable steps to anticipate delays and make good losses.

Other terms

2.25 Contracts must not prohibit clients from corresponding with, or responding to written or oral communications from creditors or others acting on behalf of creditors. However, in order to avoid duplicate or contradictory action, contracts may reasonably require the client to send to the DMC a copy of any communication from a creditor. Where the contract requires or suggests that the client should send such correspondence to the DMC, it must deal with it appropriately and promptly. The DMC must send to the client a copy of any written communication it sends to or receives from the creditor, and (unless the creditor itself sends a copy to the client) must keep the client informed of other communications.

2.26 Contracts must not include declarations such as 'I fully understand the requirements of the contract' or confirmation that certain provisions have been explained.

Advice

2.27 All advice given should be in the best interests of the client. Debt management programmes are not suitable for all debtors, and DMCs must exercise all due discretion, in the best interests of the debtor, in deciding whether or not take a debtor as a client.

Financial position

2.28 A realistic assessment of the financial circumstances of the consumer, including both income and outgoings, must be made before advice is given.

- Consumer income must be verified by appropriate means, such as pay slips.
- Reasonable steps must also be taken to verify regular outgoings. Estimates of expenditure on certain items are permitted, but only if precise figures are not available. Standard expenditure guidelines may be used where there is no better indication of the client's outgoings provided that there is nothing to suggest that they are inappropriate. A copy of any financial statement sent to creditors must also be sent to the client.

Payments

2.29 Any advice given to the client to cancel direct debits or standing orders prior to the repayment plan being agreed with creditors must be demonstrably in the best interests of the client. It is not a step which should be undertaken lightly. DMCs must clearly warn clients of the risks and consequences of this course of action if they advise it. Where this course is taken, the OFT would normally expect that regular payments to creditors (even if lower than the contractual ones) should continue to be made wherever possible.

2.30 The difficulties associated with stopping contractual payments are especially acute when they are accompanied by a period in which no payments at all are made (for example, because the DMC takes the first payment under the plan as a deposit or up front fee (see also clauses 2.5 and 2.13), or because there is a delay in distributing payments to creditors). If this will, or is likely to, happen under the plan the consumer must be clearly informed and warned of the consequences. It is not sufficient for this purpose that there be a statement to this effect in the small print of the terms and conditions.

2.31 Clients should not be advised to make payments to accounts at a rate lower than the rate at which any interest and other charges are accruing or may accrue, unless this is demonstrably in their best interests. In such a case, a clear explanation must be given to the client as to why this course is necessary and its implications.

2.32 If, following advice to cancel direct debits or reduce the level of contractual payments, it becomes clear that the course of action is not producing results in the client's interest, (for example, because creditors are not agreeing to freeze interest), then the client must be informed immediately so that he may be advised appropriately and take whatever action is in his best interests (including the possibility of withdrawing from the plan).

2.33 Clients must be advised of the importance of meeting debts such as mortgages, rent and utility payments. More generally it should not be assumed that it is always in the client's best interests simply to divide available income between debts in proportion to their size. For example advice should take into account the fact that some loans may lose the benefit of a reduced rate of interest if payments are missed, or that there may be a benefit in settling a loan with a higher rate of interest sooner than one with a lower rate of interest.

Previous page
Next page

Other points

2.34 Clients must be advised not to ignore correspondence or other contact from creditors or those acting on behalf of creditors.

2.35 DMCs must take special care where they are dealing with clients in a different jurisdiction (for example, a company based in England dealing with a Scottish client) because there may be differences in contract law or court procedure that may have significant impact on what is the best course of action for the client. It is not acceptable to ignore this point until legal proceedings are issued, and then to inform the client that no further help can be given because the DMC has no expertise in the law of the other jurisdiction.

Debt management services

2.36 DMCs must inform the client of the outcome of negotiations with creditors. This is not limited to the situation when creditors have refused to deal with the DMC, or have returned payments to the DMC, or refused to freeze interest. But it is especially important in those cases.

2.37 Clients must be kept informed of any developments in the relationship with creditors, in particular the issue of default notices or the threat of issue of legal proceedings.

2.38 Where the service provided by the DMC includes debt repayment, the DMC must:

- take full account of debts such as mortgage payments, rent, utility payments etc including any arrears already incurred on those debts, in setting monthly repayments, and
- reassess the payment plan and consider any necessary changes (including bringing the plan to an end) to ensure it remains in the client's best interests, as soon as it becomes aware of material change in the client's financial position. The client should be advised of any recommended changes without delay. Repayment plans should in any event be re-assessed on at least an annual basis and the client informed of the outcome of the reassessment.

2.39 Clients should at the outset be given a statement of how their money is being disbursed. In addition, where a plan has been agreed, the balance owed (or if an accurate figure is not known the best estimate), the period of payment needed to clear the debts and the fee charged by the DMC must be included in the statement. Clients must be kept informed of any material changes to these arrangements at the time they occur. DMCs should meet any reasonable request by a client for a statement of his or her position.

2.40 DMCs should respond to complaints promptly and fairly.

2.41 All correspondence, statements and other paperwork sent to or received from the client or the client's creditors and which has not already been copied to or returned to the client, should be retained by the DMC until such time as the contract is completed or terminated. On termination or completion of the contract, all retained paperwork should be returned to the client unless, at that time, the client says that they do not want the paperwork.

3. CLARIFICATION NOTE FOR CABX AND OTHER INDEPENDENT ADVICE AGENCIES

Marketing, promotion and advertisements – Clauses 2.2-2.5

3.1 Where an advice agency promotes its services through advertising material or any other medium the key principles and guidance must be observed:

- it should be accurate, clear and not mislead – (2.2)
- where warnings or caveats are required they should be given equal prominence to the material they refer to – (2.3)
- it should not imply debts can be ignored or guarantee a favourable outcome to the consumer in negotiations with the creditors – (2.4).

Contact with consumers – Clause 2.7-2.9

3.2 The paragraphs in clause 2.7-2.9 are unlikely to apply to the free sector.

Contracts and pre-contract information – Clauses 2.10 - 2.26

3.3 The sections on 'pre contract information' and 'contract terms' are specifically written with fee charging debt management companies in mind. There is no requirement in the guidance for advice agencies to have a formal contract with the client.

3.4 Where an advice agency has an agreement with a client, which sets out the nature of the service to be provided and the responsibilities of the client, elements of the section on 'Information to be provided before the contract is signed' will apply. The key points are that:

- adequate information about the nature of the service should be provided – (2.10, third bullet)
- warnings should be given to the client that:
  - creditors need not accept proposals to reduce payments or freeze interest
  - collection actions, default notices and litigation may still follow the likely impact on the client's credit rating
  - it is important to meet mortgage, rent and utility payments
- correspondence from creditors should not be ignored. The way in which correspondence is dealt with will then be a matter for judgment in all the relevant circumstances (2.13).

3.5 Although the above mentioned warnings should be given in writing where there is a written agreement, where there is not, it is sufficient for advice agencies to make these points verbally.

3.6 Where an agreement is used advice agencies should ensure

- that it is fair, written in plain, intelligible language and easily legible –(2.16)
- it sets out the nature of the services that are being supplied and
- amount to be repaid or the best available estimate in the circumstances
- clients are not prohibited from corresponding or communicating with creditors, that the advice agency deals appropriately and promptly with any correspondence it handles on behalf of the client, sends the client a copy of any correspondence sent to or received from a creditor and generally keeps the client informed of other communications – (2.25).

3.7 If an advice agency handles money for the client the guidance on 'Handling money' (2.23 and 2.24) will apply. Some advice agencies arrange use of a mechanism called 'PayLink' which allows consumers to make a single payment, which is then disbursed to a number of creditors. This does not involve the advice agency in handling money and as such the 'Handling money' parts of the guidance do not apply to it.

Advice

Clause 2.27

3.8 All of this section on advice, except that which deals with the possible effect of payments made to a debt management company (clause 2.30), are likely to apply to advice agencies.

Clause 2.28

3.9 Clause 2.28 requires 'reasonable steps' or 'appropriate means' to be employed in determining client outgoings and income. What is 'reasonable' and 'appropriate' will depend on the circumstances and the nature of the service being provided. For example there is likely to be less information available when providing advice at a duty desk and less required when providing a self help service.

Clause 2.29

3.10 This clause is intended to apply to any form of contractual payment and the Debt Management Guidance will be amended as set out below in due course when the guidance is reviewed in order to reflect this. ('Any advice given to a client to cancel a contractual payment including direct debits or standing orders.....')

Clause 2.30

3.11 This clause is not intended to prevent clients being advised to stop or pay less than the normal contractual payment but is there to ensure that this is only done when it is demonstrably in the best interest of the client and that a clear explanation of this is given.

Previous page

Next page

3.12 The key principle is that all advice should be in the best interests of the client. Those giving guidance should take into account relevant factors such as the nature of the debt, the client's financial position, the powers of the creditor, whether interest has been frozen etc. For this reason the guidance (at 2.33) notes that it should not be 'assumed' that pro rata payments are in the best interests of the client. This does not preclude an advice agency concluding after an examination of the circumstances, that it is in the best interest of the client to make a pro-rata distribution Office of Fair Trading 22 of available funds. The key, however, is that it should not be assumed that this is the best outcome.

3.13 Where appropriate efforts have been made to establish the financial position of the client but information is still incomplete, advice should be based on the information that is available.

Debt management services – Clause 2.36-2.41

3.14 All of this section, with the exception of 2.39 which deals with the disbursement of funds by a debt management company, is likely to apply to the free sector.

5.2 DEBT ADVICE AND INFORMATION PACKAGE (SCOTLAND)

IMPORTANT – Do not ignore this information

You have been given this booklet because one of the following is happening or is about to happen:

- Someone that you owe money to is using a legal process to get back what you owe to them; or
- Someone that you owe money to intends to ask the court to make you bankrupt; or
- You have discussed entering a trust deed with an insolvency practitioner; or
- You have discussed the issue of a Certificate for Sequestration with an authorised person.

The law says information about where to get debt and money advice must be provided to you before further action can be taken. This booklet contains important information about getting advice to help you deal with your creditors and your debt.

Do not ignore this information

Ignoring your debts can lead to serious problems for you. You could lose your possessions, including your home and savings, or be made bankrupt. Getting money advice as soon as possible can help you to deal with your debts and your creditors and may help you to improve your situation.

You are strongly advised to seek money advice.

If someone has provided you with this booklet, action is being taken, or is about to be taken, against you.

WHO CAN GIVE ME HELP AND ADVICE?

You can get free money advice in your area.

APS Group Scotland 153550 (11/10)

5.2 DEBT ADVICE AND INFORMATION PACKAGE (SCOTLAND)

There are a number of people who can give free, confidential, and impartial money advice face-to-face in your local area. Some organisations may also give information and advice over the telephone or online.

People that can give free, face-to-face advice include advisers at Citizens Advice Bureaux and Local Authority money advisers.

You can find a local, free money adviser by contacting:

Money Advice Scotland
0141 572 0237
www.moneyadvicescotland.org.uk

You can find your local Citizens Advice Bureau by contacting:

Citizens Advice Scotland
0131 550 1000
www.cas.org.uk

Citizens Advice Scotland also offer advice online at:
www.adviceguide.org.uk/Scotland

Other organisations that can give free advice include:

Consumer Credit Counselling Service
0800 138 3328
www.scottishdebtline.co.uk

National Debtline
0808 808 4000
www.nationaldebtline.co.uk/scotland

Business Debtline
0800 197 6026
www.bdl.org.uk/scotland

If you do not have access to the internet your local library may be able to provide free access.

You can also get advice from insolvency practitioners. You should ask if they will charge you for their initial advice or for any other work they may do in connection with your debts.

The Institute of Chartered Accountants of Scotland (ICAS) on 0131 347 0100 or at **www.icas.org.uk** and the Insolvency Practitioners Association (IPA) on 020 7623 5108 or at **www.insolvency-practitioners.org.uk/ipsearch** can help you find an insolvency practitioner in your area.

You can also contact a solicitor, a financial adviser or a Debt Management Company. They will probably charge you a fee. You may be entitled to legal aid to help with the cost of a solicitor.

Whoever you ask for money or debt advice, make sure that the person you speak to knows you live in Scotland.

WHAT CAN THEY DO FOR ME?

People who provide debt and money advice can look at your personal situation, discuss the options available to you and help you decide which is the best course of action for you.

You may also be given information on how to maximise your income or deal with emergencies. For example, they may discuss whether you are entitled to benefits and what you can do if your bank account is frozen, if your gas or electricity is cut off or if you are facing eviction.

A money adviser can help you deal with your creditors. They may also help you with applications to court and represent you at court hearings.

WHAT CAN I DO ABOUT MY CREDITORS AND DEBTS?

Most importantly, **do not ignore your creditors or your debts.**

If you take action as soon as possible there may be ways to improve your situation. Your options may include:

- Making informal arrangements with your creditors;
- Arranging for extra time to pay what you owe;
- Setting up a statutory Debt Payment Programme;
- Entering a trust deed; or
- As a last resort, applying for your own bankruptcy. There is an application fee for this.

APS Group Scotland 153550 (11/10)

A money adviser can help you decide what to do, give you advice about all of the above options and tell you if there are more options for you. They can also tell you about the consequences of any of these options.

THE CONSEQUENCES OF NOT DEALING WITH YOUR DEBT

If you have been provided with this booklet, one of the following is happening or is about to happen:

1. Someone that you owe money to is using one of several legal processes called diligence to get back what you owe

In Scotland, there are a number of legal processes that people you owe money to (your creditors) can use to get back what they are owed. These processes are known as diligences and are usually carried out by sheriff officers on behalf of your creditors.

These are some of the diligences that can be used:

- Your employer can be instructed to make deductions from your wages. This is known as **arrestment of earnings.**
- Your bank can be instructed to freeze funds in your bank accounts and to release those funds to your creditor after 14 weeks. This is known as **arrestment.**
- Someone who has goods belonging to you can be instructed to freeze them. The goods can later be removed and sold at auction. This is also known as **arrestment.**
- Your creditor can ask a sheriff officer to secure some items in your possession. This is known as **attachment.** The items can later be taken away and sold at auction. Goods inside a dwellinghouse can only be attached in exceptional circumstances.
- Sheriff officers can be instructed to take away money in your possession through **money attachment.**
- Your creditors can register an **inhibition** to prevent you disposing of your home or other property that you own.

When using most diligences, creditors are required by law to provide you with this booklet.

APS Group Scotland 153550 (11/10)

Previous page

Next page

2. Someone that you owe money to intends to ask the court to make you bankrupt

Your creditors can ask the court to make you bankrupt if you owe them at least £3,000. They must provide you with this booklet.

In Scotland, **sequestration** is the legal word for bankruptcy.

Bankruptcy has serious consequences. It will affect your credit rating and make it difficult for you to get credit in future and can affect your employment or future employment. Your bank may freeze or close your bank accounts. Bankruptcy can lead to the loss of your home, vehicles and other possessions.

If you are made bankrupt, control of your assets (things you own), such as your home, car, savings and other items, automatically passes to your trustee who may sell them to pay your creditors. Your trustee is the person responsible for overseeing your bankruptcy.

3. You have discussed entering a trust deed with an insolvency practitioner

If you sign a trust deed, you enter an agreement with a trustee who will administer the trust deed. You must co-operate with your trustee. You agree that control of the things you own, including your home, car, savings and other items passes to your trustee who may sell them to pay your creditors. You usually also agree to pay a regular amount from your wages or other income.

If enough of your creditors agree to the terms of your trust deed, it can become protected. As long as you keep to what you have agreed, your creditors are not allowed to take further action against you.

Insolvency practitioners are required by law to provide you with this booklet if you are about to set up a trust deed with them. They must give you this booklet before you sign the trust deed.

APS Group Scotland 153550 (11/10)

4. You have discussed the issue of a Certificate for Sequestration with an authorised person

A Certificate for Sequestration certifies that you are unable to pay your debts as they become due. You can use the certificate to support an application for your own bankruptcy.

Authorised persons who can grant a certificate include most money advisers, insolvency practitioners and some people who work for insolvency practitioners.

The authorised person must tell you about all the options available to you and must provide you with this booklet prior to granting you the Certificate for Sequestration.

FURTHER INFORMATION

Further information booklets are available for debtors and creditors, on trust deeds and on bankruptcy restrictions.

A booklet called **"Debt and the Consequences"** gives you more information about what can happen if you do not deal with your debts or your creditors. It also tells you more about the options that might be available to you.

You can get all of these booklets from the Accountant in Bankruptcy online at **www.aib.gov.uk**. You can also request a copy by e-mail at **helpline@aib.gsi.gov.uk** or by telephoning 0300 200 2600.

The Accountant in Bankruptcy also provides further information about bankruptcy, trust deeds, the Debt Arrangement Scheme and the legal processes known as diligences on their website at **www.aib.gov.uk.**

This booklet is for general guidance only.
It is not a detailed or full statement of the law.

Previous page

Next page

APS Group Scotland 153550 (11/10)

Section 6

Other Profession Regulations and Guidance

CONTENTS

6.1 IPA Professional Indemnity Insurance Regulations

1. DEFINITIONS

1.1 In these definitions the following expressions shall have the following respective meanings:-

Gross Fee Income
The aggregate of all fees and income for professional services rendered, (net of VAT and disbursements and excluding for the avoidance of doubt interest dividends and rents received by the Professional Practice, income and capital profits from investments made by the Professional Practice and bad debts written off), attributable to the Member and his staff agents or locums (whether working under a contract of service or for services) from insolvency or insolvency related work, including both formal and informal appointments and advisory work where insolvency considerations apply including for the avoidance of doubt, fees received in respect of work subcontracted to others unless it is clearly demonstrated to the Individual Member's satisfaction that the subcontractor is taking professional responsibility for his work and has appropriate PII cover

PII
Professional Indemnity Insurance which is underwritten in accordance with the minimum requirements of these Regulations

Principal
A sole practitioner, partner, director or other person held out as a principal of a Professional Practice who is engaged in Insolvency Administration

Professional Practice
A Firm including one whose business or practice is not confined to Insolvency Administration

1.2 The following words shall have the same meaning as defined in the Articles of Association of the Association:-

Association, Firm, Individual Members, Insolvency Act, Insolvency Administration, Insolvency Appointment, Insolvency Authorisation, Insolvency Practitioner.

2. INTRODUCTION

2.1 PII is compulsory for each Individual Member who holds one or more Insolvency Appointments.

2.2 These Regulations set out the requirements for the minimum level of cover which must be obtained.

2.3 Individual Members are required to provide a certificate from their insurer setting out the principal terms of their PII cover to be submitted to the Association with each Insolvency Authorisation application or renewal form.

3. MINIMUM TERMS OF COVER

3.1 Each Individual Member is required to have a minimum PII cover for any one claim of whichever is the greater of:-

3.1.1 £250,000 (or such other figure as may from time to time be determined by Council); or

3.1.2 2.5 times his Gross Fee Income.

3.2 Where an Individual Member is in partnership or association with other Insolvency Practitioners and they are covered by a single PII policy, the minimum PII cover required shall be calculated by aggregating each Individual Member's Gross Fee Income.

3.3 In the case of a PII policy covering a number of Individual Members practising in partnership or by association, the required minimum cover under the policy need not exceed £1,500,000 (or such other figure as may from time to time be determined by Council).

3.4 PII policies must be entered into only with insurers authorised by the Department for Business, Enterprise and Regulatory Reform and must comply with the approved minimum wording for PII policies in accordance with such protocols as may from time to time be agreed between the Institute of Chartered Accountants in England and Wales and certain insurers known as participating insurers.

3.5 In addition to the approved minimum wording, the PII policy shall include fidelity insurance covering the dishonest acts or omissions of principals and employees of the Individual Member to the same level of cover as applies to the PII itself.

4. EXCESS

4.1 The minimum PII cover for each Individual Member can include an excess of not more than £20,000 (or such other figure as may from time to time be determined by Council).

4.2 Where an Individual Member is in partnership or association with other Insolvency Practitioners and they are covered by a single PII policy, the excess may not exceed £20,000 (or such other figure as aforesaid) multiplied by the number of Principals.

4.3 In the case of a Firm being a corporate practice, the number of Principals shall only include those who have entered into a legally binding personal obligation in respect of the excess.

5. RUN-OFF INSURANCE

5.1 An Individual Member who retires or ceases to act as an Insolvency Practitioner, is required to satisfy the Association that adequate run-off cover is in place for a minimum of six years after ceasing to act at an indemnity level not less than that applying immediately prior to retirement or cessation.

6. TRANSFERS BETWEEN PRACTICES

6.1 An Individual Member who transfers from one professional practice to another is required to satisfy the Association that adequate PII arrangements are in place to cover any claims made in respect of work done by him whilst at his previous practice in respect of the preceding period of not less than six years.

6.2 IPA Professional Indemnity Insurance Guidance

GUIDANCE

1. The Professional Indemnity Insurance ["PII"] Regulations make PII compulsory for Individual Members and set out the minimum requirements acceptable to the Insolvency Practitioners Association. However, you are strongly advised to obtain a greater level of cover and to take advice from your insurance broker. You should also review the extent of the cover available, since some policies will, for example, include legal costs within rather than in addition to the limit of the indemnity cover.

2. Most PII policies provide for a minimum level of risk, known as "excess", to be borne by the insured. You should consider both your firm's and your own personal resources when deciding what level of excess is appropriate for you. The maximum excess provided under these Regulations is £20,000 per individual.

3. From discussions with underwriters, it is considered that there is currently sufficient competition in the PII market for all Members to obtain an adequate level of PII cover on relatively competitive terms. However, should you, for any reason, find it impossible to obtain minimum cover, or if insurers decline insurance or attempt to avoid your policy, you must bring this matter to the attention of the Secretary of the Association without delay. You will be obliged to give full information to the Membership and Authorisation Committee, who will then consider the consequences.

4. Failure to obtain and maintain PII cover may also invalidate your Insolvency Bond and thus your ability to act as an Insolvency Practitioner.

5. Almost invariably, PII policies are written on a claims made basis, which means that the insurance will provide cover for claims first made or circumstances arising and notified to the insurers during the term of the current policy, irrespective of when the activity giving rise to the claim occurred. It is therefore important that, assuming (which is usually the case) that the policy provides such cover, the policy remains in force to provide protection against any claims which may arise in the future for work done in the past.

Previous page

Next page

6. If you are an Individual Member in partnership with others, or you have an arrangement where you are covered by another Professional Practice's PII policy, you must ensure that the PII cover provided by such policy or policies is adequate to cover the requirements of these Regulations as they apply to you.

7. Gross Fee Income, as defined in the Regulations, should be based on the most recently completed accounting year immediately preceding the start of the policy. If you are commencing practice, you should give your broker your best estimate of your anticipated Gross Fee Income or ensure that he is provided with such information by the person responsible for such matters within your firm.

8. The approved minimum policy wording is that adopted under a protocol agreed between the Institute of Chartered Accountant in England and Wales and certain "participating insurers" (details of which are available on request). You should also ensure that your PII policy includes fidelity insurance to cover any dishonest acts or omissions of principals employees and subcontractors in a manner and in terms not more limited than those contained in the approved minimum wording. The minimum policy wording must also be written on the basis that former-partners, and employees and subcontractors are covered.

9. Run-off cover for retiring Insolvency Practitioners may be provided under the PII of a continuing practice or you may need to take out an individual policy. Either way, you should personally check with your broker that you would be covered if any claim were made after you have retired from practice in respect of work done while you were in practice. If your former or successor practice has agreed to include run-off cover for you in its current cover, you must provide full details to the Association, who will need to be advised of any changes during the minimum six-year period. You will be responsible for taking out a new policy in the event of any run-off cover lapsing during the six-year period.

10. If you transfer from one practice to another, you must satisfy the Association that the PII cover remains in place for the work you carried out at your former firm. This should either be by having the old practice confirm that their PII policy will cover any claims made for a period of not less than six years or that your new PII cover will accept responsibility for

a similar period. It is important to ensure that, on changing firms, there is no gap in the PII cover and you may be asked to confirm to the Association the terms of any leaving agreement.

11. If your existing practice merges or breaks-up into small firms, you are required to ensure that there is no break in the existence and level of PII cover and to provide appropriate confirmations to the Association. You must ensure that, on a merger or split or any other alteration to the practice, there continues to be an adequacy of cover in accordance with the Regulations.

12. Confirmation of your PII arrangements will be requested by the Association as an item of your renewal of your Insolvency Authorisation. You should obtain from your insurer a certificate setting out the basic details of your cover including the sum insured per claim and in aggregate, the period of insurance, the names of the principals in the practice, the commencement of the insurance period, the amount of the excess and any specific instructions or conditions attaching to the cover. The Association may check with your brokers or insurers that the information is correct.

13. If you become aware of a claim or circumstances which might give rise to a claim falling under your PII policy, you are required to notify your insurers promptly since failure to do so could seriously prejudice your or your firm's rights and entitlement to indemnity under the policy. You should not wait until there have been developments or delay pending the completion of a detailed report of the matter.

14. The existence of claims or circumstances should be regarded objectively and insurers notified immediately even if the allegations are vague or unspecified and regardless of the fact that you think liability is unlikely. It is considered good practice to have a review of potential PII claims as an agenda item for partners' meetings and prior to the renewal of PII cover, a circular sent to all partners and senior staff requiring confirmation that they are not aware of any claim or circumstance which might give rise to a claim. Your broker may well be able to provide you with a claims handling / risk prevention booklet to assist in this respect, in which case it should be obtained and its advice adhered to.

Previous page

Next page

15. In consultation with your broker, you may wish to think about the following issues when deciding whether a PII policy is suitable for your purposes:-

15.1 The sum insured per claim and in the aggregate?

15.2 The excess?

15.3 What does the policy cover?

15.4 Does the policy cover dishonest acts of principals and employees and former principals and employees?

15.5 What triggers coverage - claims, notice of intention to claim, or circumstances arising?

15.6 Is there a provision in the policy covering a claim "series" i.e. claims arising from the same or a series of acts or omissions?

15.7 Are there any exclusions or conditions breach of which might entitle the insurer to avoid the whole policy?

15.8 What are the notice requirements, and consequences of late notification?

15.9 What are the complaint handling requirements?

16. You should avoid having double insurance.

17. It is suggested that you provide your brokers with a copy of both these Regulations and Guidance Notes and ask them to confirm that your PII policy meets the minimum requirements laid down by the Regulations.

6.3 R3 MONEY LAUNDERING GUIDANCE FOR INSOLVENCY PRACTITIONERS

INTRODUCTION

UK anti-money laundering law is based on the EU Third Directive on Money Laundering.

There are three key pieces of legislation:

- The Money Laundering Regulations 2007 ('the Regulations')
- The Proceeds of Crime Act 2002 (as amended by the Serious Organised Crime and Police Act 2005)
- The Terrorism Act 2000 (as amended by the Anti-Terrorism Crime and Security Act 2001 and the Terrorism Act 2006)

The Regulations set out the systems and procedures that relevant persons (see Appendix), must have and follow. One of these is to have a system for recording and reporting knowledge or suspicion of money laundering. The reporting obligations are further elaborated in the Proceeds of Crime Act (see below). Failure to comply with the requirements of either the Regulations or the Proceeds of Crime Act can carry criminal sanctions.

Regulators, such as the Financial Services Authority (FSA), may impose additional systems and controls requirements on persons and businesses regulated by them. A person or business regulated by the FSA needs to have regard to its Money Laundering Sourcebook as well as the Regulations.

The Proceeds of Crime Act sets out in Part 7 for the regulated sector (see Appendix) details of what constitutes money laundering and money laundering offences, the offences of tipping off and the offence of failing to disclose knowledge or suspicion of money laundering. It also lays down detailed responsibilities as regards disclosing (reporting) knowledge or suspicion to the criminal authorities and gaining consent to certain acts where needed. Section 342 in Part 8 describes a further offence of prejudicing an investigation.

The anti-terrorism legislation provides that financing terrorism or handling terrorist proceeds is laundering money and applies responsibilities similar to those in the Proceeds of Crime Act.

In addition to this legislation, supervisory bodies (e.g. the Consultative Committee of Accountancy Bodies (CCAB) and The Law Society) issue guidance for their members to follow. The Joint Money Laundering Steering Group (JMLSG) also issues guidance to the financial community.

The CCAB and Law Society guidance gives detailed information about the Money Laundering legislation and associated offences, and provides comprehensive guidance on compliance with the various requirements imposed by the legislation. R3 recommends that insolvency practitioners have regard, in addition to the guidance attached, to the CCAB or Law Society guidance in accordance with their professional status. They should also refer to the JMLSG guidance with particular reference to matters of identification.

The guidance which follows is concerned principally with matters particularly affecting those acting as insolvency office holders within the meaning of section 388 Insolvency Act 1986 or Article 3 of the Insolvency (Northern Ireland) Order 1989. These relate to identification, reporting suspicions, and obtaining consent to transactions involving potentially criminal property. It should be borne in mind that because of the complexities and ambiguities of the legislation the legal position in many areas may not be clear and may need to be clarified by the courts.

IDENTIFICATION

The provisions relating to identification procedures set out in the Regulations apply in situations where the person subject to the regulations and his counterparty form, or agree to form, a 'business relationship'. A 'business relationship' is defined in the Regulations as

"a business, professional or commercial relationship between a relevant person and a customer, which is expected by the relevant person, at the time when contact is established, to have an element of duration"

The Regulations require that identification takes place as soon as is reasonably practicable after contact is first made in connection with the proposed business relationship. In the context of insolvency, there is taken to be a 'business relationship' between the insolvency practitioner and the entity or individual over which he is appointed. Practitioners should commence identification procedures at their initial contact with the debtor or company. This would include, for example, accepting instructions from directors to take steps to

place a company into liquidation, to act as nominee in a company voluntary arrangement not preceded by another insolvency procedure, to accept an appointment as administrator under paragraph 22 of Schedule B1 to the Insolvency Act 1986, or to agree to act as nominee in an individual voluntary arrangement. Although in certain circumstances it is not strictly necessary to have completed the identification procedure before taking office (Regulation 9(3)), it would be advisable to do so in order to avoid possible later complications.

Where a practitioner is appointed by court order or by a creditors' meeting convened by the official receiver without any prior involvement with the insolvent, reliance on the order of appointment or the initial bankruptcy or winding-up order is considered to be sufficient evidence of identity. This would apply to the following cases:

- Appointment as provisional liquidator by order of the court
- Appointment as liquidator in a winding up by the court (whether by court order following an administration, at a creditors' meeting convened by the official receiver or directly by the Secretary of State)
- Appointment as administrator by order of the court
- Appointment as trustee in bankruptcy (whether at a creditors' meeting convened by the official receiver or directly by the Secretary of State)

In cases such as appointments made at a creditors' meeting in a voluntary liquidation, the practitioner should commence his identification procedures on appointment and complete them as soon as is reasonably practicable (within 5 working days is considered a reasonable period). Much of the necessary information may be obtainable from the practitioner who assisted with convening the meeting, for example, by providing certified copies of the necessary documentation.

Where a practitioner is appointed receiver or administrator by a bank or other institution which is itself subject to the money laundering regulations, the practitioner may well be able to obtain certified copies of the bank's own evidence of identity. Again, this process should be completed as soon as is reasonably practicable. Practitioners must note that it is for them to be satisfied that they have sufficient evidence of identity and so must conduct such further enquiries as they see fit if convening accountants or appointing lenders are unable to provide sufficient information.

The appointment of an insolvency practitioner to a company which is not itself subject to the Money Laundering legislation (e.g. a restaurant, manufacturing business or a shop) will not bring the company within the ambit of the legislation so as to require identification of trading partners in respect of transactions conducted by the company during the course of the insolvency. The same would apply in the case of appointment as supervisor of a voluntary arrangement of an individual or partnership which is not subject to the legislation.

Where practitioners are providing services outside of formal insolvency proceedings, they should identify those parties entering into a contractual relationship with them. For example, where work is to be carried out for one party (e.g. a creditor or investor) in respect of a debtor, or investee entity, and both parties sign the letter of instruction, both parties should be identified. Where instructions letters are received from groups of creditors or investors, it will normally be sufficient to identify those parties who act on behalf of the group and enter into a contract with the practitioner (i.e. sign the letter of instruction), such as the agent or trustee.

Particular care needs to be taken where the client is a politically exposed person ('PEP'). A PEP is defined by the Regulations as a person who is, or has at any time in the preceding year, been entrusted with a prominent public function by a state other than the UK, a Community institution or an international body (regulation 14(5)). The definition extends to the family and the known close associates of such an individual.

In such cases the Regulations require approval from senior management before a business relationship is established, identification of the source of wealth and funds involved and ongoing monitoring (regulation 14(4)).

Where practitioners are unable to complete satisfactory identification procedures the Regulations require that the practitioner:

- must not carry out a transaction with or for the client through a bank account;
- must not establish a business relationship and must terminate any business relationship that already exists; and
- must consider whether he should make a money laundering report.

Previous page

Next page

REPORTING SUSPICIONS OF MONEY LAUNDERING

There is guidance on suspicion and reporting in the CCAB Guidance. Note that the requirement to report relates to suspicion of any criminal activity resulting in proceeds regardless of who may have committed the offence, and where it was committed if the conduct would have been criminal if undertaken in the UK. In addition, the relevant date is when the practitioner becomes suspicious, not when the conduct occurred.

Consent may be obtained from SOCA to enter into a transaction which involves suspected criminal property and which would otherwise constitute a Money Laundering offence. SOCA has seven working days (starting the day after submission of a report) in which to grant or refuse consent. If nothing is heard from SOCA during that time consent is deemed to have been given. Consent is also deemed to have been given if within seven days SOCA gives notice of refusal but then a further 31 days ('the moratorium period') passes without any restraint order being granted.

Practitioners should bear in mind that, where they suspect the assets of a company or individual to which they have been appointed may be tainted by criminality, selling those assets without consent may itself constitute an offence under section 327 of the Proceeds of Crime Act.

If a practitioner has reported suspicion to SOCA, he should obtain a consent to the act of selling the business and assets. If a practitioner is suspicious that the funds offered to purchase a business or assets are of criminal origin, again he should obtain a consent from SOCA.

Where an insolvency practitioner contemplates entering into, or causing a company to enter into, a transaction which may involve criminal property, whether the property is that of the company or a counterparty, he will need to submit a report to SOCA and seek approval of the transaction. SOCA has indicated that most requests for consent should be dealt with in 24 hours, but if the matter is particularly urgent this fact will need to be highlighted on the disclosure form. To facilitate a rapid response from SOCA, it is important to:

- make a report and seek consent as soon as it is apparent that the consent may be needed;
- make the report and consent request in writing;

- fax it to the SOCA duty desk and mark it 'urgent'; and
- follow up the fax with a call to the SOCA duty desk to explain any special urgency or potential deadlines.

There is clearly scope for conflict between a practitioner's duty to achieve the best results for creditors and his duty under the Money Laundering legislation. However, in view of the criminal sanctions attached to committing a Money Laundering offence or failing to report it is probable that the latter will prevail. Practitioners may, in some circumstances, wish to seek legal advice and possibly, the directions of the court.

In addition to the offences under the Proceeds of Crime Act, insolvency practitioners must report suspicions of proceeds from, or finance intended for, terrorism, regardless of how and when the suspicion arises. This is required by the Terrorism Act 2000. Suspicions of terrorism are to be reported using the same methods as for suspicions of Money Laundering.

TIPPING OFF

Tipping off is an offence under the Proceeds of Crime Act and care must be taken not to tip off a suspected money launderer. The offence arises when there is knowledge or suspicion that a report has been made, or, for terrorism related offences, that a report will be made. This includes internal reports. The practitioner also needs to know or suspect that his actions will prejudice an investigation in order to commit an offence.

Practitioners should be careful to ensure that reports to creditors do not contain anything that might constitute tipping off. Note that there is no provision for obtaining consent to tipping off.

WHERE THE INSOLVENT IS SUBJECT TO THE MONEY LAUNDERING LEGISLATION

Where an insolvency practitioner is appointed to a company, partnership or individual which is itself subject to the Money Laundering legislation (e.g. an accountancy partnership, he will need to ensure that the insolvent's own internal systems comply with the legislation and continue to function during the course of the insolvency. However, the practitioner himself will also have to report suspicions coming to him in the course of his duties through his own money laundering reporting officer.

Previous page

Next page

REPORTING REQUIREMENTS UNDER OTHER LEGISLATION

Insolvency practitioners are subject to a number of reporting duties. For example they are required to submit reports on directors under the disqualification legislation, and under section 218 of the Insolvency Act 1986 a liquidator must report to the prosecuting authority if it appears to him that any past or present officer or member of a company has been guilty of an offence for which he is criminally liable. Under these various duties the matters to be reported and the nature and extent of the supporting evidence may differ from that required under the Money Laundering legislation. For example section 218 covers a wider range of criminal activity than the Money Laundering legislation, and requires more than just suspicion on the part of the practitioner. When submitting reports practitioners should confine themselves to the matters required under the relevant legislation and any associated guidance. In cases where a report has been made to NCIS under the Money Laundering legislation this fact should not be mentioned in reports made under any other provisions.

APPENDIX

Persons covered by the legislation

The legislation applies to persons who carry on business in 'the regulated sector' (in the language of the Proceeds of Crime Act and the Terrorism Act) or who carry on 'relevant business' (in the language of the Regulations). The definition of 'the regulated sector' is set out in Schedule 9 to the Act, and the definition of 'relevant person' is set out in regulation 3 of the Regulations. Those persons who are excluded are set out in regulation 4 of the Regulations.

Despite the different terminology the activities in both cases are the same and, broadly, are:

- Regulated activity under the Financial Services and Markets Act 2000
- The activities of the National Savings Bank
- Any activity carried on for raising money under the National Loans Act 1986
- Operating a bureau de change, transmitting money or cashing cheques payable to customers
- The activities in points 1 to 12 of Annex 1 to the Banking Consolidation Directive
- Estate agency work
- Operating a casino by way of business
- The activities of a person appointed to act as an insolvency practitioner within the meaning of section 388 of the Insolvency Act 1986 or article 3 of the Insolvency(Northern Ireland) Order 1989
- The provision of tax advice
- The provision of accountancy services
- The provision of audit services
- The provision of legal services which involve participation in a financial or real property transaction
- The provision by way of business services in relation to the formation, operation or management of a company or trust
- Dealing in high value goods of any description (involving cash payments of 15,000 euros or more)

Previous page

Next page

6.4 IPA CLIENT MONEY REGULATIONS

1. These Regulations are made by the Council on 28th April 2000 pursuant to Article 62 of the Association's Articles of Association (adopted by Special Resolution passed 28th April 2000).

2. COMMENCEMENT

These Regulations shall come into force on 1st August 2000.

3. DEFINITIONS

3.1 In these Regulations the following expressions shall have the following respective meanings:-

Articles

the Articles of Association of the Association adopted by Special Resolution passed on 28th April 2000;

Bank

(a) a branch in the United Kingdom of:

the Bank of England;

the Central Bank of another member State of the European Union;

an authorised institution within the meaning of the Banking Act 1987; or

a building society within the meaning of the Building Societies Act 1986 which has adopted the power to provide money transmission services and has not assumed any restriction on the extent of that power; and

(b) a branch outside the United Kingdom of:

a bank within the meaning of paragraph (a) above;

a bank which is a subsidiary or parent company of such bank; or

a credit institution (as defined in EEC Directive number 77/780)

established in a member state of the European Union other than the United Kingdom, and duly authorised by the relevant supervisory authority in that member state; or

a bank on the Island of Guernsey that is registered as a Deposit Taker under the Protection of Depositors (Bailiwick of Guernsey) Ordinance 1971; or

a bank on the Island of Jersey (including a registered person under the Depositors and Investors (Prevention of Fraud) (Jersey) law 1967); or

a bank on the Isle of Man (including a bank which is licensed under section 3 of the Banking Act 1975, as amended);

Client
a person in respect of whom there is no Insolvency Appointment at the relevant time;

Client Bank Account
an account with a Bank in the name of the Firm separate from other accounts of the Firm which may be either a general account or an account designated by the name of a specific Client or by a number or letters allocated to that account and which, in all cases, includes the word 'client' in its title;

Client Money
money of any currency held or received by a Firm from or on behalf of a Client;

Estate Account
an account with a Bank in respect of a person over which the Individual Member holds an Insolvency Appointment and shall include the Insolvency Services Account;

European Union
includes the European Economic Area where any provision relates to a matter to which the European Economic Area Agreement relates;

Principal
an Individual Member who is either a sole practitioner or a partner in a Firm which is a partnership or a director of a Firm which is a body corporate;

Previous page

Next page

3.2 The following words and expressions shall have the same meaning as defined in the Articles:-

Association, Firm, Individual Member, Insolvency Appointment

3.3 References in these Regulations to any statutory provision shall include any statutory modification or re-enactment thereof

4. OPENING A CLIENT BANK ACCOUNT

On opening a Client Bank Account a Firm shall give written notice to the Bank concerned:

4.1 that all money standing to the credit of that account is held by the Firm as Client Money and that the Bank is not entitled to combine the account with any other account or to exercise any right to set-off or counterclaim against money in that account in respect of any sum owed to it on any other account of the Firm; and

4.2 that any interest payable in respect of sums credited to the account shall be credited to the account; and

4.3 requiring the Bank to acknowledge in writing that it accepts the terms of the notice.

5. PAYMENT INTO A CLIENT BANK ACCOUNT

5.1 Client Money received by a Firm as cash shall unless otherwise expressly directed by the Client be paid forthwith into a Client Bank Account.

5.2 Every other remittance received by a Firm which is drawn in favour of the Firm or of any Principal and which comprises or includes Client Money shall be paid forthwith into a Client Bank Account.

5.3 A Firm shall not pay any money into a Client Bank Account, unless

5.3.1 the Firm is required or permitted to make such payment under these Regulations; or

5.3.2 the money is the Firm's own money and:

5.3.2.1 it is required to be so paid for the purpose of opening or maintaining the account and the amount is the minimum required for that purpose; or

5.3.2.2 it is so paid in order to restore in whole or in part any money paid out of the account in contravention of these Regulations.

5.4 A Firm shall not be regarded as having breached Regulation 5.3 simply because it transpires that money which the Firm paid into a Client Bank Account in the belief that it was required so to do under these Regulations should not have been paid into such an account, provided that immediately upon discovering the error the Firm takes the necessary steps to withdraw the money which has been paid into such account in error.

5.5 Where Client Money of any one Client in excess of £10,000 is held or is expected to be held by the Firm for more than 30 days, the Client Money shall be paid into a Client Bank Account designated by the name of the client or by a number or letters allocated to that account, unless the Client directs otherwise.

5.6 Subject to Regulations 5.8 and 6.1 if the aggregate amount of Client Money held or received by a Firm in respect of any one Client at any one time is such as would, if deposited in an interest bearing account at a rate no less than that from time to time posted publicly by the relevant Bank for small deposits subject to the minimum period of notice of withdrawals, result in or be likely to result in material interest being received thereon such sum shall be placed in an interest bearing Client Bank Account.

5.7 Subject to Regulations 5.8 and 6.1 all interest accruing to the sums placed in an interest bearing account (in accordance with Regulation 5.6 or otherwise) shall be accounted for to the Client concerned.

5.8 Regulations 5.6 and 5.7 shall not apply to Client Money held by a Firm as stakeholder.

5.9 In addition to payments in permitted by Regulation 5.3, the special nature of insolvency practice requires that the following money may be paid into a general Client Bank Account of the Firm:

Previous page

Next page

5.9.1 cheques and drafts accountable to Estate Accounts but where the payee is incorrectly designated;

5.9.2 money received by a Firm the legal entitlement to which is uncertain;

5.9.3 money received in respect of an Insolvency Appointment but subject to conditions which prevent its being paid into an Estate Account;

5.9.4 money received in respect of an Insolvency Appointment but where the appropriate Estate Account has been closed or has not been opened.

5.10 All money paid into a general Client Bank Account pursuant to Regulation 5.9 shall be paid out or transferred to the appropriate Estate Account as soon as practicable.

6. PAYMENT OF INTEREST ON CLIENT MONEY

6.1 Regulations 5.6 and 5.7 shall not affect any agreement in writing, whenever made, between a Firm and a Client as to the payment of interest or money in lieu thereof on Client Money held or received by the Firm for that Client.

6.2 It shall be a breach of these Regulations if a Firm fails to comply with any of the terms of any such agreement as is referred to in Regulation 6.1.

6.3 For the purposes of Regulations 5.6 to 5.8, 6.1 and 6.2 Client Money held by a Firm for two or more clients acting together in one or more transactions shall be treated as though held for a single client.

7. WITHDRAWALS FROM A CLIENT BANK ACCOUNT

7.1 When a remittance is paid into a Client Bank Account which includes money which is not Client Money, the money which is not Client Money shall be withdrawn from the account as soon as practicable.

7.2 Money shall not be withdrawn from a Client Bank Account except the following:

7.2.1 money, not being Client Money, paid into a Client Bank Account for the purpose of opening or maintaining the account;

7.2.2 money paid into a Client Bank Account in circumstances which amount to a contravention of these Regulations or which would have so amounted but for Regulation 5.4 or 5.9;

7.2.3 money required to be withdrawn under Regulation 7.1;

7.2.4 money which would remain in a Client Bank Account after all Clients whose money has been credited to that account received payment in full of sums due to them from that account whether under these Regulations or otherwise;

7.2.5 money which has become transferable to an Estate Account following the start of an Insolvency Appointment;

7.2.6 money properly required for a payment to or on behalf of a Client;

7.2.7 money properly required for or towards payment of a debt due to the Firm from a client otherwise than in respect of fees or commissions earned by the Firm;

7.2.8 subject to Regulation 7.4, money properly required for or towards payment of fees payable to the Firm by the Client and specified in a statement delivered to the Client showing the details of the work undertaken;

7.2.9 money withdrawn on a Client's prior authority or in conformity with any contract between the Firm and the Client;

7.2.10 money which may properly be transferred into another Client Bank Account.

7.3 Money withdrawn under Regulation 7.2.5 to 7.2.10 shall not exceed the total of the money held for the time being on account of the Client concerned.

7.4 Money shall not be withdrawn from a Client Bank Account for or towards payment of fees payable by the Client to the Firm unless:

7.4.1 the precise amount thereof has been agreed by the Client or has been finally determined by a court or arbitrator; or

7.4.2 the fees have been accurately calculated in accordance with a formula agreed in writing by the Client on the basis of which the amount thereof can be determined; or

7.4.3 thirty days have elapsed since the date of delivery to the Client of the statement referred to in Regulation 7.2.8 and the Client has not questioned the amount therein specified.

7.5 Money which may be withdrawn from a Client Bank Account in accordance with Regulation 7.2.7 or 7.2.8 by way of payment from the Client to the Firm shall be withdrawn as soon as practicable after the Firm becomes entitled to withdraw it under that Regulation.

8. RECORDS AND RECONCILIATION

8.1 A Firm shall at all times maintain records so as to show clearly all Client Money it has received and the details of any other money dealt with by it through a Client Bank Account, clearly distinguishing the money of each Client from the money of other Clients and from Firm money.

8.2 Each Client Bank Account shall be reconciled against the balances shown in each Client's ledger not less frequently than monthly and records shall be kept of such reconciliations.

8.3 Records kept in accordance with Regulations 8.1 and 8.2 shall be preserved for at least six years from the date of the last transaction recorded therein.

9. THE RESPONSIBILITY OF A PRINCIPAL

9.1 A Principal shall be responsible for any breach of these Regulations on the part of his Firm, and liable to disciplinary action accordingly, unless he proves that responsibility for the breach was entirely that of another Principal or other Principals.

Previous page

Next page

6.5 IPA CLIENT MONEY GUIDANCE

1. In order to harmonise regulation as much as possible, the Association has adopted Regulations based on those adopted by the Institute of Chartered Accountants in England and Wales. Those Regulations, however, cover many other areas of professional practice than insolvency practice; and the Regulations adopted by the Association have accordingly been adapted to reflect the particular needs of Insolvency Practitioners.

2. For convenience only, the Regulations have been drafted in terms of the duties imposed on Firms. Disciplinary proceedings can, however, be brought against Individual Members under Regulation 9.1. Attention is drawn to the defence in that Regulation.

3. Regulations controlling the use of Client Bank Accounts are necessary to preserve their integrity, so that third party funds are segregated from those of the Firm, readily identified and protected in the event of the Firm's financial failure.

4. Most money handled by Insolvency Practitioners will not fall into the definition of Client Money, since it will be in respect of an established Insolvency Appointment. The handling of such money is in many cases closely regulated by statute; and in addition Members are reminded of the terms of Statement of Insolvency Practice 11 "The Handling of Funds in Formal Insolvency Appointments". The Regulations deal rather with the handling of money prior to a formal Insolvency Appointment or where there is no such appointment.

5. Money held by a Firm as stakeholder is governed by the Regulations but the payment of interest provisions do not apply (Regulation 5.8).

6. Unless the Firm agrees otherwise in writing with a client (Regulation 6.1) a Client Bank Account must be an interest bearing account if 'material interest' would be likely to accrue within the meaning of Regulation 5.6. Any interest earned must in the absence of such agreement be accounted for to the Client in accordance with Regulation 5.7.

7. 'Material interest' shall be deemed to be likely to accrue if the sum of money is or is likely to be held for at least the number of weeks shown in the left hand column of the following table and the minimum balance in the Client

Previous page

Next page

Bank Account (or credited to the Client in the case of an account comprising the money of two or more Clients) equals or exceeds the corresponding sum in the right hand column of the Table:

Number of Weeks	Minimum Balance
8	£500
4	£1,000
2	£5,000
1	£10,000

The above is merely a guide to the interpretation of 'material interest'. The obligation of the Individual

Member is to take reasonable steps to ensure that the Client does not suffer material loss if money remains on bank accounts bearing low or no interest. There may be circumstances, for example, where money should be placed on overnight deposit.

Previous page

Next page

6.6 IPA CONTINUING PROFESSIONAL EDUCATION GUIDANCE

Members are expected to take steps to ensure that they keep abreast of developments in statutory and case law, in professional practice and in the commercial environment relevant to the competent performance of insolvency administration.

CPE FOR AUTHORISATION APPLICANTS AND AUTHORISATION HOLDERS

Members applying for, or applying to renew, an authorisation to act as an insolvency practitioner (IP) are required to show that they have undertaken the minimum level of relevant structured continuing professional education (CPE) as a necessary part of becoming, and continuing to be, fit and proper to be an IP.

In addition, the Membership & Authorisation Committee may require an authorisation holder to undertake specific CPE, as part of or additional to the minimum CPE requirement.

MINIMUM LEVEL OF CPE

The minimum level of relevant structured CPE is 25 hours in the twelve months immediately preceding an application for, or to renew, an authorisation.

RELEVANCE OF CPE

CPE should be relevant to the work that the applicant undertakes or intends to undertake. Thus for example for an IP who acts or intends to act in relation to individual voluntary arrangements, the major part of CPE would be expected to cover personal insolvency including alternative non-statutory solutions in order that he/she should be able to advise debtors on all the options available to them or otherwise be able to satisfy him/herself that debtors have been so advised – that is, not limited to an IVA or bankruptcy. For an IP who specialises in liquidations and/or administrations, the major part of CPE would be expected to cover corporate insolvency; but a part would also be expected to cover personal insolvency to warrant an authorisation which enables him/her to undertake any of the insolvency procedures.

The IPA may require a member to provide further information about the relevance of particular parts of his/her CPE to the type and nature of the work which he/she undertakes or intends to undertake. For this purpose, members

Previous page

Next page

may find it useful to carry out their own analysis of their knowledge and skills for the work they undertake or intend to undertake, and what might be expected of them; and to identify CPE aimed at developing or filling gaps in that knowledge and those skills.

STRUCTURED CPE

Structured CPE will include:

- attending IPA Conferences and Members' Meetings.

Structured CPE may include:

- attending or speaking at courses, conferences, seminars and lectures
  - organised by the Association of Business Recovery Professionals (R3), other commercial course and conference providers, in-house or by other professionals or their firms
  - covering knowledge and application of technical and regulatory aspects of insolvency law and practice or
  - development of interpersonal, business and management skills and competences.

Structured CPE may also comprise where the subject matter is insolvency related:

- research and preparation of papers for courses, conferences or seminars, lectures or articles
- attendance at technical or regulatory committees
- reading material provided in advance of attendance at a structured CPE course, conference, seminar or lecture or technical or regulatory meeting.

Structured CPE may also comprise formal presentations, talks or discussions of insolvency related subjects at professional gatherings which may also be of a social nature.

Where members find it difficult, because of their geographical location, to attend sufficient courses, conferences, seminars and lectures without involving unreasonable time and cost, there may be scope to organise their own structured discussion group with fellow professionals in their locality which may count towards the minimum CPE requirement.

Previous page

Next page

Members may use distance learning as readily accessed CPE also counting towards the minimum requirement: it should nevertheless be structured (by them). But given the value attached to, and achieved by, interaction and networking with fellow professionals at courses, conferences, seminars and lectures, distance learning would be expected to account for no more than half the minimum CPE requirement; and it may be further restricted where the Membership & Authorisation Committee is of the view that the member should attend courses, conferences, lectures or seminars generally or in relation to specific aspects of insolvency.

The minimum level of relevant structured CPE is likely to need to be supplemented by for example reading professional journals, law reports and similar.

CALCULATION OF CPE HOURS

The actual time spent on CPE will usually be the appropriate amount. However, unless the circumstances are demonstrably different, the following would generally apply:

- full day course – 6 hours
- half-day course – 3 hours
- evening seminar/lecture – 1 hour

IPA One-Day Conferences are usually accredited for 6 hours CPE: IPA Members' Meetings are usually accredited for 2 hours CPE.

RECORDS OF CPE

Those applying for, or who have, an authorisation are required to maintain records of the CPE which they have undertaken; and should have available to produce to the IPA on request details and evidence of courses, conferences, seminars and lectures they have attended, including the topics covered, and of other CPE undertaken in relation to the last three years.

OTHER MEMBERS

Members who do not have or who do not intend applying for an authorisation are not required to undertake CPE. But if they are in any way involved in insolvency administration or insolvency related work, then it is very much in their own interests and those of their firm, creditors, insolvents and others who are affected by an insolvency that they should maintain a knowledge of current insolvency law and practice.

Previous page

Next page

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