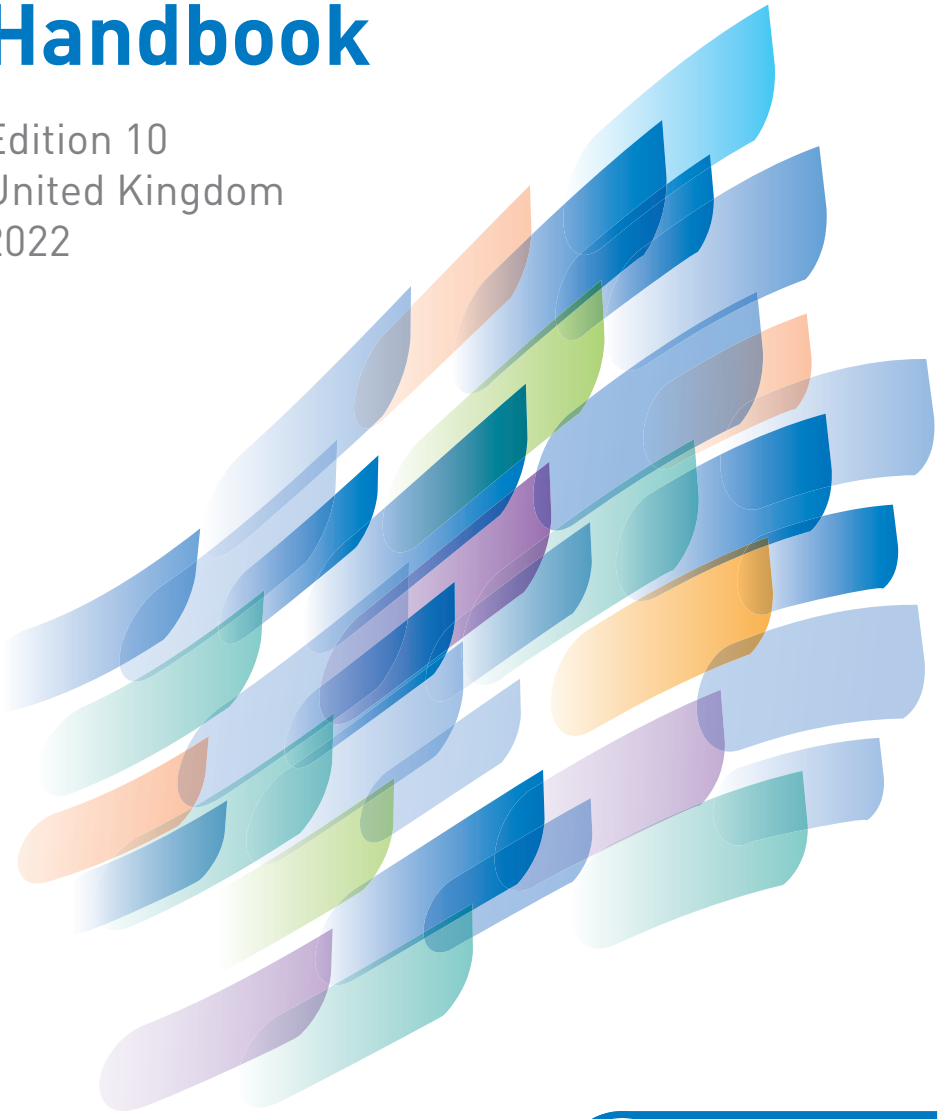
# Insolvency Practitioners' Handbook

10th Edition

Edition 10
United Kingdom
2022



Insolvency Practitioners Association

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# Insolvency Practitioners' Handbook

Edition 10
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## INTRODUCTION

*Welcome to the 2022 and 10th Edition of the IPA's Insolvency Practitioners Handbook.*

*On 14 April 1961, the 'Discussion Group of Accountants Specialising in Insolvency' held its first meeting with 15 founder members. That group became the Insolvency Practitioners' Association (IPA) and over the following six decades has developed into an industry leading regulatory body at the forefront of the profession, specialising solely in insolvency. The insolvency practitioners who came together in 1961 shared a desire to see the profession recognised in its own right, and a common will to support each other. The IPA handbook (published annually) sustains that purpose, by bringing together in one useful book the current key guidance and codes that practitioners (and those studying for insolvency exams) need to have at their fingertips. With our members assisting businesses and individuals right across the UK, the handbook covers England, Wales, Scotland and Northern Ireland. This edition also includes a revised section on anti-money laundering.*

*The handbook is also available online for IPA members at www.insolvency-practitioners.org.uk*

*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 Insolvency Practitioners (IPs), to act under the Insolvency Act 1986 in the UK. We are the second largest RPB in terms of authorising and regulating IPs but the country's largest RPB in terms of insolvency market coverage. We are also an Anti-Money Laundering Supervisory Body.*

*As the only RPB solely involved in insolvency, we have been at the forefront in:*

- *making innovative changes to strengthen the UK's regulatory framework*
- *creating and developing 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.*

*As well as IPA licence holders and members, this book is of huge benefit to students studying insolvency legislation and rules to progress their careers. The IPA is proud of all its students, who have the opportunity each year to sit one of the IPA's exams - Certificate of Proficiency in Insolvency (CPI) and Personal Insolvency (CPPI). These exams are seen as key 'stepping stones' to the Joint Insolvency Examination Board exams, supported by training. The vast majority of students who have sat one of these exams say it has helped them in their careers, and feedback from members tells us that 99% of employers who funded a candidate considered it a worthwhile investment. The IPA can be rightly proud of its record of encouraging and supporting those who represent the future of the profession.*

*This handbook is being published during a period of multiple challenges for the UK, Europe and the World generally. We appear to be emerging from the pandemic which has impacted us all to varying degrees, and I would like to thank all the IPA members who have continued to*

# INTRODUCTION

*maintain the professionalism for which they are recognised, as well as supporting others through voluntary efforts both large and small through this uncertain time.*

*We are also faced with a sharp rise in costs which is leading to an increase in businesses and families running into financial difficulties, exacerbating the challenges faced by those that are already struggling. Our profession will be a key part of helping the UK overcome these challenges in the months and years ahead. The war in Ukraine has given rise to huge humanitarian challenges across Europe and enormous suffering by those directly affected. The impact of these events threatens the stability of Europe and the World generally, and will be felt for many years, if not decades, to come and our profession will continue to have a significant role to play in managing though these uncertain times.*

*In conclusion, the business environment in which we currently find ourselves, is unparalleled: this handbook remains a vital resource for those working in insolvency to help them keep up to date with all legislative and regulatory developments. We are proud to publish it.*

***Samantha Keen FIPA FCA***
*IPA President 2022/23*

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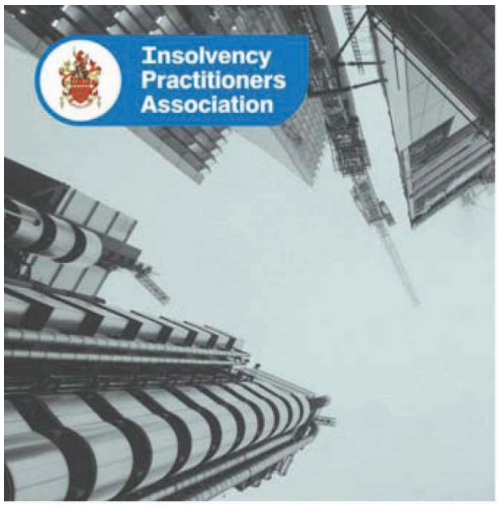
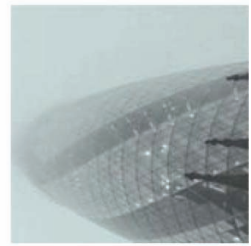
# Section 1

## The Ethics Code



# Join the IPA

The IPA is a Recognised Professional Body (RPB) for those in insolvency practice or involved in insolvency-related work in the UK – the only organisation out of the country's four RPBs to focus solely on insolvency. As an RPB, we're responsible for authorising and regulating Insolvency Practitioners in the UK. We have around 2,000 members.

The IPA is also an Anti-Money Laundering (AML) Professional Body Supervisor (PBS). The 2017 UK Money Laundering Regulations introduced the concept of the PBS. Organisations of this status are responsible for supervising their members on compliance with the 2017 Regulations. The IPA is a leading source of AML expertise and is responsible for the monitoring and reviewing of members' compliance with the Regulations in their insolvency and advisory work.

The IPA maintains a leading role in the development of professional insolvency standards. It's one of our principal aims to promote and maintain excellent performance and professional conduct standards across the range of insolvency services available in both the UK and globally. The IPA created the world-leading Certificate of Proficiency in Insolvency (CPI) and Certificate of Proficiency in Corporate Insolvency (CPCI) examinations, which are recognised as principal routes to qualification as an IP through the Joint Insolvency Examination (JIE), which the IPA administers.

The IPA is also a leading authority in the production of insolvency related literature, and this is highly regarded in the profession. Our main and most sought-after publication is the award-winning Insolvency Handbook, an invaluable reference for insolvency professionals.

A host of specialist webinars and training courses are available for Insolvency Practitioners via the IPA website.

**www.insolvency-practitioners.org.uk**

# SECTION 1 - THE ETHICS CODE

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## 1.1 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, Energy and Industrial Strategy) 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 Insolvency 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, all members 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) in all their professional and business activities and in other circumstances where to fail to do so might bring discredit upon themselves or the IPA.

4. The Code will replace all previous Codes of Ethics issued by the Board 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.

**Effective Date: 01 May 2020**

# 1.2 INSOLVENCY CODE OF ETHICS

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# 1.2 INSOLVENCY CODE OF ETHICS

## GENERAL APPLICATION OF THE CODE

### Introduction

1.1 This Code sets out the obligations of insolvency practitioners to meet the ethical requirements expected of them.

1.2 An authorising body must, so far as is reasonably practicable, act in a way which protects and promotes the public interest. This Code forms part of the framework used to meet this objective.

#### Requirements and Application Material

1.3 A1 Requirements and application material are to be read and applied with the objective of complying with the fundamental principles and applying the conceptual framework.

#### Requirements

1.3 A2 Requirements are designated with the letter "R" and, in most cases, include the word "shall." The word "shall" in the Code imposes an obligation on an insolvency practitioner to comply with the specific provision in which "shall" has been used.

1.3 A3 In some situations, the Code provides a specific exception to a requirement. In such a situation, the provision is designated with the letter "R" but uses "may" or conditional wording.

1.3 A4 When the word "may" is used in the Code, it denotes permission to take a particular action in certain circumstances, including as an exception to a requirement. It is not used to denote possibility.

1.3 A5 When the word "might" is used in the Code, it denotes the possibility of a matter arising, an event occurring or a course of action being taken. The term does not ascribe any particular level of possibility or likelihood when used in conjunction with a threat, as the evaluation of the level of a threat depends on the facts and circumstances of any particular matter, event or course of action.

#### Application Material

1.4 A1 In addition to requirements, the Code contains application material that provides context relevant to a proper understanding of the Code. In particular, the application material is intended to help an insolvency

practitioner to understand how to apply the conceptual framework to a particular set of circumstances and to understand and comply with a specific requirement. While such application material does not of itself impose a requirement, consideration of the material is necessary to the proper application of the requirements of the Code, including application of the conceptual framework. Application material is designated with the letter "A."

1.4 A2 Where application material includes lists of examples, these lists are not intended to be exhaustive.

**R1.5 In order to protect and promote the public interest, an insolvency practitioner shall observe and comply with this Code. If an insolvency practitioner is prohibited from complying with certain parts of this Code by law or regulation, the insolvency practitioner shall comply with all other parts of this Code.**

1.5 A1 The Code establishes the fundamental principles of ethics for insolvency practitioners and provides a framework for insolvency practitioners to:

a) identify threats to compliance with the fundamental principles;

b) evaluate the significance of the threats identified; and

c) apply safeguards, where available and capable of being applied, to reduce the threats to a level at which an insolvency practitioner using the reasonable and informed third party test would likely conclude that the insolvency practitioner complies with the fundamental principles.

**R1.6 An insolvency practitioner shall use professional judgement in applying this framework.**

1.6 A1 The Code also describes how the ethical framework applies in certain situations. It provides examples of actions that might be appropriate to address threats to compliance with the fundamental principles. It also describes situations where no action can address the threats, and consequently, the circumstance or relationship creating the threats needs to be avoided.

**Scope**

**R1.7 Insolvency practitioners shall ensure that the Code is applied at all times in relation to the conduct of an insolvency appointment or circumstances which might lead to an insolvency appointment.**

## 1.2 INSOLVENCY CODE OF ETHICS

**R1.8 Insolvency practitioners shall follow the fundamental principles, apply the conceptual framework and specific requirements of the Code in all their professional and business activities whether carried out with or without reward and in other circumstances where to fail to do so would bring discredit to the insolvency profession.**

**R1.9 Insolvency practitioners shall be guided not merely by the terms but also by the spirit of the Code.**

1.9 A1 The Code provides examples of matters to take into account when insolvency practitioners are considering their position, but ethical considerations are not limited to the examples. It is necessary for insolvency practitioners to take into account how their conduct might be perceived by a reasonable and informed third party.

**R1.10 Although, an insolvency appointment will be personal to the insolvency practitioner rather than their firm or employing organisation, insolvency practitioners shall ensure that work for which they are responsible, which is undertaken by members of the insolvency team on their behalf, is carried out in accordance with the requirements of this Code.**

## FUNDAMENTAL PRINCIPLES

### General

100.1A1 There are five fundamental principles of ethics for insolvency practitioners:

a) Integrity – to be straightforward and honest in all professional and business relationships.

b) Objectivity – not to compromise professional or business judgements because of bias, conflict of interest or undue influence of others.

c) Professional Competence and Due Care – to:

i. Attain and maintain professional knowledge and skill at the level required to ensure that a client or employing organisation receives competent professional service, based on current technical and professional standards and relevant legislation; and

ii. Act diligently and in accordance with applicable technical and professional standards.

d) Confidentiality – to respect the confidentiality of information acquired as a result of professional and business relationships.

e) Professional Behaviour – to comply with relevant laws and regulations and avoid any conduct that the insolvency practitioner knows or should know might discredit the profession.

**R100.2 An insolvency practitioner shall comply with each of the fundamental principles.**

100.2 A1 The fundamental principles of ethics establish the standard of behaviour expected of an insolvency practitioner. The conceptual framework establishes the approach which an insolvency practitioner is required to apply to assist in complying with those fundamental principles. Paragraphs R101.1 to R105.1 A2 set out requirements and application material related to each of the fundamental principles.

100.2 A2 An insolvency practitioner might face a situation in which complying with one fundamental principle conflicts with complying with one or more other fundamental principles. In such a situation, the insolvency practitioner might consider consulting, on an anonymous basis if necessary, with:

a) others within the firm or employing organisation.

b) those charged with governance.

c) another insolvency practitioner from a different firm.

d) a professional body.

e) an authorising body.

f) legal counsel.

However, such consultation does not relieve the insolvency practitioner from the responsibility to exercise professional judgment to resolve the conflict or, if necessary, and unless prohibited by law or regulation, disassociate from the matter creating the conflict.

## INTEGRITY

**R101.1 An insolvency practitioner shall comply with the principle of integrity, which requires an insolvency practitioner to be straightforward and honest in all professional and business relationships.**

101.1 A1 Integrity implies fair dealing and truthfulness.

**R101.2 An insolvency practitioner shall not knowingly be associated with reports, returns, communications or other information where the insolvency practitioner believes that the information:**

**a) contains a materially false or misleading statement;**

**b) contains statements or information provided recklessly; or**

**c) omits or obscures required information where such omission or obscurity would be misleading.**

101.2 A1 If an insolvency practitioner provides a modified report in respect of such a report, return, communication or other information, the insolvency practitioner is not in breach of paragraph R101.2.

**R101.3 When an insolvency practitioner becomes aware of having been associated with information described in paragraph R101.2, the insolvency practitioner shall take steps to be disassociated from that information.**

## 1.2 INSOLVENCY CODE OF ETHICS

### OBJECTIVITY

**R102.1 An insolvency practitioner shall comply with the principle of objectivity, which requires an insolvency practitioner not to compromise professional or business judgement because of bias, conflict of interest or undue influence of others.**

102.1 A1 Objectivity is the state of mind which has regard to all considerations relevant to the task in hand but no other.

**R102.2 An insolvency practitioner shall not undertake a professional activity if a circumstance or relationship unduly influences the insolvency practitioner's professional judgement regarding that activity.**

### PROFESSIONAL COMPETENCE AND DUE CARE

**R103.1 An insolvency practitioner shall comply with the principle of professional competence and due care, which requires an insolvency practitioner to:**

**a) attain and maintain professional knowledge and skill at the level required to ensure that a competent professional service is provided, based on current technical and professional standards and relevant legislation; and**

**b) act diligently and in accordance with applicable technical and professional standards.**

103.1 A1 Professional competence requires the exercise of sound judgement in applying professional knowledge and skill when undertaking professional activities.

103.1 A2 Maintaining professional competence requires a continuing awareness and an understanding of relevant technical, professional and business developments. Continuing professional development enables an insolvency practitioner to develop and maintain the capabilities to perform competently within the professional environment.

103.1 A3 Diligence encompasses the responsibility to act in accordance with the requirements of an assignment, carefully, thoroughly and on a timely basis.

## 1.2 INSOLVENCY CODE OF ETHICS

**R103.2 In complying with the principle of professional competence and due care, an insolvency practitioner shall take reasonable steps to ensure that those working in a professional capacity under the insolvency practitioner's authority have appropriate training and supervision.**

**R103.3 Where appropriate, an insolvency practitioner shall make users of the insolvency practitioner's services or activities or their employing organisation aware of the limitations inherent in the services or activities.**

### CONFIDENTIALITY

104.1 A1 The principle of confidentiality is not only to keep information confidential, but also to take all reasonable steps to preserve confidentiality. Whether information is confidential or not will depend on its nature.

**R104.2 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 shall always report on their acts and dealings as fully as possible given the circumstances of the case, in a way that is transparent and understandable, bearing in mind the expectations of others and what a reasonable and informed third party would consider appropriate.**

**R104.3 An insolvency practitioner shall comply with the principle of confidentiality, which requires an insolvency practitioner to respect the confidentiality of information acquired as a result of professional and business relationships. An insolvency practitioner shall:**

**a) be alert to the possibility of inadvertent disclosure, including in a social environment, and particularly to a close business associate or an immediate or a close family member;**

**b) maintain confidentiality of information within the firm or employing organisation;**

**c) maintain confidentiality of information disclosed by the employing organisation;**

**d) not disclose confidential information acquired as a result of professional and business relationships outside the firm or**

**employing organisation without proper and specific authority, unless there is a legal or professional duty or right to disclose;**

**e) not use confidential information acquired as a result of professional and business relationships for the personal advantage of the insolvency practitioner or for the advantage of a third party;**

**f) not use or disclose any confidential information, either acquired or received as a result of a professional or business relationship, after that relationship has ended; and**

**g) take reasonable steps to ensure that personnel under the insolvency practitioner's control, and individuals from whom advice and assistance are obtained, respect the insolvency practitioner's duty of confidentiality.**

104.3 A1 There are circumstances where insolvency practitioners are or might be required to disclose confidential information or when such disclosure might be appropriate:

a) Disclosure is required by law, for example:

i. producing statutory reports for the creditors of the insolvent;

ii. submitting reports on the conduct of directors of an insolvent entity;

iii. production of documents or other provision of evidence in the course of legal proceedings; or

iv. disclosure to the appropriate public authorities of infringements of the law that come to light;

b) Disclosure is permitted by law and is authorised by the employing organisation; and

c) There is a professional duty or right to disclose, when not prohibited by law:

i. to comply with the quality review of an authorising body;

ii. to respond to an inquiry or investigation by an authorising body or the oversight body;

iii. to protect the professional interests of an insolvency practitioner in legal proceedings; or

iv. to comply with technical and professional standards, including ethics requirements.

104.3 A2 In deciding whether to disclose confidential information, factors to consider, depending on the circumstances, include:

a) Whether the interests of any parties, including third parties whose interests might be affected, could be harmed if the client or employing organisation consents to the disclosure of information by the insolvency practitioner.

b) Whether all the relevant information is known and substantiated, to the extent practicable. Factors affecting the decision to disclose include:

- unsubstantiated facts.
- incomplete information.
- unsubstantiated conclusions.

c) Whether all the relevant information is known and substantiated, to the extent practicable. Factors affecting the decision to disclose include:

d) The proposed type of communication, and to whom it is addressed.

e) Whether the parties to whom the communication is addressed are appropriate recipients.

**R104.4 An insolvency practitioner shall continue to comply with the principle of confidentiality even after the end of the relationship between the insolvency practitioner and an employing organisation. When changing employment or accepting an insolvency appointment, the insolvency practitioner is entitled to use prior experience but shall not use or disclose any confidential information acquired or received as a result of a professional or business relationship.**

# 1.2 INSOLVENCY CODE OF ETHICS

## PROFESSIONAL BEHAVIOUR

**R105.1 An insolvency practitioner shall comply with the principle of professional behaviour, which requires an insolvency practitioner to comply with relevant laws and regulations and avoid any conduct that the insolvency practitioner knows or should know might discredit the profession. An insolvency practitioner shall not knowingly engage in any business, occupation or activity that impairs or might impair the integrity, objectivity or good reputation of the insolvency profession, and as a result would be incompatible with the fundamental principles.**

105.1 A1 Conduct that might discredit the insolvency profession includes conduct that a reasonable and informed third party would be likely to conclude adversely affects the good reputation of the profession.

105.1 A2 The concept of professional behaviour implies that it is appropriate for insolvency practitioners to conduct themselves with courtesy and consideration towards all with whom they come into contact when performing their work.

# 1.2 INSOLVENCY CODE OF ETHICS

## THE CONCEPTUAL FRAMEWORK

### Introduction

110.1 The circumstances in which insolvency practitioners operate might create threats to compliance with the fundamental principles. This section sets out requirements and application material, including a conceptual framework, to assist insolvency practitioners in complying with the fundamental principles and meeting their responsibility to act in the public interest. Such requirements and application material accommodate the wide range of facts and circumstances, including the various professional activities, interests and relationships, that create threats to compliance with the fundamental principles. In addition, they deter insolvency practitioners from concluding that a situation is permitted solely because that situation is not specifically prohibited by the Code.

110.2 The conceptual framework specifies an approach for an insolvency practitioner to:

a) identify threats to compliance with the fundamental principles;

b) evaluate the threats identified; and

c) address the threats by eliminating or reducing them to an acceptable level.

### Requirements and Application Material

#### General

**R111.1 The insolvency practitioner shall apply the conceptual framework to identify, evaluate and address threats to compliance with the fundamental principles set out in paragraphs 100 to 105.**

**R111.2 An insolvency practitioner shall take particular care to identify the existence of threats that exist prior to or at the time of taking an insolvency appointment or which at that stage, it might reasonably be expected could arise during the course of the insolvency appointment.**

**R111.3 In taking steps to identify any threats, an insolvency practitioner shall have regard to relationships whereby the firm is held out as being part of a network.**

**R111.4 When dealing with an ethics issue, the insolvency practitioner shall consider the context in which the issue has arisen or might arise. Where an insolvency practitioner is performing professional activities pursuant to the insolvency practitioner's relationship with the firm, whether as a contractor, employee or owner, the individual shall comply with the provisions of this Code.**

**R111.5 When applying the conceptual framework, the insolvency practitioner shall:**

**a) exercise professional judgement;**

**b) remain alert for new information and to changes in facts and circumstances; and**

**c) use the reasonable and informed third party test described in paragraph 113.1 A1.**

**Exercise of Professional Judgement**

112.1 A1 Professional judgement involves the application of relevant training, professional knowledge, skill and experience commensurate with the facts and circumstances, including the nature and scope of the particular professional activities, and the interests and relationships involved. In relation to undertaking professional activities, the exercise of professional judgement is required when the insolvency practitioner applies the conceptual framework in order to make informed decisions about the courses of actions available, and to determine whether such decisions are appropriate in the circumstances.

112.1 A2 An understanding of known facts and circumstances is a prerequisite to the proper application of the conceptual framework. Determining the actions necessary to obtain this understanding and coming to a conclusion about whether the fundamental principles have been complied with also require the exercise of professional judgement.

112.1 A3 In exercising professional judgement to obtain this understanding, the insolvency practitioner might consider, among other matters, whether:

a) There is reason to be concerned that potentially relevant information might be missing from the facts and circumstances known to the insolvency practitioner.

b) There is an inconsistency between the known facts and circumstances and the insolvency practitioner's expectations.

c) The insolvency practitioner's expertise and experience are sufficient to reach a conclusion.

d) There is a need to consult with others with relevant expertise or experience.

e) The information provides a reasonable basis on which to reach a conclusion.

f) The insolvency practitioner's own preconception or bias might be affecting the insolvency practitioner's exercise of professional judgement.

g) There might be other reasonable conclusions that could be reached from the available information.

**Reasonable and Informed Third Party**

113.1 A1 The reasonable and informed third party test is a consideration by the insolvency practitioner about whether the same conclusions would likely be reached by another party. Such consideration is made from the perspective of a reasonable and informed third party, who weighs all the relevant facts and circumstances that the insolvency practitioner knows, or could reasonably be expected to know, at the time the conclusions are made. The reasonable and informed third party does not need to be an insolvency practitioner, but would possess the relevant knowledge and experience to understand and evaluate the appropriateness of the insolvency practitioner's conclusions in an impartial manner.

**Identifying Threats**

**R114.1 The insolvency practitioner shall identify threats to compliance with the fundamental principles.**

114.1 A1 An understanding of the facts and circumstances, including any professional activities, interests and relationships that might compromise compliance with the fundamental principles, is a prerequisite to the insolvency practitioner's identification of threats to such compliance. The existence of certain conditions, policies and procedures established by the

profession, legislation, regulation, the firm, or the employing organisation that can enhance the insolvency practitioner acting ethically might also help identify threats to compliance with the fundamental principles.

a) leadership of the firm 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 need to identify threats to compliance with the fundamental principles, evaluate the significance of those threats, and apply safeguards to eliminate or reduce the threats to an acceptable level;

d) documented internal policies and procedures requiring compliance with the fundamental principles;

e) policies and procedures to identify the existence of any threats to compliance with the fundamental principles before deciding whether to accept an insolvency appointment;

f) policies and procedures to identify interests or relationships between the firm or individuals within the firm and third parties;

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 firm's policies and procedures, including any changes to them, to all individuals within the firm, 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 firm's quality control system;

j) a disciplinary mechanism to promote compliance with policies and procedures;

k) published policies and procedures to encourage and empower individuals within the firm to communicate to senior levels within the firm any issue relating to compliance with the fundamental principles that concerns them.

## 1.2 INSOLVENCY CODE OF ETHICS

114.1 A2 Below there are examples of such conditions, policies and procedures which are also factors that are relevant in evaluating the level of threats (see also Professional and personal relationships):

114.1 A3 Threats to compliance with the fundamental principles might be created by a broad range of facts and circumstances. It is not possible to define every situation that creates threats. In addition, the nature of engagements and work assignments might differ and, consequently, different types of threats might be created.

114.1 A4 Threats to compliance with the fundamental principles fall into one or more of the following categories:

a) Self-interest threat – the threat that financial or other interests of the firm, an individual within the firm or a close or immediate family member of an individual within the firm will inappropriately influence the insolvency practitioner's judgement or behaviour;

b) Self-review threat – the threat that the insolvency practitioner will not appropriately evaluate the results of a previous judgement made or service performed by an individual within the firm, on which the insolvency practitioner will rely when forming a judgement as part of providing a current service;

c) Advocacy threat – the threat that an individual within the firm will promote a position or opinion to the point that the insolvency practitioner's objectivity is compromised;

d) Familiarity threat –the threat that due to a long or close relationship, an individual within the firm will be too sympathetic or antagonistic to the interests of others or too accepting of their work; and

e) Intimidation threat – the threat that an insolvency practitioner will be deterred from acting objectively because of actual or perceived pressures, including attempts to exercise undue influence over the insolvency practitioner.

114.1 A5 The following are examples of facts and circumstances within each category of threats that might create threats for an insolvency practitioner:

a) Examples of circumstances that might create self-interest threats for an insolvency practitioner include:

i. an individual within the firm having an interest in a creditor or potential creditor with a claim which requires subjective adjudication, or having an interest in a party to a transaction;

ii. an individual within the firm having a close business relationship with a creditor, potential creditor or a party to a transaction;

iii. the insolvency practitioner discovering a significant error when evaluating the results of a previous service performed by an individual within the firm;

iv. concern about the possibility of damaging a business relationship;

v. concern about future employment.

b) Examples of circumstances that might create self-review threats for an insolvency practitioner include:

i. accepting an insolvency appointment in respect of an entity where an individual within the firm has recently been employed by or seconded to that entity;

ii. an insolvency practitioner or the firm having previously carried out professional work of any description, including sequential insolvency appointments, for an entity.

c) Examples of circumstances that might create advocacy threats for an insolvency practitioner include:

i. acting in an advisory capacity for a creditor of the insolvent entity;

ii. acting in an advisory capacity to an entity prior to its insolvency;

iii. acting as an advocate for a client of the firm in litigation or a dispute with the insolvent entity.

d) Examples of circumstances that might create familiarity threats for an insolvency practitioner include:

i. an individual within the firm or a close or immediate family member having a close relationship with a director, officer, employee or any individual having a financial interest in the insolvent entity;

ii. an individual within the firm or a close or immediate family member having a close relationship with a potential purchaser of

the insolvent entity's assets and/or business or any individual having a financial interest in the potential purchaser.

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

e) Examples of circumstances that might create intimidation threats for an insolvency practitioner include:

i. an individual within the firm being threatened with dismissal or replacement;

ii. an individual within the firm being threatened with litigation, complaint or adverse publicity;

iii. an individual within the firm being threatened with violence or other reprisal.

114.1 A6 A circumstance might create more than one threat, and a threat might affect compliance with more than one fundamental principle.

**Evaluating Threats**

**R115.1 When the insolvency practitioner identifies a threat to compliance with the fundamental principles, the insolvency practitioner shall evaluate whether such a threat is at an acceptable level.**

**Acceptable Level**

115.1 A1 An acceptable level is a level at which an insolvency practitioner using the reasonable and informed third party test would likely conclude that the insolvency practitioner complies with the fundamental principles.

**Factors Relevant in Evaluating the Level of Threats**

115.2 A1 The consideration of qualitative as well as quantitative factors is relevant in the insolvency practitioner's evaluation of threats, as is the combined effect of multiple threats, if applicable.

115.2 A2 The existence of conditions, policies and procedures described in paragraph 114.1 A2 might also be factors that are relevant in evaluating the level of threats to compliance with fundamental principles. Examples of such conditions, policies and procedures include:

a) corporate governance requirements.

b) educational, training and experience requirements for the profession.

c) professional standards.

d) effective complaint systems which enable the insolvency practitioner and the general public to draw attention to unethical behaviour.

e) an explicitly stated duty to report breaches of ethics requirements.

f) professional or regulatory monitoring and disciplinary procedures.

g) external review by a legally empowered third party of the reports, returns, communications or information produced by the insolvency practitioner.

**Consideration of New Information or Changes in Facts and Circumstances**

**R115.3 If the insolvency practitioner becomes aware of new information or changes in facts and circumstances that might impact whether a threat has been eliminated or reduced to an acceptable level, the insolvency practitioner shall re-evaluate and address that threat accordingly.**

115.3 A1 Remaining alert throughout an insolvency appointment assists the insolvency practitioner in determining whether new information has emerged or changes in facts and circumstances have occurred that:

a) impact the level of a threat; or

b) affect the insolvency practitioner's conclusions about whether safeguards applied continue to be appropriate to address identified threats.

115.3 A2 If new information results in the identification of a new threat, the insolvency practitioner is required to evaluate and, as appropriate, address this threat.

**Addressing Threats**

**R116.1 If the insolvency practitioner determines that the identified threats to compliance with the fundamental principles are not at an acceptable level, the insolvency practitioner shall address the threats by eliminating them or reducing them to an acceptable level. The insolvency practitioner shall do so by:**

**a) eliminating the circumstances, including interests or relationships, that are creating the threats;**

**b) applying safeguards, where available and capable of being applied, to reduce the threats to an acceptable level; or**

**c) declining or ending the insolvency appointment.**

**Actions to Eliminate Threats**

116.1 A1 Depending on the facts and circumstances, a threat might be addressed by eliminating the circumstance creating the threat. However, there are some situations in which threats can only be addressed by declining or ending the insolvency appointment or resigning altogether from the firm or the employing organisation. This is because the circumstances that created the threats cannot be eliminated and safeguards are not capable of being applied to reduce the threat to an acceptable level.

**Safeguards**

116.1 A2 Safeguards are actions, individually or in combination, that the insolvency practitioner takes that effectively reduce threats to compliance with the fundamental principles to an acceptable level.

116.1 A3 Safeguards vary depending on the facts and circumstances. Examples of actions that in certain circumstances might be safeguards to address threats include:

a) Assigning additional time and qualified personnel to required tasks when an insolvency appointment has been accepted might address a self-interest threat.

b) Having an appropriate reviewer, who was not a member of the team, review the work performed or advise as necessary might address a self-review threat.

c) Involving another insolvency practitioner to perform or re-perform part of the engagement might address self-interest, self-review, advocacy, familiarity or intimidation threats.

d) Disclosing any referral fees or commission arrangements received for recommending services or products might address a self-interest threat.

Safeguards specific to an insolvency appointment are considered later in the Code.

**Consideration of Significant Judgements Made and Overall Conclusions Reached**

**R116.2 The insolvency practitioner shall form an overall conclusion about whether the actions that the insolvency practitioner takes, or intends to take, to address the threats created will eliminate those threats or reduce them to an acceptable level. In forming the overall conclusion, the insolvency practitioner shall:**

**a) review any significant judgements made or conclusions reached; and**

**b) use the reasonable and informed third party test.**

**Breaches of the Code**

**R120.1 An insolvency practitioner who identifies a breach of any other provision of the Code shall evaluate the significance of the breach and its impact on the insolvency practitioner's ability to comply with the fundamental principles. The insolvency practitioner shall also:**

**a) take whatever actions might be available, as soon as possible, to address the consequences of the breach satisfactorily; and**

**b) determine whether to report the breach to the relevant parties.**

120.1 A1 Relevant parties to whom such a breach might be reported include those who might have been affected by it, or an authorising body.

## Record keeping

130.1 A1 It will always be for the insolvency practitioner to justify their actions. An insolvency practitioner will be expected to be able to demonstrate the steps that they took and the conclusions that they reached in identifying, evaluating and responding to any threats, both leading up to and during an insolvency appointment, by reference to written contemporaneous records.

## 1.2 INSOLVENCY CODE OF ETHICS

**R130.2 The insolvency practitioner shall document:**

**a) the facts;**

**b) any communications with, and parties with whom the matters were discussed;**

**c) the courses of action considered, the judgements made and the decisions that were taken;**

**d) the safeguards applied to address the threats when applicable;**

**e) how the matter was addressed;**

**f) where relevant, why it was appropriate to accept or continue the insolvency appointment.**

130.2 A1 The records an insolvency practitioner maintains, in relation to the steps that they took and the conclusions that they reached, are expected to be sufficient to enable a reasonable and informed third party to reach a view on the appropriateness of their actions.

### Ethical conflict resolution

140.1 An insolvency practitioner might be required to resolve a conflict in complying with the fundamental principles.

140.1 A1 When initiating either a formal or informal conflict resolution process, the following factors, either individually or together with other factors, might be relevant to the resolution process:

a) relevant facts;

b) ethical issues involved;

c) fundamental principles related to the matter in question;

(d) established internal procedures;

e) alternative courses of action.

140.1 A2 Having considered the relevant factors, it is necessary for an insolvency practitioner to determine the appropriate course of action, weighing the consequences of each possible course of action. If the matter remains unresolved, the insolvency practitioner might wish to consult with other appropriate persons within the firm for help in obtaining resolution.

140.1 A3 Where a matter involves a conflict with, or within, an entity, an insolvency practitioner will need to decide whether to consult with those charged with governance of the entity, such as the board of directors or senior management team.

**R140.2 The insolvency practitioner shall document the substance of the issue, the details of any discussions held, and the decisions made concerning that issue.**

140.2 A1 Reference should be made to Record Keeping (130).

140.2 A2 The insolvency practitioner is expected to be seen to act in such a way that threats to the fundamental principles are adequately addressed. Therefore, it is important that the insolvency practitioner considers disclosure, for example, to the court or to the creditors and other interested parties of the existence of any threat, together with the safeguards identified and applied.

140.2 A3 If a significant conflict cannot be resolved, an insolvency practitioner might consider obtaining advice from their authorising body or from legal advisors. The insolvency practitioner generally can obtain guidance on ethical issues without breaching the fundamental principle of confidentiality if the matter is discussed with their authorising body on an anonymous basis or with a legal advisor under the protection of legal privilege.

**R140.3 If, after exhausting all relevant possibilities, the ethical conflict remains unresolved, an insolvency practitioner shall, where possible, refuse to remain associated with the matter creating the conflict. The insolvency practitioner shall determine whether, in the circumstances, it is appropriate to withdraw from the insolvency appointment, or to resign altogether from the firm or the employing organisation.**

# 1.2 INSOLVENCY CODE OF ETHICS

## SPECIFIC APPLICATION OF THE CODE

### Introduction

200.1 This part of the Code describes how the framework applies in certain situations to insolvency practitioners. This part does not describe all of the circumstances and relationships that could be encountered by an insolvency practitioner that create or could create threats to compliance with the fundamental principles. Therefore, the insolvency practitioner is encouraged to be alert for such circumstances and relationships.

### Requirements and application material

**R200.2 An insolvency practitioner shall not knowingly engage in any activity that impairs or might impair integrity, objectivity or the good reputation of the profession and as a result would be incompatible with the fundamental principles.**

**R200.3 An insolvency practitioner shall exercise judgement to determine how best to deal with threats that are not at an acceptable level, whether by applying safeguards to eliminate the threat or reduce it to an acceptable level or, where possible, by refusing to remain associated with the matter creating the conflict.**

200.3 A1 In exercising this judgement, an insolvency practitioner is expected to consider whether a reasonable and informed third party, weighing all the specific facts and circumstances available to the insolvency practitioner at that time, would be likely to conclude that the threats would be eliminated or reduced to an acceptable level by the application of safeguards, such that compliance with the fundamental principles is not compromised.

200.3 A2 In the work environment, safeguards will vary depending on the facts and circumstances. Work environment safeguards comprise safeguards existing across the firm and safeguards specific to an insolvency appointment.

200.3 A3 Examples of actions that might be safeguards specific to an insolvency appointment include:

a) consulting an independent third party, such as an authorising body or another insolvency practitioner;

b) obtaining the views of a committee of creditors;

c) disclosing ethical issues to creditors and other interested parties;

d) involving another insolvency practitioner to perform or re-perform part of the engagement;

e) obtaining legal advice from a solicitor, barrister or advocate with appropriate experience and expertise.

## General conduct

**R200.4 Where circumstances are dealt with by statute or secondary legislation, an insolvency practitioner shall comply with such provisions.**

200.5 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.

**R200.6 An insolvency practitioner shall also comply with any relevant judicial authority relating to their conduct and any directions given by the court.**

**R200.7 An insolvency practitioner shall act in a manner appropriate to their position (as an officer of the court where applicable) and in accordance with any quasi-judicial, fiduciary or other duties that the insolvency practitioner might be under.**

**R200.8 An insolvency practitioner shall comply with standards or regulations issued by their authorising body.**

**R200.9 An insolvency practitioner shall also have regard to guidance relevant to the conduct of an insolvency appointment or work that might lead to an insolvency appointment which is issued by their authorising body, the Insolvency Service and other appropriate organisations.**

## Insolvency appointments

### Introduction

210.1 Insolvency practitioners are required to comply with the fundamental principles and apply the conceptual framework to identify, evaluate and address threats.

## 1.2 INSOLVENCY CODE OF ETHICS

210.2 Acceptance of an insolvency appointment might create a threat to compliance with one or more of the fundamental principles. This section sets out specific requirements and application material relevant to applying the conceptual framework in such circumstances.

**Requirements and application material**

**R210.3 Before agreeing to accept any insolvency appointment (including a joint appointment), an insolvency practitioner shall determine whether acceptance would create any threats to compliance with the fundamental principles.**

210.3 A1 Of particular importance are threats to the fundamental principle of objectivity created by conflicts of interest. These are considered in more detail in the section on conflicts of interest (paragraphs 310 to 311.2 A4).

210.3 A2 When seeking to identify threats to the fundamental principles, an insolvency practitioner will need to identify and evaluate any professional or personal relationships that threaten compliance with the fundamental principles (see Acting with sufficient expertise, 300 below). The insolvency practitioner will then need to determine the appropriate response to any threats arising from any such relationships, including identifying and applying appropriate safeguards.

**R210.4 If the insolvency practitioner determines that the identified threats to compliance with the fundamental principles are not at an acceptable level, the insolvency practitioner shall address the threats by eliminating them or reducing them to an acceptable level. The insolvency practitioner shall do so by:**

**a) eliminating the circumstances, including interests or relationships, that are creating the threats; or**

**b) applying safeguards, where available and capable of being applied, to reduce the threats to an acceptable level.**

**R210.5 An insolvency practitioner shall not accept an insolvency appointment where a threat to the fundamental principles has been identified unless the threat is eliminated or reduced to an acceptable level.**

210.5 A1 Factors that are relevant in evaluating the level of a threat include measures that prevent unauthorised disclosure of confidential information. These measures include:

a) The existence of separate practice areas for specialty functions within the firm, which might act as a barrier to the passing of confidential client information between practice areas.

b) Policies and procedures to limit access to client files.

c) Confidentiality agreements signed by personnel and partners of the firm.

d) Separation of confidential information physically and electronically.

e) Specific and dedicated training and communication.

210.5 A2 Examples of actions that might be safeguards include:

a) involving another insolvency practitioner, either from within or out with the firm as appropriate to the circumstances, to review the work done, perform or re-perform part of the work or otherwise advise as necessary. This could include another insolvency practitioner taking a joint appointment;

b) changing members of the insolvency team or the use of separate staff;

c) terminating the financial or business relationship that gives rise to the threat;

d) seeking directions from the court.

210.5 A3 It is important that, prior to the insolvency appointment, the insolvency practitioner considers disclosure, to the court or to the creditors on whose behalf the insolvency practitioner would be appointed to act, of the existence of any threat, together with the safeguards identified and applied, and that no objection is made to the insolvency practitioner being appointed.

210.5 A4 Where an insolvency practitioner is specifically precluded by this Code from accepting an insolvency appointment as an individual, a joint appointment is not an appropriate safeguard and would not make accepting the insolvency appointment appropriate.

210.5 A5 An insolvency practitioner will need to exercise professional judgement to determine the appropriate action when threats have been identified. In exercising their judgement, an insolvency practitioner is expected to take into account whether a reasonable and informed third

party, weighing all the specific facts and circumstances available to the insolvency practitioner at the time, would be likely to conclude that the threats would be eliminated or reduced to an acceptable level, such that compliance with the fundamental principles is not compromised.

**R210.6 An insolvency practitioner might encounter situations in which the threats cannot be eliminated and safeguards are not capable of being applied to reduce the threats to an acceptable level. Where this is the case, the insolvency practitioner shall not accept the insolvency appointment.**

**R210.7 Following the acceptance of an insolvency appointment, the insolvency practitioner shall keep under review any identified threats, and the insolvency practitioner shall be mindful that other threats to the fundamental principles could arise.**

210.7 A1 Remaining alert throughout the insolvency appointment will assist the insolvency practitioner in determining whether new information has emerged or changes in facts and circumstances have occurred that:

a) impact the level of a threat; or

b) affect the insolvency practitioner's conclusions about whether safeguards applied continue to be appropriate to address identified threats.

**Mergers**

210.8 A1 If firms merge, after the merger, they are to be treated as one firm for the purposes of assessing threats to the fundamental principles.

**R210.9 At the time of the merger, the insolvency practitioner shall review existing insolvency appointments and identify any threats to the fundamental principles.**

210.9 A1 Principals and employees of the merged firm will become subject to common ethical constraints in relation to accepting new insolvency appointments to clients of either of the former firms. However existing insolvency appointments which are rendered in apparent breach of the Code by the merger need not be judged to be so automatically, provided that a considered review of the situation by the firm discloses no obvious and immediate ethical conflict.

## 1.2 INSOLVENCY CODE OF ETHICS

**R210.10 Where an individual within the firm has, in any former capacity, undertaken work upon the affairs of an entity that is incompatible with an insolvency appointment of the new firm, the individual shall not work or be employed on that assignment.**

# 1.2 INSOLVENCY CODE OF ETHICS

## ACTING WITH SUFFICIENT EXPERTISE

### Introduction

300.1 Insolvency practitioners are required to comply with the fundamental principles and apply the conceptual framework to identify, evaluate and address threats.

300.2 The fundamental principle of professional competence and due care requires that an insolvency practitioner only accepts an insolvency appointment when the insolvency practitioner has or can acquire 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. Acquiring in this context includes obtaining the expertise from elsewhere by employing experts or additional resources. This section sets out specific requirements and application material relevant to applying the conceptual framework in such circumstances.

### Requirements and application material

#### General

**R300.3 An insolvency practitioner shall not intentionally mislead an employing organisation as to the level of expertise or experience possessed.**

300.3 A1 The principle of professional competence and due care requires that an insolvency practitioner only undertake significant tasks for which the insolvency practitioner has, or can obtain, sufficient training or experience.

300.3 A2 A self-interest threat to compliance with the principle of professional competence and due care might be created if an insolvency practitioner has:

a) insufficient time for performing or completing the relevant duties;

b) incomplete, restricted or otherwise inadequate information for performing the duties;

c) insufficient experience, training and/or education;

d) inadequate resources for the performance of the duties.

300.3 A3 Factors that are relevant in evaluating the level of such a threat include:

a) the extent to which the insolvency practitioner is working with others;

b) the relative seniority of the insolvency practitioner in the firm;

c) the level of supervision and review applied to the work.

300.3 A4 Factors to be considered in evaluating expertise include:

a) an appropriate knowledge and understanding of the entity, its owners, managers and those responsible for its governance and business activities;

b) 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) knowledge of relevant industries and subject matters;

d) possessing or obtaining experience of relevant regulatory and reporting requirements;

e) availability of sufficient staff with the necessary competencies;

f) access to 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.

300.3 A5 Maintaining and acquiring professional competence requires a continuing awareness and understanding of relevant technical and professional developments.

300.3 A6 Examples of actions that might be safeguards to address such threats include:

a) obtaining assistance or training from someone with the necessary expertise;

b) ensuring that there is adequate time available for performing the relevant duties.

## 1.2 INSOLVENCY CODE OF ETHICS

**R300.4 If a threat to compliance with the principle of professional competence and due care cannot be addressed, an insolvency practitioner shall determine whether to decline to perform the duties in question or accept or continue the insolvency appointment. If the insolvency practitioner determines that declining to accept the insolvency appointment is appropriate, the insolvency practitioner shall communicate the reasons.**

**R300.5 The insolvency practitioner shall keep under review the expertise required throughout the insolvency appointment .**

# CONFLICTS OF INTEREST AND PROFESSIONAL AND PERSONAL RELATIONSHIPS

## Introduction

310.1 Insolvency practitioners are required to comply with the fundamental principles and apply the conceptual framework to identify, evaluate and address threats.

310.2 A conflict of interest creates threats to compliance with the principle of objectivity and might create threats to compliance with the other fundamental principles.

310.3 Where a conflict of interest arises, the preservation of confidentiality will be of paramount importance.

310.4 This section sets out specific requirements and application material relevant to applying the conceptual framework to conflicts of interest.

## Requirements and Application Material

### General

**R311.1 An insolvency practitioner shall not allow a conflict of interest to compromise professional or business judgement.**

**R311.2 An insolvency practitioner might encounter circumstances where a threat to the principle of objectivity or other fundamental principles cannot be eliminated and safeguards cannot be applied to reduce the threat to an acceptable level. Where this is the case the insolvency practitioner shall not accept the insolvency appointment.**

311.2 A1 Examples of circumstances that might create a conflict of interest include where a significant relationship has existed with the entity or someone connected with the entity, or where an insolvency practitioner:

a) has to deal with conflicting or competing interests between entitles over whom they, or another insolvency practitioner in their firm, is appointed;

b) or another insolvency practitioner in their firm has previously acted as an insolvency office holder to a company with a common director, or

common directors. Where the insolvency practitioner has been appointed officeholder to a number of insolvent companies with the same director or directors, there will be an increased risk of a conflict of interest arising;

c) has, or others in their firm have, previously carried out one or more assignments for an entity and / or its wider group and they are appointed as an insolvency office holder to the entity or its connected entities;

d) has, or others in their firm have, previously carried out one or more assignments for an entity's charge holders or stakeholders and the insolvency practitioner is appointed as an insolvency office holder to the entity or its connected entities;

e) is appointed administrator by a floating charge holder, under a recent charge, and the assets are sold to a purchaser and the purchaser is connected to the floating charge holder;

f) is appointed to act as supervisor of a debtor's IVA or trustee in a debtor's bankruptcy or sequestration, and has, or another insolvency practitioner in the same firm, has been appointed as an insolvency officeholder to a company of which the debtor is a director, or was a director in the past three years;

g) is appointed to deal with an insolvent individual's affairs, and the insolvency practitioner, or another individual in their firm, was involved in bringing about the individual's insolvency. There could be an increased risk of a conflict of interest where the insolvency practitioner has a claim for outstanding costs;

311.2 A2 There will be an increased risk of a conflict arising where an insolvency practitioner or their firm has carried out a number of previous assignments for an entity, its group or its charge holders or stakeholders. There will also be an increased risk if the previous assignments took place over an extended period of time. The level of risk will also depend on the services that were provided and the nature of the work carried out.

311.2 A3 There will be an increased risk where an insolvency practitioner has, or others in their firm have, carried out one or more pre-appointment engagements for the entity, and the insolvency practitioner is appointed as

an insolvency officeholder, and they, or another insolvency practitioner in their firm is subsequently appointed officeholder in a further insolvency process.

311.2 A4 The fact that an insolvency practitioner, or their firm, might not have been formally engaged to carry out an assignment, or might not have been paid for their work, does not negate the possibility of a conflict of interest arising.

## Professional and personal relationships

### Introduction

312.1 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.

### Requirements and Application Material

**R312.2 The principle of objectivity might be threatened if any individual within the firm, the close or immediate family of an individual within the firm or the firm itself, has or has had a professional or personal relationship which relates to the insolvency appointment being considered.**

312.2 A1 Relationships could include (but are not restricted to) relationships with:

a) the entity;

b) senior management or any director or shadow director or former director or shadow director of the entity;

c) shareholders or Persons of Significant Control 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) potential purchasers;

i) creditors;

j) funders, including shareholders, private equity houses and debenture holders of the entity;

k) debtors of the entity;

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

m) others with commercial relationships with the firm or personal relationships with an individual within the firm.

312.2 A2 The examples above are not exhaustive, and the substance of any relationship should be considered.

**R312.3 An insolvency practitioner shall ensure that the firm has policies and procedures to identify relationships between individuals within the firm and third parties in a way that is proportionate and reasonable in relation to the insolvency appointment being considered.**

**R312.4 Before accepting an insolvency appointment, an insolvency practitioner shall take reasonable steps to identify circumstances (including any relationships) that might create a conflict of interest, and therefore a threat to compliance with one or more of the fundamental principles. Such steps shall include identifying:**

**a) the nature of the relevant interests and relationships between all stakeholders; and**

**b) the nature, extent and timing of any prior work for the entity or connected entities and its implication for all stakeholders.**

312.4 A1 An effective conflict identification process assists an insolvency practitioner when taking reasonable steps to identify interests and relationships that might create an actual or potential conflict of interest, both before determining whether to accept an insolvency appointment and throughout the appointment. Such a process includes considering matters identified by external parties, for example directors of insolvent entities or insolvent individuals. The earlier an actual or potential conflict of interest is identified, the greater the likelihood of the accountant being able to address threats created by the conflict of interest.

312.4 A2 An effective process to identify actual or potential conflicts of interest will take into account factors such as:

a) the nature of any previous work carried out for the entity or connected entities

b) the nature of the insolvency appointment

c) the size of the firm

d) the size and nature of the client base

e) the structure of the firm, for example, the number and geographic location of offices.

**R312.5 Where a professional or personal relationship of the type described in paragraph 312.2 A1 has been identified the insolvency practitioner shall evaluate the impact of the relationship in the context of the insolvency appointment being sought or considered.**

312.5 A1 Issues to consider in evaluating whether a relationship creates a threat to the fundamental principles include the following:

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

b) The impact of the work conducted by the firm 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 fees for the work or the costs incurred are or were significant to the insolvency practitioner, the insolvency practitioner's department or the firm itself.

d) Whether the fee received for the work or the cost of the work was substantial.

e) How recently any professional work was carried out. It is likely that greater threats will arise (or could be seen to arise) where work has been carried out within the previous three years. However, there might still be instances where, in respect of non-audit work, any threat is at an acceptable level. Conversely, there might be situations whereby the nature of the work carried out was such that a considerably longer period will need to have elapsed before any threat can be reduced to an acceptable level.

f) Whether the insolvency appointment being considered involves consideration of any work previously undertaken by the firm for that entity.

## 1.2 INSOLVENCY CODE OF ETHICS

g) 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.

h) 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).

i) The nature of any previous duties undertaken by an individual within the firm during any earlier relationship with the entity.

j) The extent of the insolvency team's familiarity with the individuals connected with the entity.

312.5 A2 When evaluating the nature of any previous work done, an insolvency practitioner is expected to take into account any work done, even if it was not subject to a formal engagement and / or did not generate a fee for the firm.

**R312.6 Having identified and evaluated a relationship that might create a threat to the fundamental principles, the insolvency practitioner shall consider their response including possible actions to reduce the threat to an acceptable level.**

312.6 A1 Examples of actions which might be safeguards to reduce the level of threat created by a professional or personal relationship to an acceptable level are considered in paragraph 210.5 A2. Examples of other safeguards include:

a) terminating (where possible) the financial or business relationship giving rise to the threat;

b) disclosure of the relationship and any financial benefit received by the firm (whether directly or indirectly) to the entity or to those on whose behalf the insolvency practitioner would be appointed to act.

312.6 A2 While an insolvency practitioner might not be able to withdraw from the team, the threat created by another individual's professional or personal relationship could be reduced to an acceptable level by that individual withdrawing from the insolvency team.

**R312.7 An insolvency practitioner could encounter situations in which no action can be taken 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 or a significant personal relationship. Where this is case the insolvency practitioner shall not accept the insolvency appointment.**

**R312.8 An insolvency practitioner shall always consider the perception of others when deciding whether to accept an insolvency appointment.**

312.8 A1 While an insolvency practitioner might regard a relationship as not being significant to the insolvency appointment, the perception of others could differ and this might in some circumstances be sufficient to make the relationship significant. In considering perception, this needs to be considered on the basis of a reasonable and informed third party, weighing up all the specific facts and circumstances available to the insolvency practitioner at that time.

**R312.9 The insolvency practitioner shall document:**

**a) the facts;**

**b) any communications with, and parties with whom the matters were discussed;**

**c) the courses of action considered, the judgements made and the decisions that were taken;**

**d) the safeguards applied to address the threats when applicable;**

**e) how the matter was addressed;**

**f) where relevant, why it was appropriate to accept or continue the insolvency appointment.**

**R312.10 The records an insolvency practitioner maintains, in relation to the steps that they took and the conclusions that they reached, shall be sufficient to enable a reasonable and informed third party to reach a view on the appropriateness of their actions.**

**Changes in Circumstances**

**R313.1 An insolvency practitioner shall remain alert to changes over time in the nature of services, interests and relationships that might create a conflict of interest while acting as an insolvency office holder.**

## 1.2 INSOLVENCY CODE OF ETHICS

313.1 A1 The nature of interests and relationships might change during the appointment. This is particularly true when an insolvency practitioner is appointed in a situation that might become adversarial, even though the stakeholders might not initially be involved in a dispute. It could also be the case where a debt is sold or transferred during the appointment, where an insolvency practitioner is appointed as a replacement officeholder, where a liquidator in a members' voluntary liquidation is converting the winding up to a creditors' voluntary liquidation or where a creditor goes into an insolvency process.

**Network firms**

**R314.1 If the firm is a member of a network, an insolvency practitioner shall consider conflicts of interest that the insolvency practitioner has reason to believe might exist or arise due to interests and relationships of a network firm.**

314.1 A1 Factors to consider when identifying interests and relationships involving a network firm include:

a) the nature of the professional services provided;

b) the clients served by the network;

c) the geographic locations of all relevant parties.

### Threats Created by Conflicts of Interest

315.1 In general, the more direct the connection between the professional service and the matter on which the parties' interests conflict, the more likely the level of the threat is not at an acceptable level.

315.2 Factors that are relevant in evaluating the level of a threat created by a conflict of interest include measures that prevent unauthorized disclosure of confidential information when dealing with insolvency appointments for two or more insolvent entities whose interests with respect to that matter are in conflict. These measures include:

a) the existence of separate practice areas for specialty functions within the firm, which might act as a barrier to the passing of confidential client information between practice areas;

b) policies and procedures to limit access to case files;

c) confidentiality agreements signed by personnel and partners of the firm;

d) separation of confidential information physically and electronically;

e) specific and dedicated training and communication.

315.3 Examples of actions that might be safeguards to address threats created by a conflict of interest include:

a) having separate engagement teams who are provided with clear policies and procedures on maintaining confidentiality;

b) having an appropriate reviewer, who is not involved in providing the service or otherwise affected by the conflict, review the work performed to assess whether the key judgements and conclusions are appropriate.

**R315.4 An insolvency practitioner shall exercise professional judgement to determine whether the nature and significance of a conflict of interest are such that specific disclosure and explicit consent is necessary when addressing the threat created by the conflict of interest.**

315.4 A1 Factors to consider when determining whether specific disclosure and explicit consent are necessary include:

a) the circumstances creating the conflict of interest;

b) the parties that might be affected;

c) the nature of the issues that might arise;

d) the potential for the particular matter to develop in an unexpected manner.

315.4 A2 Disclosure and consent might take different forms, for example:

a) disclosure to the court on making an application to court for an administration or any other order;

b) obtaining consent from a creditors' committee;

c) obtaining consent from a secured lender;

d) disclosure to creditors.

315.4 A3 It is generally expected that any disclosure will include the circumstances of the particular conflict and how any threats created were addressed.

315.4 A4 More information on accepting insolvency appointments is set out in insolvency appointments (see paragraph 210).

## Confidentiality

### General

**R316.1 An insolvency practitioner shall remain alert to the principle of confidentiality, including when making disclosures or sharing information within the firm or network and seeking guidance from third parties.**

316.1 A1 Paragraphs 104.1 to 104.4 set out requirements and application material relevant to situations that might create a threat to compliance with the principle of confidentiality.

## SPECIALIST ADVICE AND SERVICES

### Introduction

320.1 Insolvency practitioners are required to comply with the fundamental principles and apply the conceptual framework to identify, evaluate and address threats.

320.2 If an insolvency practitioner obtains specialist advice or services from others, this might create a self-interest threat to compliance with one or more of the fundamental principles. This section sets out specific application material relevant to applying the conceptual framework in such circumstances.

### Requirements and Application Material

**R320.3 When an insolvency practitioner intends to rely on the advice or work of another, from within the firm or by a third party, the insolvency practitioner shall evaluate whether such advice or work is warranted.**

**R320.4 Any advice or work contracted shall reflect best value and service for the work undertaken.**

320.4A Factors that are relevant in evaluating best value and service are:

a) the cost of the service;

b) the expertise and experience of the service provider;

c) that the provider holds appropriate regulatory authorisations;

d) the professional and ethical standards applicable to the service provider.

**R320.5 The insolvency practitioner shall review arrangements periodically to ensure that best value and service continue to be obtained in relation to each insolvency appointment.**

**R320.6 The insolvency practitioner shall document the reasons for choosing a particular service provider.**

320.6 A1 Threats to the fundamental principles (for example familiarity threats and self-interest threats) can arise if services are provided by a regular source within the firm or by a party with whom the insolvency practitioner, firm, or an individual within the firm, has a business or personal relationship.

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320.6 A2 Business or personal relationships might include the following:

a) an immediate family member e.g. spouse, parent, child, sibling etc;

b) a business partner;

c) any company or business in which there are common shareholdings with the firm, or which have the same beneficial owner(s); or one of the companies or business controls or owns the other.

320.6 A3 The examples above are not exhaustive, and the substance of the relationship between the insolvency practitioner, the firm or an individual within the firm and the provider of the service should be considered.

320.6 A4 When taking steps to assess the nature of any such relationship, the insolvency practitioner should have regard to conflicts of interest and professional and personal relationships.

320.6 A5 While the insolvency practitioner might regard a relationship as not being a cause for concern, the perception of others could differ. In considering perception, it is expected that the insolvency practitioner considers this on the basis of a reasonable and informed third party, weighing up all the specific facts and circumstances available to the insolvency practitioner at that time.

320.6 A6 Examples of actions that might be safeguards to address such threats include:

a) applying clear guidelines and policies within the firm on such relationships;

b) disclosure of the relevant relationships and the process undertaken to evaluate best value and service to the general body of creditors or the creditors' committee if one exists;

c) the benefit of negotiated commercial terms such as volume or settlement discounts being received in full by the insolvent estate.

320.6 A7 Where the insolvency practitioner does not control decisions about the choice of the provider of specialist advice or service, to be able to comply with the requirements in this part the insolvency practitioner will need to obtain sufficient information to establish the nature of the relationship with the provider. Reference should also be made to – The insolvency practitioner as an employee (see paragraph 380).

## AGENCIES AND REFERRALS

### Introduction

330.1 Insolvency practitioners are required to comply with the fundamental principles and apply the conceptual framework to identify, evaluate and address threats.

330.2 If an insolvency practitioner receives referred work, refers work to others, or establishes an agency arrangement, this might create a self-interest threat to compliance with one or more of the fundamental principles. A referral could be a formal request made in the course of a professional relationship, for advice on the selection of a potential professional adviser. A referral might also be an informal request, including where there is no existing relationship between the insolvency practitioner and the enquirer. This section sets out specific application material relevant to applying the conceptual framework in such circumstances.

330.3 Attention is also drawn to the legislative provisions regarding the use of personal data.

330.4 The requirements in respect of referral fees and commissions are detailed in Referral fees and commission (see paragraph 340).

### Requirements and Application Material

**R330.5 The insolvency practitioner shall consider the fitness for purpose of the third party to whom a referral is proposed or an agency arrangement is being considered, to address the needs of the recipient of the service.**

330.5 A1 Insolvency practitioners are expected to consider any factors they are aware of that would indicate the proposed third party is not fit for purpose in terms of the potential engagement. The insolvency practitioner needs to take into account what a reasonable person might expect an insolvency practitioner to know.

330.5 A2 Examples of actions that might be safeguards to address threats created by any referral and agency arrangements include:

a) applying clear guidelines and policies within the firm on referrals and agency arrangements;

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b) disclosure of the process undertaken to evaluate best value and service and any relevant relationships to the general body of creditors or the creditors' committee if one exists.

330.5 A3 In making that consideration of fitness for purpose, the insolvency practitioner is expected to take account of the professional or regulatory status of the third party.

**R330.6 Insolvency practitioners shall not, because of the self-interest threat, enter into any financial arrangements with another supplier either personally or through their firm which would prejudice the objectivity of themselves or their firm.**

**R330.7 Before accepting or continuing an agency with another supplier, insolvency practitioners shall satisfy themselves that their ability to discharge their professional obligations are not compromised.**

330.7 A1 When referring work or establishing an agency, insolvency practitioners have a responsibility to ascertain that a referral is conducted in accordance with this Code because insolvency practitioners cannot do, or be seen to do, through others what they cannot do themselves.

**R330.8 When insolvency practitioners or their firm are considering the establishment of an agency, the terms of the agency contract (actual or implied) shall not require exclusive referral regardless of suitability. This would make important safeguards inoperable.**

**R330.9 An insolvency practitioner shall not make a referral to a third party, even with a disclaimer, if they know of a better alternative.**

**R330.10 The insolvency practitioner shall document the reasons for establishing an agency with another supplier or recommending a particular provider.**

**R330.11 When permitting the introduction of services or products, an insolvency practitioner shall address the threats to compliance with the fundamental principles.**

330.11 A1 When permitting the introduction of services or products to those who are the subject of an insolvency appointment, factors that are relevant to such introductions include:

a) the level of knowledge and expertise of those who are subject to, or have a financial interest in, the insolvency appointment or prospective insolvency appointment;

b) the ability of those who are subject to, or have a financial interest in, the insolvency appointment or prospective insolvency appointment, to question the information provided by or with the consent of the insolvency practitioner;

c) information provided to those who are subject to, or have had financial interest in, the insolvency appointment or prospective insolvency appointment to enable an informed decision to be made;

d) whether consent has been obtained from the individual subject to the insolvency appointment, or prospective insolvency appointment, for their personal information to be shared with the provider of the service or product;

e) the cost of the service;

f) the financial impact on those who are subject to, or have a financial interest in, the insolvency appointment or prospective insolvency appointment;

g) the regulatory status of the provider of the service or product;

h) disclosing the nature of the referral or arrangement to those who are subject to, or have a financial interest in, the insolvency appointment or prospective insolvency appointment.

330.11 A2 Being transparent about any referral or agency arrangements and setting out in writing to the individuals concerned the nature of the arrangement might be an appropriate safeguard. (see paragraph 330.5 A2 above)

330.11 A3 When communicating information about any referral or agency arrangements the insolvency practitioner should provide the following information:

a) the advantages and disadvantages of the service or product being provided;

b) that similar services or products could be available from other providers at a different cost;

c) any direct or indirect benefit that the insolvency practitioner or the firm might receive if a service or product is taken up;

d) that seeking independent advice should be considered.

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**R330.12 If the insolvency practitioner or the firm has a relationship with the third party, for example a family connection or an automatic referral arrangement, there are clear self-interest or familiarity threats and the connection shall be disclosed. The disclosure shall include any potential benefit, whether direct or indirect, they, or others will receive.**

330.12 A1 In addition to disclosure required by R330.12, the insolvency practitioner should consider including the additional information listed in 330.11 A3.

330.12 A2 This is particularly important where an insolvency practitioner is considering recommending the products of another supplier with which there is an agency agreement or referral arrangement and the insolvency practitioner, firm, or an individual within the firm, has a business or personal relationship with the provider of the service.

330.12 A3 Business or personal relationships might include the following:

a) an immediate family member e.g. spouse, parent, child, sibling etc;

b) a business partner;

c) any company or business in which there are common shareholdings with the firm, or which have the same beneficial owner(s); or one of the companies or business controls or owns the other.

330.12 A4 The examples above are not exhaustive, and the substance of the relationship between the insolvency practitioner, the firm or an individual within the firm and the provider of the service should be considered.

330.12 A5 When taking steps to assess the nature of any such relationship, the insolvency practitioner should have regard to conflicts of interest and professional and personal relationships.

330.12 A6 While the insolvency practitioner might regard a relationship as not being a cause for concern, the perception of others could differ. It is necessary to consider perception on the basis of a reasonable and informed third party, weighing up all the specific facts and circumstances available to the insolvency practitioner at that time.

330.12 A7 The requirement to disclose includes situations where in substance there is a one-to-one relationship between the insolvency practitioner and the third party (for example, the insolvency practitioner is the only insolvency practitioner in the area and the third party is the only solicitor), as this implies automatic referral.

**R330.13 An insolvency practitioner shall not in any circumstances conduct their firm in such a manner as to give the impression that the insolvency practitioner is a principal rather than an agent.**

330.13 A1 This includes considering signs on premises, websites and any other outward signs or literature used.

330.13 A2 Where the insolvency practitioner does not control decisions about referrals and agencies within the firm, to comply with the requirements in this part the insolvency practitioner will need to obtain sufficient information about any arrangements.

Reference should also be made to – the insolvency practitioner as an employee (see paragraph 380).

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## REFERRAL FEES AND COMMISSIONS[1]

### Introduction

340.1 Insolvency practitioners are required to comply with the fundamental principles and apply the conceptual framework to identify, evaluate and address threats.

340.2 Paying or receiving referral fees and commissions might create a self-interest threat to compliance with one or more of the fundamental principles. This section sets out specific application material relevant to applying the conceptual framework in such circumstances.

### Requirements and Application Material

340.3 A self-interest threat to compliance with the principles of objectivity and professional competence and due care is created if an insolvency practitioner, the firm or an associate offers or pays a referral fee or commission.

**R340.4 An insolvency practitioner, the firm or an associate shall not make or offer to make any payment or commission for the introduction of an insolvency appointment.**

340.4 A1 Remuneration arising from an employer/employee relationship would not normally be included within the scope of payments referred to in R340.4 above.

340.4 A2 A self-interest threat to compliance with the principles of objectivity and professional competence and due care is created if an insolvency practitioner, the firm or an associate receives a referral fee or commission.

[1] As per Section 642 Companies Act 2014, referral fees and commission are strictly prohibited in the Republic of Ireland.

**R340.5 Where an engagement might lead to an insolvency appointment, insolvency practitioners shall not accept referral fees or commissions unless they take action to reduce the threats created by such fees or commissions to an acceptable level.[2]**

340.5 A1 Examples of actions that might be safeguards to address such threats include:

a) disclosure in advance of any arrangements to the appointing body, creditors or any other relevant stakeholders;

b) obtaining the views of the creditors committee.

**R340.6 If after the receipt of any such payments by the insolvency practitioner, the firm or an associate, the insolvency practitioner accepts an insolvency appointment, the amount and any source of any fee or commission received shall be disclosed to creditors.**

**R340.7 During an insolvency appointment, referral fees or commissions shall not be accepted by the insolvency practitioner, the firm or an associate unless they are paid into the insolvent estate. Any such payments shall be disclosed to creditors.**

**R340.8 Where the insolvency practitioner or firm obtains preferential contractual terms from suppliers of goods and services obtained for an insolvency appointment, for example volume or settlement discounts, the benefit shall be received in full by the insolvent estate.**

340.8 A1 The term 'associate' of an insolvency practitioner or the firm includes the following:

a) an immediate family member e.g. spouse, parent, child, sibling etc;

b) a business partner;

c) any company or business in which there are common shareholdings with the firm, or which have the same beneficial owner(s); or one of the companies or business controls or owns the other.

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[2] Insolvency Practitioners operating in the Republic of Ireland or operating in respect of an Irish Company should not accept referral fees or commission under any circumstances (see footnote 1 above).

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340.8 A2 The examples of associates are not exhaustive, and the substance of the association between the insolvency practitioner and/or the firm and the recipient or payor of any referral fee or commission should be considered.

340.8 A3 When taking steps to assess the nature of any such association, the insolvency practitioner is expected to have regard to the section on conflicts of interest (paragraphs 310.1 to 311.2 A4) of this Code – Conflicts of Interest and Professional and Personal Relationships.

340.8 A4 While the insolvency practitioner might regard an association as not being a cause for concern, the perception of others might differ. In considering perception, it is expected that it be considered on the basis of a reasonable and informed third party, weighing up all the specific facts and circumstances available to the insolvency practitioner at that time.

340.8 A5 When referring work, insolvency practitioners have a responsibility to ascertain that a referral is conducted in accordance with this Code because insolvency practitioners cannot do, or be seen to do, through others what they cannot do themselves.

340.8 A6 Where the insolvency practitioner does not control decisions about referral and commission arrangements, to comply with the requirements in this section the insolvency practitioner will need to obtain sufficient information to establish the nature and purpose of any payments made or received. Reference should also be made to– the Insolvency Practitioner as an Employee (see paragraph 380).

## INDUCEMENTS, INCLUDING GIFTS AND HOSPITALITY

### Introduction

350.1 Insolvency practitioners are required to comply with the fundamental principles and apply the conceptual framework to identify, evaluate and address threats.

350.2 In relation to an insolvency appointment, offering or accepting inducements might create a self-interest, familiarity or intimidation threat to compliance with the fundamental principles, particularly the principles of integrity, objectivity and professional behaviour.

350.3 This section sets out requirements and application material relevant to applying the conceptual framework in relation to the offering and accepting of inducements when performing services that do not constitute non-compliance with laws and regulations. This section also requires an insolvency practitioner to comply with relevant laws and regulations when offering or accepting inducements.

### Requirements and Application Material

#### General

350.4 A1 An inducement is an object, situation, or action that is used as a means to influence another individual's behaviour, but not necessarily with the intent to improperly influence that individual's behaviour. Inducements can range from minor acts of hospitality, to acts that result in non-compliance with laws and regulations. An inducement can take many different forms, for example:

a) gifts;

b) hospitality;

c) entertainment;

d) political or charitable donations;

e) appeals to friendship and loyalty;

f) employment or other commercial opportunities;

g) preferential treatment, rights or privileges.

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350.4 A2 An inducement might be offered to the firm, an individual within the firm or a close or immediate family member, as well as to the insolvency practitioner personally. Inducements offered to others will still give rise to threats to compliance with the fundamental principles.

**Inducements Prohibited by Laws and Regulations**

**R350.5 In many jurisdictions, there are laws and regulations, such as those related to bribery and corruption, that prohibit the offering or accepting of inducements in certain circumstances. The insolvency practitioner shall obtain an understanding of relevant laws and regulations and comply with them when the insolvency practitioner encounters such circumstances.**

**Inducements Not Prohibited by Laws and Regulations**

350.5 A1 The offering or accepting of inducements that is not prohibited by laws and regulations might still create threats to compliance with the fundamental principles.

**Inducements with Intent to Improperly Influence Behaviour**

**R350.6 An insolvency practitioner shall not offer, or encourage others to offer, any inducement that is made, or which the insolvency practitioner considers a reasonable and informed third party would be likely to conclude is made, with the intent to improperly influence the behaviour of the recipient or of another.**

**R350.7 An insolvency practitioner shall not accept, or encourage others to accept, any inducement that the insolvency practitioner concludes is made, or considers a reasonable and informed third party would be likely to conclude is made, with the intent to improperly influence the behaviour of the recipient or of another.**

350.7 A1 An inducement is considered as improperly influencing an individual's behaviour if it causes the individual to act in an unethical manner. Such improper influence can be directed either towards the recipient or towards another individual entity that has some relationship with the recipient. The fundamental principles are an appropriate frame of reference for an insolvency practitioner in considering what constitutes unethical behaviour on the part of the insolvency practitioner and, if necessary by analogy, others.

350.7 A2 A breach of the fundamental principle of integrity arises when an insolvency practitioner offers or accepts, or encourages others to offer or accept, an inducement where the intent is to improperly influence the behaviour of the recipient or of another individual.

350.7 A3 The determination of whether there is actual or perceived intent to improperly influence behaviour requires the exercise of professional judgement. Relevant factors to consider might include:

a) the nature, frequency, value and cumulative effect of the inducement;

b) timing of when the inducement is offered relative to any action or decision that it might influence;

c) whether the inducement is a customary or cultural practice in the circumstances, for example, offering a gift on the occasion of a religious holiday or wedding;

d) whether the inducement is ancillary to the insolvency appointment, for example, offering or accepting lunch in connection with a business meeting;

e) whether the offer of the inducement is limited to an individual recipient or available to a broader group. The broader group might be internal or external to the firm, such as other suppliers to the provider of the inducement;

f) the roles and positions of the individuals offering or being offered the inducement;

g) whether the insolvency practitioner knows, or has reason to believe, that accepting the inducement would breach the policies and procedures of the recipient;

h) the degree of transparency with which the inducement is offered;

i) whether the inducement was required or requested by the recipient;

j) the known previous behaviour or reputation of the offeror.

**Consideration of Further Actions**

350.8 A1 If the insolvency practitioner becomes aware of an inducement offered with actual or perceived intent to improperly influence behaviour, threats to compliance with the fundamental principles might still be created even if the requirements in the paragraphs R350.6 and R350.7 are met.

350.8 A2 Examples of actions that might be safeguards to address such threats include:

a) informing senior management of the firm or those charged with governance of the offeror regarding the offer;

b) amending or terminating the business relationship with the offeror.

**Inducements with No Intent to Improperly Influence Behaviour**

350.9 A1 The requirements and application material set out in the conceptual framework apply when an insolvency practitioner has concluded there is no actual or perceived intent to improperly influence the behaviour of the recipient or of another.

350.9 A2 If such an inducement is trivial and inconsequential, any threats created will be at an acceptable level.

350.9 A3 Examples of circumstances where offering or accepting such an inducement might create threats even if the insolvency practitioner has concluded there is no actual or perceived intent to improperly influence behaviour include:

a) Self-interest threats:

— An insolvency practitioner is offered hospitality from the prospective purchaser of an insolvent business.

b) Familiarity threats:

— An insolvency practitioner regularly takes someone to an event.

c) Intimidation threats:

— An insolvency practitioner accepts hospitality, the nature of which could be perceived to be inappropriate were it to be publicly disclosed.

Examples of circumstances where offering or accepting such an inducement might create threats even if the insolvency practitioner has concluded there is no actual or perceived intent to improperly influence behaviour include:

350.9 A4 Relevant factors in evaluating the level of such threats created by offering or accepting such an inducement include the same factors set out in paragraph 350.7 A3 for determining intent.

350.9 A5 Examples of actions that might eliminate threats created by offering or accepting such an inducement include:

a) Declining or not offering the inducement;

b) Transferring responsibility for the provision of professional services to another individual who the insolvency practitioner has no reason to believe would be, or would be perceived to be, improperly influenced when providing the services.

350.9 A6 Examples of actions that might be safeguards to address such threats created by offering or accepting such an inducement include:

a) Being transparent with senior management of the firm about offering or accepting an inducement.

b) Registering the inducement in a log monitored by senior management of the firm or another individual responsible for the firm's ethics compliance or maintained by the recipient.

c) Having an appropriate reviewer, who is not otherwise involved in the insolvency appointment, review any work performed or decisions made by the insolvency practitioner with respect to the provider of the inducement to the insolvency practitioner.

d) Reimbursing the cost of the inducement, such as hospitality, received.

e) As soon as possible, returning the inducement, such as a gift, after it was initially accepted.

**R350.10 If an insolvency practitioner encounters a situation in which no or no reasonable action can be taken to reduce a threat arising from offers of gifts or hospitality to an acceptable level the insolvency practitioner shall conclude that it is not appropriate to accept the offer.**

**R350.11 An insolvency practitioner shall not offer or provide gifts or hospitality where this would give rise to an unacceptable threat to compliance with the fundamental principles.**

**Immediate or Close Family Members**

**R350.12 An insolvency practitioner shall remain alert to potential threats to the insolvency practitioner's compliance with the fundamental principles created by the offering of an inducement by or to an immediate or close family member of the insolvency practitioner.**

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**R350.13 Where the insolvency practitioner becomes aware of an inducement being offered to or made by an immediate or close family member and concludes there is intent to improperly influence behaviour, or considers a reasonable and informed third party would be likely to conclude such intent exists, the insolvency practitioner shall advise the immediate or close family member not to offer or accept the inducement.**

350.13 A1 The factors set out in paragraph 350.7 A3 are relevant in determining whether there is actual or perceived intent to improperly influence behaviour. Another factor that is relevant is the nature or closeness of the relationship, between:

a) the insolvency practitioner and the immediate or close family member;

b) the immediate or close family member and the other party; and

c) the insolvency practitioner and the other party.

For example, the offer of employment, outside of the normal recruitment process, to the spouse of the insolvency practitioner by a creditor in an insolvency might indicate such intent.

350.13 A2 The application material in paragraph 350.8 A2 is also relevant in addressing threats that might be created when there is actual or perceived intent to improperly influence behaviour even if the immediate or close family member has followed the advice given pursuant to paragraph R350.13.

**Application of the Conceptual Framework**

350.14 A1 Where the insolvency practitioner becomes aware of an inducement offered in the circumstances addressed in paragraph R350.12, threats to compliance with the fundamental principles might be created where:

a) the immediate or close family member offers or accepts the inducement contrary to the advice of the insolvency practitioner pursuant to paragraph R350.13; or

b) the insolvency practitioner does not have reason to believe an actual or perceived intent to improperly influence behaviour exists.

350.14 A2 The application material in paragraphs 350.9 A1 to 350.9 A6 is relevant for the purposes of identifying, evaluating and addressing such threats. Factors that are relevant in evaluating the level of threats in these circumstances also include the nature or closeness of the relationships set out in paragraph 350.13 A1.

**Financial incentives for team members**

350.15 A1 An insolvency practitioner or members of the insolvency team might be offered an inducement by their employer to achieve certain targets relating to insolvency appointments. Such arrangements might create threats to compliance with the fundamental principles.

350.15 A2 Examples of circumstances that might create a self-interest threat include situations in which the insolvency practitioner or members of the insolvency team:

a) holds a direct or indirect financial interest in the employing organisation and the value of that financial interest might be directly affected by decisions made by the insolvency practitioner;

b) is eligible for a profit-related bonus and the value of that bonus might be directly affected by decisions made by the insolvency practitioner;

c) participates in arrangements which provide incentives to achieve targets.

# 1.2 INSOLVENCY CODE OF ETHICS

## ADVERTISING, MARKETING AND OTHER PROMOTIONAL ACTIVITIES

### Introduction

360.1 Insolvency practitioners are required to comply with the fundamental principles and apply the conceptual framework to identify, evaluate and address threats.

360.2 When an insolvency practitioner seeks an insolvency appointment or work that might lead to an insolvency appointment through advertising or other forms of marketing or promotional activity, there might be threats to compliance with the fundamental principles, including integrity and professional behaviour.

360.3 This section sets out requirements and application material relevant to applying the conceptual framework in relation to advertising and marketing for insolvency appointments and includes the content of the websites and other promotional activities.

360.4 Reference should also be made to Specialist Advice and Services (320) and Referral Fees and Commissions (340).

### Requirements and Application Material

**R360.5 When undertaking marketing or promotional activities, an insolvency practitioner shall not bring the profession into disrepute. An insolvency practitioner shall be honest and truthful and shall not make:**

**a) exaggerated claims for the services offered by, or the qualifications or experience of, the insolvency practitioner; or**

**b) disparaging references or unsubstantiated comparisons to the work of others.**

**R360.6 When considering whether to accept an insolvency appointment an insolvency practitioner shall be satisfied that any advertising, marketing or other form of promotional activity pursuant to which the insolvency appointment might have been obtained:**

**a) has been fair and not misleading;**

**b) has avoided unsubstantiated or disparaging statements;**

**c) has complied with relevant codes of practice and guidance in relation to advertising;**

**d) has been clearly distinguishable as advertising or marketing material, and has been legal, decent, honest and truthful.**

360.6 A1 If reference is made in advertisements or other forms of marketing to fees or to the cost of the services to be provided, the insolvency practitioner needs to be satisfied that the basis of calculation and the range of services that the reference is intended to cover has been provided. The insolvency practitioner needs to take care to ensure that such references are clear as to the precise range of services and the time commitment that the reference is intended to cover.

360.6 A2 If an insolvency practitioner is in doubt about whether a form of advertising or marketing is appropriate, the insolvency practitioner is encouraged to consult with their authorising body.

**R 360.7 Where an insolvency practitioner or the firm obtains work via a third party or a third party conducts marketing activities on behalf of the insolvency practitioner or the firm, the insolvency practitioner shall be responsible for ensuring that the third party follows the application material above.**

360.7 A1 When obtaining work via a third party or using a third party to conduct marketing activities insolvency practitioners have a responsibility to ascertain that a referral manner is in accordance with this Code because insolvency practitioners cannot do, or be seen to do, through others what they cannot do themselves.

**R360.8 Insolvency Practitioners shall never promote or seek to promote their services, or the services of other insolvency practitioners, in such a way, or to such an extent, as to amount to harassment.**

# 1.2 INSOLVENCY CODE OF ETHICS

## DEALING WITH THE ASSETS OF AN ENTITY

### Introduction

370.1 Insolvency practitioners are required to comply with the fundamental principles and apply the conceptual framework to identify, evaluate and address threats.

370.2 When an insolvency practitioner realises assets, this might create threats to compliance with one or more of the fundamental principles. This section sets out specific application material relevant to applying the conceptual framework in such circumstances.

### Requirements and Application Material

**R370.3 Except in circumstances which clearly do not impair the insolvency practitioner's objectivity, insolvency practitioners appointed to any insolvency appointment in relation to an entity, shall not themselves acquire, directly or indirectly, any of the assets of an entity, nor knowingly permit any individual within the firm, or any close or immediate family member of an individual within the firm, directly or indirectly, to do so.**

370.3 A1 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 could also be seen as a threat to objectivity by creditors or others not involved in the prior agreement.

370.3 A2 Examples of actions that might be safeguards to address threats to objectivity include:

a) obtaining an independent valuation of the assets or business being sold;

b) considering other potential purchasers.

370.3 A3 It is important for an insolvency practitioner to take care to ensure (where to do so does not conflict with any legal or professional obligation) that their decision-making processes are transparent, understandable and readily identifiable to all third parties who could be affected by a sale or proposed sale.

## THE INSOLVENCY PRACTITIONER AS AN EMPLOYEE

### Introduction

380.1 All insolvency practitioners are required to comply with the fundamental principles and apply the conceptual framework to identify, evaluate and address threats.

380.2 Where an insolvency practitioner is an employee of a firm, the insolvency practitioner might face particular threats to compliance with the fundamental principles. This section sets out specific application material relevant to applying the conceptual framework in such circumstances. It does not describe all of the facts and circumstances, including professional activities, interests and relationships, that could be encountered by an insolvency practitioner who is an employee, which create or might create threats to compliance with the fundamental principles. Therefore, the conceptual framework requires insolvency practitioners who are employees to be alert for such facts and circumstances.

380.3 On occasion, where the insolvency practitioner is an employee or is considering accepting an offer of employment, the insolvency practitioner might be unable to address the threats to compliance with the fundamental principles. In those circumstances the insolvency practitioner will need to consider whether they can accept the offer of employment or resign from their current employment.

### Requirements and Application Material

380.4 An insolvency practitioner might be an employee, contractor, partner, or director within the firm. The legal form of the relationship of the insolvency practitioner with their employer has no bearing on the ethical responsibilities placed on the insolvency practitioner.

**R380.5 An insolvency practitioner who is an employee shall comply with the fundamental principles.**

380.5 A1 The insolvency practitioner who is an employee might have a reduced ability to control or influence matters within the firm which might affect the actions available as safeguards to address threats to compliance with the fundamental principles.

## 1.2 INSOLVENCY CODE OF ETHICS

380.5 A2 The following are examples of facts and circumstances that might create threats for an insolvency practitioner as an employee:

a) being eligible for a bonus related to achieving targets or profits;

b) having inadequate resources for the performance of an insolvency appointment;

c) a lack of control over processes and internal governance;

d) being threatened with dismissal or demotion over a disagreement about an insolvency appointment;

e) an individual attempting to influence the decision-making process of the insolvency practitioner.

**R380.6 An insolvency practitioner shall consider whether there are appropriate safeguards available to ensure compliance with the fundamental principles before accepting an offer of employment.**

380.6 A1 Examples of actions that might be safeguards to address such threats prior to accepting an offer of employment include:

a) Appropriate provisions within any contract of employment or separate legal agreement with the employer acknowledging that the insolvency practitioner has a duty to comply with the Code of Ethics of their authorising body and that the insolvency practitioner will be able to take all necessary steps they deem necessary to comply with the fundamental principles;

b) Ensuring that policies and procedures are in place within the firm to prohibit individuals who are not members of the insolvency team from inappropriately influencing the conduct of an insolvency appointment;

c) Ensuring that the firm has published policies and procedures to encourage and empower individuals within the firm to communicate to senior levels within the firm any issue relating to compliance with the fundamental principles that concern them;

d) Obtaining sufficient information to obtain an understanding of the structure and ownership of the firm.

380.6 A2 If no actions are available to address these threats, it is expected that the insolvency practitioner consider whether it is appropriate to accept the offer of employment.

380.6 A3 The existence of certain conditions, policies and procedures established by the profession, legislation, regulation, the firm, or the employing organisation that can enhance the insolvency practitioner acting ethically might also help identify threats to compliance with the fundamental principles. In this context such factors could include:

a) Policies and procedures within the firm to prohibit individuals who are not members of the insolvency team from inappropriately influencing the conduct of an insolvency appointment.

b) Published policies and procedures to encourage and empower individuals within the firm to communicate to senior levels within the firm any issue relating to compliance with the fundamental principles that concern them.

380.6 A4 Examples of actions that might be safeguards to address threats at a particular time include:

a) reporting concerns to senior management within the firm;

b) seeking legal advice or advice from their authorising body;

c) reporting the concerns to their authorising body or the Complaints Gateway.

380.6 A5 The more senior the position of the insolvency practitioner, the greater will be the ability and opportunity to access information, and to influence policies, decisions made and actions taken by others involved with the firm. To the extent that they are able to do so, taking into account their position and seniority in the organisation, insolvency practitioners are expected to encourage and promote an ethics-based culture in the organisation. Examples of actions that might be taken include the introduction, implementation and oversight of:

a) ethics education and training programs;

b) ethics and whistle-blowing policies;

c) policies and procedures designed to prevent non-compliance with laws and regulations.

**R380.7 Where threats to compliance with the fundamental principles cannot be eliminated or reduced to an acceptable level then the insolvency practitioner shall not accept the insolvency appointment or refuse to remain associated with the matter creating the conflict.**

## 1.2 INSOLVENCY CODE OF ETHICS

380.7 A1 In some circumstances this could mean taking steps to resign from the employment.

380.7 A2 Reference should also be made to Obtaining Specialist Advice and Services and Referral Fees and Commissions.

## RESPONDING TO NON-COMPLIANCE WITH LAWS AND REGULATIONS

### Introduction

390.1 All insolvency practitioners are required to comply with the fundamental principles and apply the conceptual framework set to identify, evaluate and address threats.

390.2 A self-interest or intimidation threat to compliance with the principles of integrity and professional behaviour is created when an insolvency practitioner becomes aware of non-compliance or suspected non-compliance with laws and regulations.

390.3 An insolvency practitioner might encounter or be made aware of non-compliance or suspected non-compliance in the course of carrying out professional activities. This section guides the insolvency practitioner in assessing the implications of the matter and the possible courses of action when responding to non-compliance or suspected non-compliance with:

a) laws and regulations generally recognised to have a direct effect on the conduct of an appointment;

b) other laws and regulations that do not have a direct effect on the conduct of an appointment, but compliance with which might be fundamental to the outcome of an appointment;

c) other laws and regulations that do not have a direct effect on the conduct of an appointment, but compliance with which might be fundamental to the operating aspects of the employing organisation's business, to its ability to continue its business, or to avoid material penalties.

### Objectives of the insolvency practitioner in relation to non-compliance with laws and regulations

390.4 A distinguishing mark of the insolvency profession is its acceptance of the responsibility to act in the public interest. When responding to non-compliance or suspected non-compliance, the objectives of the insolvency practitioner are:

a) to comply with the principles of integrity and professional behaviour;

b) by alerting management or, where appropriate, those charged with governance of the entity, to seek to:

i. enable them to rectify, remediate or mitigate the consequences of the identified or suspected non-compliance; or

ii. deter the commission of the non-compliance where it has not yet occurred; and

c) by alerting management or, where appropriate, those charged with governance of the employing organisation, to seek to:

i. enable them to rectify, remediate or mitigate the consequences of the identified or suspected non-compliance; or

ii. deter the non-compliance where it has not yet occurred; and

d) to take such further action as appropriate in the public interest.

### Requirements and Application Material

#### General

390.5 A1 Non-compliance with laws and regulations ("non-compliance") comprises acts of omission or commission, intentional or unintentional, which are contrary to the prevailing laws or regulations committed by the following parties:

a) an entity over which the insolvency practitioner has been appointed;

b) those charged with governance of an entity;

c) management of an entity;

d) other individuals working for or under the direction of an entity;

e) the insolvency practitioner's employing organisation;

f) those charged with governance of the employing organisation;

g) management of the employing organisation;

h) other individuals working for or under the direction of the employing organisation.

390.5 A2 Examples of laws and regulations which this section addresses include those that deal with:

a) insolvency processes and procedures;

b) fraud, corruption and bribery;

c) money laundering, terrorist financing and proceeds of crime;

d) securities markets and trading;

e) banking and other financial products and services;

f) data protection;

g) tax and pension liabilities and payments;

h) environmental protection;

i) public health and safety.

390.5 A3 Non-compliance might result in fines, litigation or other consequences for the entity or employing organisation, potentially materially affecting its financial statements. Importantly, such non-compliance might have wider public interest implications in terms of potentially substantial harm to creditors, employees, investors or the general public. For the purposes of this section, an act that causes substantial harm is one that results in serious adverse consequences to any of these parties in financial or non-financial terms. Examples include breaches of environmental laws and regulations endangering the health or safety of employees or the public and perpetration of fraud against appointment estates resulting in significant financial loss to creditors.

**R390.6 In some jurisdictions, there are legal or regulatory provisions governing how insolvency practitioners should address non-compliance or suspected non-compliance. These legal or regulatory provisions might differ from or go beyond the provisions in this section, for example, anti-money laundering legislation. When encountering such non-compliance or suspected non-compliance, the insolvency practitioner shall obtain an understanding of those legal or regulatory provisions and comply with them, including:**

**a) any requirement to report the matter to an appropriate authority; and**

**b) any prohibition on alerting the relevant party.**

390.6 A1 A prohibition on alerting the relevant party might arise, for example, pursuant to anti-money laundering legislation.

390.6 A2 An insolvency practitioner who encounters or is made aware of matters that are clearly inconsequential is not required to comply with this section unless other laws or regulations require it. For example, an insolvency practitioner in the UK needs to comply with Anti-Money Laundering legislation which contains no de minimis threshold for reporting. Whether a matter is clearly inconsequential is to be judged with respect to its nature and its impact, financial or otherwise, on the entity or employing organisation, its stakeholders and the general public.

390.6 A3 This section does not address:

a) Personal misconduct unrelated to the business activities of the entity or employing organisation; and

b) Unless required by other laws or regulations, non-compliance by parties other than those specified in paragraph 390.5 A1. This includes, for example, circumstances where an insolvency practitioner has been engaged by a client to perform a due diligence assignment on a third party entity and the identified or suspected non-compliance has been committed by that creditor.

The insolvency practitioner might nevertheless find the guidance in this section helpful in considering how to respond in these situations.

**Responsibilities of Management and Those Charged with Governance**

390.7 A1 Management of an entity or employing organisation, with the oversight of those charged with governance, is responsible for ensuring that the entity's business activities are conducted in accordance with laws and regulations. Management and those charged with governance are also responsible for identifying and addressing any non-compliance by:

a) the entity or employing organisation;

b) an individual charged with governance of the entity or employing organisation;

c) a member of management; or

d) other individuals working for or under the direction of the entity or the employing organisation.

**Responsibilities of all insolvency practitioners**

**R390.8 If protocols and procedures exist within the insolvency practitioner's employing organisation to address non-compliance or suspected non-compliance, the insolvency practitioner shall consider them in determining how to respond to such non-compliance.**

390.8 A1 Many employing organisations have established protocols and procedures regarding how to raise non-compliance or suspected non-compliance internally. These protocols and procedures include, for example, an ethics policy or internal whistle-blowing mechanism. Such protocols and procedures might allow matters to be reported anonymously through designated channels.

**R390.9 Where an insolvency practitioner becomes aware of a matter to which this section applies, the steps that the insolvency practitioner takes to comply with this section shall be taken on a timely basis. In taking timely steps, the insolvency practitioner shall have regard to the nature of the matter and the potential harm to the interests of the entity, creditors, employees, investors, or the general public.**

390.9 A1 Insolvency practitioners are reminded especially of the guidance in paragraph R390.6 above in relation to over-riding laws and regulations.

**Obtaining an Understanding of the Matter and Addressing It with Management and Those Charged with Governance**

**R390.10 If an insolvency practitioner becomes aware of information concerning non-compliance or suspected non-compliance, the insolvency practitioner shall seek to obtain an understanding of the matter. This understanding shall include the nature of the non-compliance or suspected non-compliance and the circumstances in which it has occurred or might be about to occur.**

390.10 A1 The insolvency practitioner is expected to apply knowledge and expertise, and exercise professional judgement. However, the insolvency practitioner is not expected to have a level of understanding of laws and regulations beyond that which is required for the appointment. Whether an act constitutes actual non-compliance is ultimately a matter to be determined by a court or other appropriate adjudicative body.

## 1.2 INSOLVENCY CODE OF ETHICS

390.10 A2 Depending on the nature and significance of the matter, the insolvency practitioner might consult on a confidential basis with others within the firm, a network firm or a professional body, or with legal counsel.

390.10 A3 The insolvency practitioner is reminded especially of the guidance in paragraph R390.6 above in relation to over-riding laws and regulations.

**R390.11 If the insolvency practitioner identifies or suspects that non-compliance has occurred or might occur, the insolvency practitioner shall discuss the matter with the appropriate level of management. If the insolvency practitioner has access to those charged with governance, the insolvency practitioner shall also discuss the matter with them where appropriate.**

390.11 A1 The purpose of the discussion is to clarify the insolvency practitioner's understanding of the facts and circumstances relevant to the matter and its potential consequences. The discussion also might prompt management or those charged with governance to investigate the matter.

390.11 A2 The appropriate level of management with whom to discuss the matter is a question of professional judgement. Relevant factors to consider include:

a) the nature and circumstances of the matter;

b) the individuals actually or potentially involved;

c) the likelihood of collusion;

d) the potential consequences of the matter;

e) whether that level of management is able to investigate the matter and take appropriate action.

**Communicating the Matter to the Entity's External Auditor**

**R390.12 If the insolvency practitioner is liquidator in a members voluntary liquidation for:**

**a) an audit client of the firm or a network firm; or**

**b) a component of an audit client of the firm or a network firm,**

**the insolvency practitioner shall consider whether to communicate the non-compliance or suspected non-compliance within the firm or to the network firm, as appropriate. Where the communication is made, it shall be made in accordance with the firm's or network's protocols or procedures. In the absence of such protocols and procedures, it shall be made directly to the audit engagement partner.**

**R390.13 If the insolvency practitioner is supervisor of a Company Voluntary Arrangement the insolvency practitioner shall consider whether to communicate the non-compliance or suspected non-compliance to the firm that is the client's external auditor, if any.**

**Relevant Factors to Consider**

390.13 A1 Factors relevant to considering the communication in accordance with paragraphs R390.12 and R390.13 include:

a) whether doing so would be contrary to law or regulation;

b) whether there are restrictions about disclosure imposed by a regulatory agency or prosecutor in an ongoing investigation into the non-compliance or suspected non-compliance;

c) whether management or those charged with governance have already informed the entity's external auditor about the matter;

d) the likely materiality of the matter to the audit of the client's financial statements or, where the matter relates to a component of a group, its likely materiality to the audit of the group financial statements.

**Purpose of Communication**

390.13 A2 In the circumstances addressed in paragraphs R390.12 to R390.13, the purpose of the communication is to enable the audit engagement partner to be informed about the non-compliance or suspected non-compliance and to determine whether and, if so, how to address it in accordance with the provisions of this section.

**Considering Whether Further Action Is Needed**

**R390.14 The insolvency practitioner shall also consider whether further action is needed in the public interest.**

## 1.2 INSOLVENCY CODE OF ETHICS

390.14 A1 Whether further action is needed, and the nature and extent of it, will depend on factors such as:

a) the legal and regulatory framework;

b) the appropriateness and timeliness of the response of management and, where applicable, those charged with governance;

c) the urgency of the situation;

d) the involvement of management or those charged with governance in the matter;

e) the likelihood of substantial harm to the interests of the client, investors, creditors, employees or the general public.

390.14 A2 Further action by the insolvency practitioner might include:

a) disclosing the matter to an appropriate authority even when there is no legal or regulatory requirement to do so;

b) resigning from the appointment where permitted by law or regulation.

390.14 A3 In considering whether to disclose to an appropriate authority, relevant factors to take into account include:

a) whether doing so would be contrary to law or regulation;

b) whether there are restrictions about disclosure imposed by a regulatory agency or prosecutor in an ongoing investigation into the non-compliance or suspected non-compliance.

**R390.15 If the insolvency practitioner determines that disclosure of the non-compliance or suspected non-compliance to an appropriate authority is an appropriate course of action in the circumstances, that disclosure is permitted pursuant to paragraph R104.3(d) of the Code. When making such disclosure, the insolvency practitioner shall act in good faith and exercise caution when making statements and assertions. The insolvency practitioner shall also consider whether it is appropriate to inform the entity of the insolvency practitioner's intentions before disclosing the matter.**

**Imminent Breach**

**R390.16 In exceptional circumstances, the insolvency practitioner might become aware of actual or intended conduct that the insolvency practitioner has reason to believe would constitute an imminent breach**

**of a law or regulation that would cause substantial harm to investors, creditors, employees or the general public. Having first considered whether it would be appropriate to discuss the matter with management or those charged with governance of the entity, the insolvency practitioner shall exercise professional judgement and determine whether to disclose the matter immediately to an appropriate authority in order to prevent or mitigate the consequences of such imminent breach of law or regulation. If disclosure is made, that disclosure is permitted pursuant to paragraph R104.3(d) of the Code.**

**Seeking Advice**

390.16 A1 The insolvency practitioner might consider:

a) consulting internally;

b) obtaining legal advice to understand the professional or legal implications of taking any particular course of action;

c) consulting on a confidential basis with a regulatory body or their authorising body.

**Documentation**

390.16 A2 In relation to non-compliance or suspected non-compliance that falls within the scope of this section, the insolvency practitioner is encouraged to document:

a) the matter;

b) the results of discussion with management and, where applicable, those charged with governance and other parties;

c) how management and, where applicable, those charged with governance have responded to the matter;

d) the courses of action the insolvency practitioner considered, the judgements made and the decisions that were taken;

e) how the insolvency practitioner is satisfied that the insolvency practitioner has fulfilled the responsibility set out in paragraph R390.14.

390.16 A3 The insolvency practitioner is encouraged to consider whether there is a need for any such documentation to be filed separately.

## 1.2 INSOLVENCY CODE OF ETHICS

**Responsibilities of members of the insolvency team**

**R390.17 If, in the course of carrying out professional activities, a member of the insolvency team becomes aware of information concerning non-compliance or suspected non-compliance, the team member shall seek to obtain an understanding of the matter. This understanding shall include the nature of the non-compliance or suspected non-compliance and the circumstances in which it has occurred or might occur.**

390.17 A1 The team member is expected to apply knowledge and expertise, and exercise professional judgement. However, the team member is not expected to have a level of understanding of laws and regulations greater than that which is required for the team member's role within the employing organisation. Whether an act constitutes non-compliance is ultimately a matter to be determined by a court or other appropriate adjudicative body.

390.17 A2 Depending on the nature and significance of the matter, the team member might consult on a confidential basis with others within the employing organisation or an authorising body, or with legal counsel.

390.17 A3 A member of the insolvency team's attention is drawn to the content of paragraph R390.17.

**R390.18 If the team member identifies or suspects that non-compliance has occurred or might occur, the team shall, subject to paragraph R390.17, inform an immediate superior to enable the superior to take appropriate action. If the team member's immediate superior appears to be involved in the matter, the team member shall inform the next higher level of authority within the employing organisation.**

**R390.19 In exceptional circumstances, the team member may determine that disclosure of the matter to an appropriate authority is an appropriate course of action. If the team member does so pursuant to paragraphs 390.17 A2 and A3, that disclosure is permitted pursuant to paragraph R104.3(d) of the Code. When making such disclosure, the team member shall act in good faith and exercise caution when making statements and assertions.**

**Documentation**

390.19 A1 In relation to non-compliance or suspected non-compliance that falls within the scope of this section, the team member is encouraged to have the following matters documented:

a) the matter;

b) the results of discussions with the team member's superior, management and, where applicable, those charged with governance and other parties;

c) how the team member's superior has responded to the matter;

d) the courses of action the team member considered, the judgements made and the decisions that were taken.

390.20 A2 The team member is encouraged to consider whether there is a need for any such documentation to be filed separately.

# 1.2 INSOLVENCY CODE OF ETHICS

## 500 THE APPLICATION OF THE FRAMEWORK TO SPECIFIC SITUATIONS

### Introduction to specific situations

500.1 The following examples describe specific circumstances and relationships that will create threats to compliance with the fundamental principles. The examples are intended to assist an insolvency practitioner and the members of the insolvency team to assess the implications of similar, but different, circumstances and relationships.

500.2 Section 510 contains examples which do not relate to a previous or existing insolvency appointment. Section 520 contains examples that do relate to a previous or existing insolvency appointment. Section 530 contains some examples under Scottish law. Section 600 contains examples relevant to the Republic of Ireland.

500.3 The examples included in these sections are not exhaustive, and the substance of the circumstances and relationships should be considered.

500.4 When considering specific situations, insolvency practitioners should refer to the section on professional and personal relationships and changes in circumstances. As interests and relationships might change during an appointment, a significant professional relationship can arise as a result of an insolvency practitioner acting as an officeholder in a prior insolvency. An insolvency practitioner is expected to consider both pre-appointment engagements, and / or prior insolvency appointments when assessing whether they have a significant professional relationship. Insolvency practitioners are also expected to document their considerations and conclusions when assessing specific situations.

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

510.1 Insolvency appointment following audit related work

**Previous relationship**: The firm or an individual within the firm has completed audit related work.

**Response**: A Significant Professional Relationship will normally arise where the audit related work was completed within the previous 3 years.

An insolvency practitioner shall not take the insolvency appointment as it is unlikely that appropriate action can be taken to reduce the threat to compliance with the fundamental principles to an acceptable level.

Where audit related work was completed more than 3 years before the proposed date of the appointment of the insolvency practitioner a threat to compliance with the fundamental principles could still arise. The insolvency practitioner shall evaluate any such threat and consider whether the threat can be eliminated or reduced to an acceptable level by the use 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 shall consider whether there are any other circumstances that give rise to an unacceptable threat to compliance with the fundamental principles. Further, the insolvency practitioner shall satisfy themselves that the directors' declaration of solvency is likely to be substantiated by events.

510.2 Appointment as Investigating Accountant at the instigation of a creditor

**Previous relationship**: The firm or an individual within the firm 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 firm in the management of the entity; and

b) the firm 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 shall 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 shall satisfy themselves that the company, acting by its board of directors, does not object to them 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, they shall consider whether the circumstances give rise to an unacceptable threat to compliance with the fundamental principles.

### 520 Examples relating to previous or existing insolvency appointments

520.1 Insolvency appointment following an appointment as administrative or other receiver

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

**Proposed appointment**: Any insolvency appointment.

**Response**: It is unlikely that appropriate action can be taken to reduce the threat to compliance with the fundamental principles to an acceptable level. An insolvency practitioner shall not accept any insolvency appointment.

This restriction does not, however, apply where the individual within the firm was appointed a receiver by the court. In such circumstances, the insolvency practitioner shall however consider whether there are any other circumstances which give rise to an unacceptable threat to compliance with the fundamental principles.

520.2 Administration or Liquidation following appointment as supervisor of a voluntary arrangement

**Previous appointment**: An individual within the firm 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 shall consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

520.3 Liquidation following appointment as administrator

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

**Proposed appointment**: Liquidator.

**Response**: An insolvency practitioner may normally accept an appointment as liquidator provided they have complied with the relevant legislative requirements. However, the insolvency practitioner shall also consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

520.4 Conversion of members' voluntary liquidation into creditors' voluntary liquidation

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

**Proposed appointment**: Liquidator in a creditors' voluntary liquidation, where it is necessary to seek a nomination from the company's creditors.

**Response**: Where there has been a Significant Professional Relationship, an insolvency practitioner may continue or accept an appointment (subject to creditors' decision or deemed consent) only if they conclude that the company will eventually be able to pay its debts in full, together with interest.

However, the insolvency practitioner shall consider whether there are any other circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

520.5 Bankruptcy following appointment as supervisor of an individual voluntary arrangement

**Previous appointment**: An individual within the firm 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 shall consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

## 530 Examples in respect of cases conducted under Scottish Law

530.1 Sequestration following appointment as trustee under a trust deed for creditors

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

**Proposed appointment**: Interim trustee or trustee in a sequestration.

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

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

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

**Proposed appointment**: Administering the sequestration under a contract for insolvency services with the Accountant in Bankruptcy.

**Response**: The firm may normally accept an appointment under the contract for insolvency services with the Accountant in Bankruptcy. However, an individual within the firm shall consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

530.3 Sequestration or trust deed trustee following appointment as continuing money adviser under a Debt Arrangement Scheme

**Previous appointment**: An individual within the firm has been a continuing money advisor under a revoked Debt Arrangement Scheme relating to the debtor.

**Proposed appointment**: Trustee in a sequestration or a trust deed

**Response**: An insolvency practitioner may normally accept an appointment as a trustee under a trust deed or as a trustee in a sequestration. However, the insolvency practitioner shall consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

# 1.2 INSOLVENCY CODE OF ETHICS

## 600 APPLICATION IN THE REPUBLIC OF IRELAND

### Definitions

600.1 In relation to insolvency practice within the Republic of Ireland, the following amended definitions shall apply:

| | |
|---|---|
| authorising body | A prescribed accountancy body under any legislation governing the administration of insolvency in the Republic of Ireland;<br><br>A Supervisory Authority established under legislation governing insolvency in the Republic of Ireland; or<br><br>The Insolvency Service of Ireland established pursuant to section 8 of the Personal Insolvency Act 2012. |
| insolvency appointment | A formal appointment under any legislation in the Republic of Ireland which must be undertaken by an insolvency practitioner. |
| insolvency practitioner | An individual who is qualified to act as a liquidator under the Companies Act 2014 in the Republic of Ireland or a person that is appointed as a receiver to a company or the assets of a company in Ireland. |

600.2 Insolvency practitioners shall comply with the requirements of this Code in relation to insolvency practice within the Republic of Ireland. Referral Fees and Commissions notes that the payment of such fees and commissions to any creditor or member is prohibited and gives rise to a Category 2 offence pursuant to Section 642 of the Companies Act 2014.

600.3 The following examples describe specific circumstances and relationships that will create threats to compliance with the fundamental principles. The examples are intended to assist an insolvency practitioner and the members of the insolvency team to assess the implications of similar, but different, circumstances and relationships.

600.4 Liquidation following appointment as a receiver

**Previous appointment**: An individual within the firm has been receiver of any assets of a company or any company within a group with which it is associated.

**Proposed appointment**: Liquidator

**Response**: Where the receivership was completed within the previous 3 years, an insolvency practitioner or an individual within the firm shall not

accept an appointment as liquidator as it is unlikely that appropriate action can be taken to reduce the threat to compliance with the fundamental principles to an acceptable level.

Where the receivership was completed more than 3 years before the proposed date of winding up a threat to compliance with the fundamental principles might still arise. The insolvency practitioner or individual within the firm shall evaluate any such threat and consider whether the threat can be eliminated or reduced to an acceptable level by the use of safeguards.

600.5 An appointment following a significant professional relationship

**Previous appointment**: The firm or an individual within the firm has had a significant professional relationship with a company or any company within a group with which it is associated.

**Proposed appointment**: Any insolvency appointment

**Response**: Where the significant professional relationship was present within the previous 3 years, an insolvency practitioner or an individual within the firm shall not accept an insolvency appointment as it is unlikely that appropriate action can be taken to reduce the threat to compliance with the fundamental principles to an acceptable level.

Where the significant prior relationship was terminated more than 3 years before the proposed date of the insolvency appointment a threat to compliance with the fundamental principles might still arise. The insolvency practitioner or individual within the firm shall evaluate any such threat and consider whether the threat can be eliminated or reduced to an acceptable level by use of safeguards.

600.6 Liquidation following examination

**Previous appointment**: An individual within the firm has been examiner and the examiner is unable to formulate proposals for the survival of the company or where the court fails to confirm the examiner's proposals for the survival of the company, and the company subsequently goes into liquidation (either voluntarily or by order of the court).

**Response**: An insolvency practitioner may normally accept an appointment as liquidator provided they have complied with the relevant legislative requirements. However, the insolvency practitioner shall also consider

whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

600.7 Receivership following examinership

**Previous appointment**: The firm or an individual within the firm has been examiner and the examiner is unable to formulate proposals for the survival of the company or the court fails to confirm the examiner's proposals for the survival of the company, and the company subsequently goes into liquidation (either voluntarily or by order of the court) or a secured lender appoints a receiver.

**Response**: An insolvency practitioner may normally accept an appointment as receiver provided they have complied with the relevant legislative requirements. However, the insolvency practitioner shall also consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

600.8 Insolvency appointment following audit related work

**Previous relationship**: The firm or an individual within the firm has completed audit related work.

**Response**: A significant professional relationship will normally arise where the audit related work was completed within the previous 3 years. An individual within a firm shall not take the insolvency appointment as it is unlikely that appropriate action can be taken to reduce the threat to compliance with the fundamental principles to an acceptable level.

Where audit related work was completed more than 3 years before the proposed date of the appointment of the insolvency practitioner a threat to compliance with the fundamental principles might still arise. The insolvency practitioner shall evaluate any such threat and consider whether the threat can be eliminated or reduced to an acceptable level by the use of safeguards.

Note - Section 635 of the Companies Act 2014 prohibits an auditor from acting as a liquidator when they are or have been in the previous twenty four months prior to the date of commencement of the insolvency appointment, auditor to any client, even a solvent one.

# 1.2 INSOLVENCY CODE OF ETHICS

## DEFINITIONS AND INTERPRETATION

| | |
|---|---|
| Authorising body | A body declared to be a recognised professional body under any legislation governing the administration of insolvency in the United Kingdom. |
| Close or immediate family | A spouse, civil partner (or equivalent), dependant, parent, child or sibling. |
| Employee | A person subject to a contract of employment or a contract for services with an insolvency practitioner or a firm |
| Entity | Any natural or legal person or any group of such persons, including a partnership. |
| Firm | The firm (a sole practitioner, partnership, limited liability partnership or corporation) in which the insolvency practitioner practises together with:<br>a) an entity that controls the firm, through ownership, management or other means<br>b) an entity controlled by the firm, through ownership, management or other means<br>c) an entity with which the firm is under common control through ownership, management or other means. |
| Individual within the firm | The insolvency practitioner, any principals in the firm and any employees of the firm. |
| Insolvency appointment | A formal appointment under the terms of legislation in the United Kingdom, which must be undertaken by an insolvency practitioner. |
| Insolvency practitioner | An individual who is authorised or recognised as an insolvency practitioner in the United Kingdom by an authorising body. |
| Insolvency team | All persons under the control or direction of an insolvency practitioner. |
| Network | A larger structure:<br>a) that is aimed at co-operation; and<br>b) that is clearly aimed at profit or cost sharing or shares common ownership, control or management, common quality control policies and procedures, common business strategy, the use of a common brand name, or a significant part of professional resources. |
| Principal | In respect of a firm:<br>a) which is a company: a director<br>b) which is a partnership: a partner<br>c) which is a limited liability partnership: a member<br>d) which is comprised of a sole practitioner: that person.<br>Alternatively, any person within the firm who is held out as being a director, partner or member. |

# 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")[1]. 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 (Paragraph R104.2 of the new, 2020, Insolvency Code of Ethics) 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."

[1] This refers to the previous Insolvency Code of Ethics adopted by the Recognised Professional Bodies in November 2008 which is not reproduced in this Handbook. The references have, however, been updated to refer to the new 2020 Insolvency Code of Ethics.

## 1.3 TRANSPARENCY AND CONFIDENTIALITY: A GUIDANCE NOTE

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.

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 (Paragraph 100.1A1 in the new 2020 Insolvency Code of Ethics) 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.

## 1.3 TRANSPARENCY AND CONFIDENTIALITY: A GUIDANCE NOTE

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.

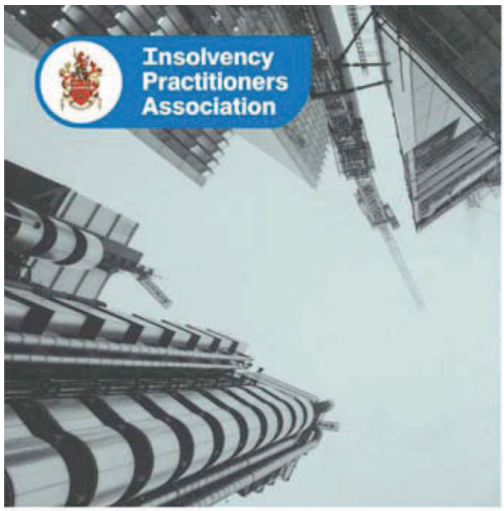
16. When considering the application of the principle of confidentiality it is also important that members recognise that the circumstances in which obligations of confidence will arise are likely to be different where they have been appointed as an office holder to those where the member acts as an 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 - UK




## Foundations in Corporate Insolvency webinars with ISS Training – Insolvency Practitioners Association members can take advantage of discounted rates

The Insolvency Practitioners Association (IPA) has negotiated a discount, for the benefit of Insolvency Practitioners and their teams, of 10% across Insolvency Support Services Training's new ONLINE one-hour modules for corporate insolvency in England & Wales, and Scotland. The modules build into a solid introduction to the concept of insolvency and our role as Insolvency Practitioner; the corporate insolvency frameworks of liquidation and administration; an Insolvency Practitioner's responsibility to investigate and report on directors; and how we engage with stakeholders.

These modules give firms convenient access to training for anyone who is just starting their career in insolvency with little or no formal training, junior team members looking to progress their career or anyone looking for an introduction to the subject working within the accountancy, legal or banking professions.

Priced at a discounted rate of just £45 + VAT per person per module, choose from the courses in the next column.

**England & Wales**
Introduction to Corporate Insolvency Law Concepts
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Introduction to Administration
Introduction to Investigation and the Company Director Disqualification Act
Engaging with Creditors in Insolvency Procedures

**Scotland**
Introduction to Corporate Insolvency Law Concepts
Introduction to Insolvent Liquidation
Introduction to Administration
Introduction to Investigation and the Company Director Disqualification Act
Engaging with Creditors in Insolvency Procedures

Participants will be enrolled to the online Insolvency Support Service's Moodle School. They will receive an email with login details, allowing them to complete the course at any time, and from any internet enabled device. For more details and to book, go to insolvencysupportservicesisstraining.arlo.co/w/ondemand/cat-24/
or email courses@insolvencysupportservices.com
or telephone 0845 601 7570.
**When booking, use or quote the discount code: IPA10**

# SECTION 2 - STATEMENTS OF INSOLVENCY PRACTICE - UK

All the current Statements of Insolvency Practice (SIPs) are included in this section are set out in numerical order but colour coded for each of the regional variations to show those that apply to England, Wales and Scotland and Northern Ireland as a whole, as distinct from those for England & Wales, those for Scotland and those for Northern Ireland.
SIPs are issued to insolvency practitioners under procedures agreed between the insolvency regulatory authorities, acting through the Joint Insolvency Committee. The dates shown at the bottom of each page are for ease of reference and refer to the date on which the particular SIP came into effect.

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## SECTION 2 - STATEMENTS OF INSOLVENCY PRACTICE - UK



| SIP | Date of Withdrawal |
|---|---|
| SIP 4 – Disqualification Of Directors | 6 October 2016 |
| SIP 5 – Non-Preferential Claims By Employees Dismissed Without Proper Notice By Insolvent Employers | 1 August 1999 |

## 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.

## 2.1 SIP 1

**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. An insolvency practitioner who becomes aware of any insolvency practitioner who they consider is not complying or who has not complied with the relevant laws and regulations and whose actions discredit the profession, should report that insolvency practitioner to the complaints gateway operated by the Insolvency Service or to that insolvency practitioner's recognised professional body.

5. 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. An insolvency practitioner should inform creditors at the earliest opportunity that they are bound by the Insolvency Code of Ethics when carrying out all professional work relating to an insolvency appointment. The insolvency practitioner should, if requested, provide details of any threats identified to compliance with the fundamental principles and the safeguards applied. If it is not appropriate to provide such details, the insolvency practitioner should provide an explanation why.

### Regulatory status

6. 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.

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

8. 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.

9. 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, Department of Enterprise, Trade & Investment

10. 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: 01 October 2015**

# 2.2 STATEMENT OF INSOLVENCY PRACTICE 2 INVESTIGATIONS BY OFFICE HOLDERS IN ADMINISTRATIONS AND INSOLVENT LIQUIDATIONS AND THE SUBMISSION OF CONDUCT REPORTS BY OFFICE HOLDERS

## 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.

2. Both an administrator and a liquidator of an insolvent entity have a duty to investigate what assets there are (including potential claims against third parties including the directors) and what recoveries can be made. Each of the above matters gives rise to the need for an office holder to carry out appropriate investigations, in order to satisfy the specific duties of the office holder and to allay, if possible, the legitimate concerns of creditors and other interested parties. This statement deals specifically with the investigations of an office holder in administration or insolvent liquidation.

3. Additionally, an administrator, liquidator, administrative receiver or receiver in Scotland may have a duty to report to the Secretary of State, or in Northern Ireland the Department of Enterprise, Trade and Investment (DETI), on the conduct of those that formerly controlled the company. This statement also deals with these obligations.

## 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.

   Conduct reports and any subsequent new information should be submitted in a timely manner, noting the expectation that extensions to the statutorily prescribed period will only be considered in exceptional circumstances.

## 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.

## 2.2 SIP 2

10. In every case, an office holder should make an initial assessment as to 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, either from within the estate and/or from other sources, 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, consultation and approval can be carried out/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 others.

**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 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.

**Record keeping**

18. 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.

**Conduct reporting requirements**

19. The office holder should base any conduct report on information coming to light in the ordinary course of their enquiries and is not required to carry out investigations specifically for the purpose of fulfilling their statutory reporting obligations. The submission of conduct reports is one of the statutory duties that automatically fall upon the office holder and, as such, must be complied with notwithstanding any shortage of funds.

20. If the office holder has not already interviewed the subject of the conduct report, the office holder may consider seeking a meeting with the subject, with a view to confirming the office holder's understanding of the facts.

21. An office holder should be mindful that the content of conduct reports are prepared for the purpose of the Secretary of State and DETI discharging their statutory functions and should not be disclosed to third parties.

## 2.2 SIP 2

22. Notwithstanding the confidential nature of conduct reports, office holders should be mindful that there may be circumstances in which the content of a conduct report is made available to the subject, or potentially others. Should the subject of a conduct report request disclosure, an office holder should contact the Secretary of State or DETI (as appropriate) as soon as a request is received in order to consider whether any factors apply that may result in an exemption from disclosure being applicable. Office holders should be aware that the subject may make a disclosure request directly to the Secretary of State or DETI (as appropriate), which will usually result, (after appropriate redactions) in a copy being provided to them. Additionally, conduct reports may be disclosed by Secretary of State or DETI to other Regulatory Authorities, where disclosure is considered to be in the public interest. An office holder should also bear in mind that, if disqualification proceedings are brought, the conduct report will usually be made available to the subject during the disclosure process.

23. When reporting on conduct or providing new information, the office holder should highlight whether recovery proceedings have or may be commenced against the subject of the report, as this may have an impact upon any decision taken by the Secretary of State or DETI (as appropriate) to seek a compensation order or undertaking.

**Other reporting requirements**

24. An office holder should report possible offences disclosed during the course of their investigations to the relevant authorities.

**Effective Date: 06 April 2016**

## 2.3 STATEMENT OF INSOLVENCY PRACTICE 3.1 (E,W & NI) INDIVIDUAL VOLUNTARY ARRANGEMENTS

### INTRODUCTION

1. An Individual Voluntary Arrangement (IVA) is a statutory contract between a debtor and his or her creditors under which an insolvency practitioner will have powers and duties. An insolvency practitioner will be central to the preparation and agreement of the proposal, and the implementation of the arrangement, whether acting as adviser, nominee or supervisor. The particular nature of an insolvency practitioner's position renders transparency and fairness in all dealings of primary importance. The debtor and creditors should be confident that an insolvency practitioner will act professionally and with objectivity in each role associated with the arrangement. Failure to do so may prejudice the interests of both the debtor and creditors, and is likely to bring the practitioner and the profession into disrepute.

### PRINCIPLES

2. An insolvency practitioner should differentiate clearly between the stages and roles that are associated with an IVA (these being, the provision of initial advice, assisting in the preparation of the proposal, acting as the nominee, and acting as the supervisor) and ensure that they are explained to the debtor and the creditors.

3. An insolvency practitioner should ensure that the information and explanations provided to a debtor about all the options available are such that the debtor can make an informed judgement as to whether an IVA is an appropriate solution.

4. An insolvency practitioner should explain to the debtor, the debtor's responsibilities and the consequences of an IVA.

5. Where an IVA is to be proposed, an insolvency practitioner should be satisfied that it is achievable and that a fair balance is struck between the interests of the debtor and the creditors.

6. An insolvency practitioner's reports should provide sufficient information to enable creditors to make informed decisions in relation to the proposal and the IVA, and report accurately in a manner that aims to be clear and useful.

## 2.3 SIP 3.1 (E,W & NI)

### KEY COMPLIANCE STANDARDS

7. Certain key compliance standards are of general application, but others will depend on whether the insolvency practitioner is acting as adviser, nominee, or supervisor.

### STANDARDS OF GENERAL APPLICATION

#### Advice to the debtor

8. The insolvency practitioner should have procedures in place to ensure that the information and explanations provided to the debtor at each stage of the process (that is, assessing the options available, and then preparing and implementing an IVA), are designed to set out clearly:

   (a) the advantages and disadvantages of each available option;

   (b) the key stages and the roles of the adviser, the nominee and the supervisor, any potential delays or complications, and the likely duration of the IVA;

   (c) what is required of the debtor;

   (d) the consequences of proposing and entering into an IVA, including the rights of challenge to the IVA and the potential consequences of those challenges; and

   (e) what may happen if the IVA is not approved or not successfully completed.

#### Meeting the debtor

9. A meeting should always be offered to the debtor. At each stage of the process, an assessment should be made as to whether a face-to-face meeting with the debtor is required, depending on the debtor's attitude and the circumstances and complexity of the case.

#### Assessment

10. The insolvency practitioner needs to be satisfied, at each stage of the process, that there are procedures in place to ensure that an assessment is made of:

    (a) the solutions available and their viability;

(b) whether the debtor is being sufficiently cooperative;

(c) the debtor's understanding of the process, and commitment to it;

(d) the likely attitude of any key creditors and the general body of creditors, in particular as to the fairness and balance of the proposals;

(e) whether an IVA would have a reasonable prospect of being approved and implemented; and

(f) whether an interim order is needed or available.

**Documentation**

11. The insolvency practitioner should be able to demonstrate that proper steps have been taken at all stages of the IVA, by maintaining records of:

(a) discussions with the debtor, including the information and explanations provided, the options outlined, and the advantages and disadvantages of each;

(b) comments made by the debtor, and the debtor's preferred option;

(c) any discussions with creditors or their representatives;

If the insolvency practitioner considers it appropriate in the circumstances, summaries of these discussions should be sent to the debtor.

## STANDARDS OF SPECIFIC APPLICATION

**Initial advice**

12. An insolvency practitioner may be asked to give advice on a debtor's financial difficulties, and the way in which those difficulties might be resolved. The insolvency practitioner should have procedures in place to ensure, taking account of the personal circumstances of the debtor, that:

(a) the role of adviser is explained to the debtor, at this stage advising the debtor (in the debtor's interests) but in the context of needing to find a workable solution to the debtor's financial difficulties;

(b) sufficient information is obtained to make a preliminary assessment of the solutions available and their viability;

## 2.3 SIP 3.1 (E,W & NI)

(c) the obligations of the debtor to cooperate and provide full disclosure are explained. The insolvency practitioner should be able to form a view of whether the debtor has a sufficient understanding of the situation and the consequences, and whether there will be full cooperation in seeking a solution;

(d) when considering possible solutions, account is taken of the impact of each solution on the debtor and the debtor's assets, in particular the family home, and on any third parties that may be affected;

(e) the debtor is provided with an explanation of all the options available, the advantages and disadvantages of each, and the likely costs of each so that the solution best suited to the debtor's circumstances can be identified. This explanation should be confirmed to the debtor in writing.

**Preparing for an IVA**

13. When preparing for an IVA, the insolvency practitioner should have procedures in place to ensure, taking account of the personal circumstances of the debtor and the nature of the debtor's finances, that:

(a) the debtor has had, or receives, the appropriate advice in relation to an IVA. This should be confirmed in writing if the insolvency practitioner or their firm has not done so before;

(b) the obligations of the debtor to cooperate and provide full and accurate disclosure, are explained and the consequences of not doing so if the insolvency practitioner has not done so before. The insolvency practitioner should be able to form a view of whether the debtor has a sufficient understanding of the process of an IVA, its likely duration and the consequences, and whether there will be full cooperation and commitment from the debtor;

(c) sufficient information is obtained to make an assessment of an IVA as a solution, and to enable a nominee to prepare a report, including;

(i) the measures taken by the debtor to avoid recurrence of their financial difficulties, if any;

(ii) the likely expectations of any key creditors;

(iii) the effect of the IVA on third parties where their view may have an effect on the viability of the IVA; and

(d) proportionate investigations into, and verification of, income and expenditure and assets and liabilities.

**The proposal**

14. Where the insolvency practitioner has been asked to assist the debtor to prepare a proposal, the insolvency practitioner should have procedures in place to ensure that the proposal contains the following:

(a) sufficient information for creditors to understand the debtor's financial and trading history (where appropriate), including:

(i) the background and financial history of the debtor;

(ii) why the debtor has become insolvent;

(iii) any other attempts that have been made to solve the debtor's financial difficulties, if there are any such difficulties;

(b) a comparison of the estimated outcomes of the IVA and the outcome if the IVA is not approved, including disclosure of the estimated costs of the IVA and the bases for those estimates;

(c) the identity of the source of any referral of the debtor, the relationship or connection of the referrer to the debtor and, where any payment has been made or is proposed to the referrer, the amount and reason for that payment;

(d) details of the amounts and source of any payments made, or proposed to be made, to the nominee and the supervisor or their firms in connection, or otherwise, with the proposed IVA, directly or indirectly and the reason(s) for the payment(s); and;

(e) where relevant, sufficient information to support any profit and cash projections, subject to any commercial sensitivity.

## 2.3 SIP 3.1 (E,W & NI)

**The nominee**

15. It is the responsibility of the nominee to report in relation to the proposed IVA. When acting as nominee, the insolvency practitioner should have procedures in place to ensure that:

    (a) the debtor has had, or receives, the appropriate advice in relation to an IVA. This should be confirmed in writing if the insolvency practitioner or his firm has not done so before;

    (b) the nominee is able to report whether or not:

        (i) the debtor's financial position is materially different from that contained in the proposal, explaining the extent to which the information has been verified;

        (ii) the IVA is manifestly unfair;

        (iii) the IVA has a reasonable prospect of being approved and implemented.

    (c) the debtor's consent is sought on any modifications to the proposal put forward by creditors, and the debtor understands the impact of the modifications on the implementation of the IVA and its viability;

    (d) where a modification is adopted, the insolvency practitioner must ensure that consent is obtained from the debtor and, if appropriate, the creditors.

    (e) in the absence of consent, the IVA cannot proceed. The debtor's consent must be recorded.

**The supervisor**

16. When acting as supervisor, the insolvency practitioner should have procedures in place to ensure that:

    (a) where a proposal is modified, creditors have been made aware of the final form of the accepted IVA;

    (b) the IVA is supervised in accordance with its terms;

    (c) the progress of the IVA is monitored;

    (d) any departures from the terms of the IVA are identified at an early stage and appropriate action is then taken promptly by the supervisor;

    (e) any discretion(s) conferred on the supervisor are exercised where necessary, on a timely basis and that exercise is reported at the next available opportunity;

    (f) any variation to the terms of the IVA has been appropriately approved before it is implemented;

    (g) enquiries by the debtor and creditors are dealt with promptly;

    (h) full disclosure is made of the costs of the IVA and of any other sources of income of the insolvency practitioner or the practice, in relation to the case, in reports;

    (i) if the costs of the IVA have increased beyond previously reported estimates, this increase should be reported at the next available opportunity; and

    (j) the IVA is closed promptly on completion or termination.

**Effective Date: 01 July 2014**

## 2.4 STATEMENT OF INSOLVENCY PRACTICE 3.2 COMPANY VOLUNTARY ARRANGEMENTS

### INTRODUCTION

1. A Company Voluntary Arrangement (CVA) is a statutory contract between a company and its creditors under which an insolvency practitioner will have powers and duties. An insolvency practitioner will be central to the preparation and agreement of the proposal, and the implementation of the arrangement, whether acting as adviser, nominee or supervisor. The particular nature of an insolvency practitioner's position renders transparency and fairness in all dealings of primary importance.

2. An insolvency practitioner may be asked to assist a company's directors when a CVA may be a solution to the company's financial difficulties; or an insolvency practitioner may propose a CVA as administrator or liquidator. Where the principles and key compliance standards in this statement of insolvency practice are relevant only to a CVA proposed by a company's directors these are identified as such.

### PRINCIPLES

3. An insolvency practitioner should differentiate clearly between the stages and roles that are associated with a CVA (these being, the provision of initial advice, assisting in the preparation of the proposal, acting as the nominee, and acting as the supervisor) and ensure that they are explained to the company's directors (where they are making the proposal), shareholders and creditors.

4. An insolvency practitioner should act professionally and with objectivity in each role associated with the arrangement. Failure to do so may prejudice the interests of both the company and creditors, and is likely to bring the practitioner and the profession into disrepute.

5. (*Directors' proposal*) An insolvency practitioner should ensure that information and explanations about all the options available are provided to the directors, so that they can make an informed judgement as to whether a CVA is an appropriate solution for the company.

6. An insolvency practitioner should explain to the directors, the directors' responsibilities and role before and during the CVA, and the consequences of a CVA.

7. Where a CVA is to be proposed, an insolvency practitioner should be satisfied that it is achievable and that a fair balance is struck between the interests of the company and the creditors.

8. An insolvency practitioner's reports should provide sufficient information to enable the company's shareholders and creditors to make informed decisions in relation to the proposal and the CVA, and report accurately in a manner that aims to be clear and useful.

## KEY COMPLIANCE STANDARDS

9. Certain key compliance standards are of general application, but others will depend on whether the insolvency practitioner is acting as adviser, nominee, supervisor, administrator or liquidator.

## STANDARDS OF GENERAL APPLICATION

### Advice (directors' proposal)

10. The insolvency practitioner should have procedures in place to ensure that the information and explanations provided to the company and/or the directors at each stage of the process, as appropriate (that is, assessing the options available, and then preparing and implementing a CVA), are designed to set out clearly:

    (a) the advantages and disadvantages of each available option;

    (b) the key stages and the roles of the adviser, the nominee and the supervisor;

    (c) whether and why the company will require additional specialist assistance which will not be provided by any supervisor appointed, including the likely cost of that additional assistance, if known;

    (d) any potential delays or complications; and the likely duration of the CVA;

    (e) what is required of the company and its directors;

    (f) the consequences of proposing and entering into a CVA, including the rights of challenge to the CVA and the potential consequences of those challenges; and

    (g) what may happen if the CVA is not approved or not successfully completed.

## 2.4 SIP 3.2

**Meeting the directors (directors' proposal)**

11. In view of the complex nature of CVAs the initial meeting with the directors should always be in person (whether at a physical meeting or using conferencing technology).

**Assessment**

12. The insolvency practitioner needs to be satisfied, at each stage of the process, that there are procedures in place to ensure that an assessment is made of:

(a) the solutions available and their viability;

(b) (*Directors' proposal*) whether the directors are being sufficiently cooperative;

(c) where the directors' compliance is required for the implementation of the CVA, the directors' understanding of the process, and commitment to it;

(d) the likely attitude of any key creditors and the general body of creditors, in particular as to the fairness and balance of the proposals;

(e) whether a CVA would have a reasonable prospect of being approved and implemented; and

(f) whether a moratorium is required or available.

**Documentation**

13. The insolvency practitioner should be able to demonstrate that proper steps have been taken at all stages of the CVA, by maintaining records of:

(a) (*Directors' proposal*) discussions with the directors, including the information and explanations provided, the options outlined, and the advantages and disadvantages of each, and an explanation of the roles of the nominee and supervisor. All advice provided to the directors should be confirmed in writing;

(b) (*Directors' proposal*) comments made by the directors, and their preferred option;

(c) any discussions with creditors (or their representatives) and the company's shareholders; and

(d) a detailed note of the strategy, outlining the advantages and disadvantages of each option, including the impact of trading within a CVA for a prolonged period and the continued viability of the business during that period.

## STANDARDS OF SPECIFIC APPLICATION

### Preparing for a CVA

14. When preparing for a CVA, the insolvency practitioner should have procedures in place to ensure, taking account of the company's circumstances and the nature of the company's finances, that:

(a) (*Directors' proposal*) The directors have had, or receive, the appropriate advice in relation to a CVA; this should be confirmed in writing if the insolvency practitioner or their firm has not done so before;

(b) Sufficient information is obtained to make an assessment of a CVA as a solution, and to enable a nominee to prepare a report, including:

(i) the measures taken by the directors or others to avoid recurrence of the company's financial difficulties, if any;

(ii) the likely expectations of any key creditors;

(iii) the effect of the CVA on third parties where their view may have an effect on the viability of the CVA; and

(iv) proportionate investigations into, and verification of, income and expenditure and assets and liabilities;

(c) Creditors are given adequate time to consider what is being planned as regards the CVA. Where creditors may need assistance in understanding the consequences of a CVA, the insolvency practitioner should consider signposting sources of help.

### The proposal

15. Whether the insolvency practitioner has been asked to assist the directors to prepare a proposal or a proposal is being prepared by an administrator or liquidator, the insolvency practitioner should have procedures in place to ensure that the proposal is considered objectively, and contains the following:

## 2.4 SIP 3.2

(a) sufficient information for creditors to understand the company's financial and trading history;

(b) the roles of the directors and key employees and their future involvement in the company, including the background and financial history of the directors where relevant;

(c) any additional specialist assistance which may be required by the company which will not be provided by any supervisor appointed, and the reason why such assistance may be necessary;

(d) if the company has become, or is about to become, insolvent, why;

(e) any other attempts that have been made to solve the company's financial difficulties, and the alternative options considered, both prior to and within formal insolvency by the company;

(f) a comparison of the estimated outcomes of the CVA and the outcome if the CVA is not approved;

(g) where relevant, sufficient information to support any profit and cash projections, subject to any commercial sensitivity;

(h) an explanation of the role and powers of the supervisor;

(i) details of any discussions that have taken place with key creditors;

(j) where it is proposed that certain creditors are to be treated differently, an explanation as to which creditors are affected, how and why, in a manner which aims to be clear and useful;

(k) an explanation of how debts are to be valued for voting purposes, in particular where the creditors include long term or contingent liabilities;

(l) disclosure of the estimated costs of the CVA including the proposed remuneration of the nominee and the supervisor and the bases for those estimates;

(m) the cost of any additional specialist assistance which will not be provided by any supervisor appointed;

(n) the identity of the source of any referral of the company, the relationship or connection of the referrer to the company and, where any payment has been made or is proposed to the referrer, the amount and reason for that payment;

(o) details of the amounts and source of other payments made, or proposed to be made, to the nominee and the supervisor or their firms in connection, or otherwise, with the proposed CVA, directly or indirectly and the reason(s) for the payment(s);

(p) an explanation of how debts which it is proposed are compromised will be treated should the CVA fail;

(q) the circumstances in which the CVA may fail, and

(r) what will happen to the company and any remaining assets subject to the CVA should the CVA fail.

**The nominee**

16. Where the nominee is not the administrator or liquidator, it is the responsibility of the nominee to report in relation to the proposed CVA. When acting as nominee, the insolvency practitioner should have procedures in place to ensure that:

(a) The nominee is able to report objectively whether or not, in the nominee's judgement:

(i) the company's financial position is materially different from that contained in the proposal, explaining the extent to which the information has been verified;

(ii) the CVA is manifestly unfair;

(iii) the CVA has a reasonable prospect of being approved and implemented.

(b) The proposer's consent is sought on any modifications to the proposal put forward by creditors, and the proposer understands the impact of the modifications on the implementation of the CVA and its viability.

(c) Where a modification is adopted, the insolvency practitioner must ensure that consent is obtained from the proposer of the CVA and, if appropriate, the creditors. In the absence of consent, the CVA cannot proceed in a modified form. The proposer's consent or otherwise must be recorded.

17. Where the nominee is the administrator or liquidator, and the directors' compliance is required, their consent shall be sought.

## 2.4 SIP 3.2

**The supervisor**

18. When acting as supervisor, the insolvency practitioner should have procedures in place to ensure that:

    (a) where a proposal is modified, creditors have been made aware of the final form of the accepted CVA;

    (b) the CVA is supervised in accordance with its terms;

    (c) the progress of the CVA is monitored;

    (d) any departures from the terms of the CVA are identified at an early stage and appropriate action is taken promptly by the supervisor;

    (e) any discretions conferred on the supervisor are exercised where necessary, on a timely basis and that exercise is reported at the next available opportunity;

    (f) any variation to the terms of the CVA has been appropriately approved before it is implemented;

    (g) enquiries by creditors and shareholders are dealt with promptly;

    (h) full disclosure is made of the costs of the CVA and of any other sources of income of the insolvency practitioner, associates of the insolvency practitioner or their firm, in relation to the case, in reports; and

    (i) if the costs of the CVA have increased beyond previously reported estimates, this increase should be reported at the next available opportunity and an explanation of the increase provided.

**Effective Date:** This SIP applies to all cases where the nominee is appointed on or after **01 April 2021**

## 2.5 STATEMENT OF INSOLVENCY PRACTICE 3.3 (SCOTLAND) TRUST DEEDS

### Introduction

1. A Trust Deed is a voluntary deed granted by a debtor whereby the debtor conveys all or part of his estate to a named Trustee to be administered for the benefit of creditors and to effect the settlement of debts in whole or in part. The Trustee may seek to make the Trust Deed protected by following the relevant statutory procedures. A Trust Deed will not satisfy the requirements for protection unless it complies with the definition of "trust deed" in section 228(1) of the Bankruptcy (Scotland) Act 2016 ("the Act") and satisfies the requirements in section 167 of the Act).[1]

2. Creditors may agree or be deemed to agree to the Trust Deed. If the Trust Deed becomes protected, all creditors are bound by the terms laid down in the statutory provisions. However, if objections reach the prescribed levels the Trust Deed will not become protected. Even if objections do not reach the prescribed levels, protection may be refused by the Accountant in Bankruptcy in prescribed circumstances.

3. The advice provided by an insolvency practitioner will be central to the decision taken by the debtor. Where the decision is to grant a Trust Deed and seek its protection the insolvency practitioner will take the necessary steps. The particular nature of an insolvency practitioner's position renders transparency and fairness in all dealings of primary importance. The debtor and the creditors should be confident that an insolvency practitioner acts professionally and with objectivity. Failure to do so may prejudice the interests of both the debtor and creditors and is likely to bring the practitioner and the profession into disrepute.

4. It is not competent in terms of the Act to have a conjoined Trust Deed signed by more than one party, and purporting to deal with the combined estates of more than one person. Individual Trust Deeds are required for each separate legal person or entity.

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[1] The legislative references in this SIP have been updated to reflect the fact that the Bankruptcy (Scotland) Act 2016 came into effect on 30 November 2016 and the Bankruptcy (Scotland) Act 1985 was repealed for the purposes of all new sequestrations and trust deeds on or after 30 November 2016. The 2016 Act is a consolidation of existing legislation and therefore the requirements of this SIP remain unchanged notwithstanding the changes to the legislative references.

## 2.5 SIP 3.3 (SCOTLAND)

5. The insolvency practitioner should exercise his judgement and consider the extent to which these principles and procedures apply where there is no intention that the Trust Deed should become protected.

### Principles

6. The insolvency practitioner should differentiate clearly to the debtor his role in providing initial advice from his responsibilities as Trustee. The debtor should be advised of the insolvency practitioner's requirement to maintain independence. The insolvency 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.

7. An insolvency practitioner should ensure that the advice, information and explanations provided to a debtor about the options available are such that the debtor can make an informed judgement on which process is appropriate to his circumstances. An insolvency practitioner should also explain the debtor's responsibilities and the consequences of signing a Trust Deed.

8. If a Trust Deed is proposed, an insolvency practitioner should ensure that a fair balance is struck between the interests of the debtor and those of the creditors.

9. In the initial circular to creditors the insolvency practitioner should provide clear and accurate information to enable creditors to decide whether or not to object to the Trust Deed becoming protected and he should advise of the procedure for objections. At all times an insolvency practitioner should report accurately and in a manner that aims to be clear and useful.

### Initial Considerations and Requirements

10. The practice of insolvency is principally governed by statute and secondary legislation and is subject ultimately to the control of the Court. Where requirements are set out in statute or secondary legislation, an insolvency practitioner must comply with such provisions.

11. The special nature of insolvency appointments makes the payment for, or offer of any commission for, or the furnishing of any valuable consideration towards, the introduction of insolvency appointments inappropriate.

12. An office holder should provide details and the cost of any work that has been carried out in relation to the Trust Deed other than by the office holder or his or her staff whether chargeable to the estate or not. There should be no additional cost to the estate. Any such payment should reflect the value of the work undertaken, comply with the Code of Ethics of the Authorising Body, comply with guidance issued by the Accountant in Bankruptcy, and be approved in line with the provisions of SIP9 (Scotland).

13. In addition to the statutory requirements to provide documentation to creditors and the Accountant in Bankruptcy, the Trustee in the first written communication to all known creditors should provide details of the following matters:

    (a) where a payment has been made or is due to be made to a third party (whether by the insolvency practitioner or any other party) for work done in relation to the Trust Deed:

        - the name and address of the party carrying out the work;
        - the name and address of the party making the payment; and
        - the amount of the payment.

    (b) Where the insolvency practitioner or his firm or any associate of either (as defined in section 229[2] of the Act or section 435 of the Insolvency Act 1986) has an interest in the business of the party being paid, that interest should be detailed.

    (c) Where the Trustee's fee is not a fixed fee in accordance with section 183[3] the anticipated 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 and outlays must be approved in accordance with SIP9 (Scotland).

14. Where the insolvency practitioner is consulted by two individuals who are 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 offer advice based on each

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2 See footnote 1 above.

3 See footnote 1 above.

individual's own circumstances. Where the insolvency practitioner has been consulted by two or more parties and considers that there is a conflict of interest in the insolvency practitioner advising both or all parties, the insolvency practitioner should consider which appointment, if any, it is appropriate to accept.

### Key Compliance Standards

15. Certain key compliance standards are of general application, but others will depend on whether the insolvency practitioner is acting as adviser or Trustee.

### Standards of General Application

### Advice to the debtor

16. In all cases the insolvency practitioner is responsible for ensuring that the debtor has been given appropriate advice.

17. The insolvency practitioner should have procedures in place to satisfy himself that appropriate information and explanations are provided to the debtor at each stage of the Trust Deed process. He should set out clearly:

    (a) the key stages of the Trust Deed process (i.e. assessing the options available, signing and witnessing the Trust Deed, asset realisations, contributions, fee approval, discharge of the debtor and Trustee, and concluding the Trust Deed);

    (b) the roles of the insolvency practitioner as adviser and as Trustee;

    (c) the intended duration of the Trust Deed, any potential delays or complications, and the possibility and likelihood of extending the period of the Trust Deed;

    (d) what is required of the debtor at each stage of the process;

    (e) the consequences of signing a Trust Deed including apparent insolvency, and the responsibilities of the debtor;

    (f) the insolvency practitioner's assessment of the likelihood of the Trust Deed becoming protected, the consequences of it not becoming protected and the consequences of the debtor failing to comply with its terms.

## Assessment

18. The insolvency practitioner should have procedures in place to ensure that an assessment is made at an appropriate stage of:

    (a) whether the debtor is being honest and open and sufficiently co-operative;

    (b) the debtor's understanding of the process, and commitment to it;

    (c) the attitude of any key creditors and of the general body of creditors;

    (d) whether a Trust Deed is an appropriate solution;

    (e) whether the Trust Deed will have a reasonable prospect of becoming protected;

    (f) whether the EC Regulation on Insolvency Proceedings applies to the Trust Deed and, if so, whether the Trust Deed constitutes main or territorial proceedings.

## Meeting the debtor

19. Regular assessment should be made as to whether a meeting in person with the debtor is required, which will be dependent on the debtor's attitude and the circumstances and complexity of the case.

## Documentation

20. The insolvency practitioner should be able to demonstrate that appropriate steps have been taken at all stages of the Trust Deed, by maintaining records of:

    (a) discussions with the debtor, the information and explanations provided, and options outlined and the advantages and disadvantages to the debtor of each option;

    (b) comments made by the debtor, and the debtor's preferred option;

    (c) any discussions with creditors or their representatives;

    (d) the way in which any issues raised have been resolved.

    Summaries of the records maintained under (i) and (ii) above where material should be sent to the debtor.

## 2.5 SIP 3.3 (SCOTLAND)

### Dealing with Assets and Contributions

21. The Trustee should follow the Accountant in Bankruptcy's guidance notes on Trust Deeds and sequestrations when dealing with assets. The Trustee should satisfy himself that a comprehensive schedule of non-exempt 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 conveyed to the Trustee.

22. If any asset is not going to be realised, or not realised in full, the reasons for this must be clearly explained in writing to creditors when the Trust Deed is presented to them for consideration for protection, or at any other time that such a decision is taken.

23. The Trustee should be aware that in order to achieve protected status, the Trust Deed must convey to the Trustee the debtor's whole estate with the exception of property which would be excluded from vesting in a sequestration, except that the Trust Deed may still become protected where the debtor's dwelling house is excluded in accordance with paragraph (b) of the definition of "trust deed" set out in section 228(1) of the Act.

### Standards of Specific Application

24. The insolvency practitioner or a suitably experienced member of his staff should interview the debtor prior to the Trust Deed being signed. A meeting in person should always be offered to the debtor but a telephone interview may be conducted. It is recommended that the debtor be interviewed using a similar style of questionnaire as is used in sequestration proceedings under the Act. The questionnaire and appendices should be signed and dated by the debtor.

25. An assessment should be made as to whether a meeting in person with the debtor is required, depending on the debtor's attitude and the circumstances and complexity of the case.

26. If the debtor is carrying on a business the insolvency practitioner, or a suitably experienced member of staff, must assess whether it is necessary to visit the business premises as part of the information gathering and planning exercise.

27. Whether the debtor is interviewed in person or by telephone, the insolvency practitioner must satisfy himself that appropriate client identification and money laundering procedures have been completed and that relevant copy documentation is retained on the case file.

28. 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 purpose of obtaining creditor approval to the Trust Deed.

29. An insolvency practitioner may be approached to give advice on a debtor's financial difficulties, and the way in which those difficulties might be resolved. The insolvency practitioner should have procedures in place to ensure, taking account of the personal circumstances of the debtor, that:

    (a) the role of adviser is explained to the debtor and that at this stage the insolvency practitioner is advising the debtor and acting in the debtor's interests but in the context of finding a workable solution to the debtor's financial difficulties;

    (b) sufficient information is obtained to make a preliminary assessment of the solutions available and their viability;

    (c) it is explained that the debtor will need to co-operate and provide full disclosure. The insolvency practitioner should be able to form a view of whether the debtor has a sufficient understanding of the situation and the consequences, and whether there will be full co-operation in seeking a solution;

    (d) when considering possible solutions, account is taken of the impact of each solution on the debtor and on any third parties that may be affected;

    (e) the debtor is provided with an explanation of the options available, so that the solution best suited to the debtor's circumstances can be identified. This information should be confirmed to the debtor in writing.

30. Where a Statement of Affairs and Statement of Income and Expenditure are prepared by a third party, these must be checked by the insolvency practitioner. These statements must be agreed by the debtor who should be asked to sign the statements confirming such agreement.

## 2.5 SIP 3.3 (SCOTLAND)

31. The insolvency practitioner must ensure that the debtor is advised the dwelling house (the debtor's sole or main residence over which there is a secured loan) may be excluded from the Trust Deed and the Trust Deed may still qualify for protection. The insolvency practitioner must also ensure that the debtor is advised of the risks involved in excluding the dwelling house from the Trust Deed. In particular, if there is equity in the dwelling house and the debtor chooses to exclude the property the unsecured creditors may not agree to the Trust Deed becoming protected, and the implications thereof.

32. Where heritable property is to be included in the Trust Deed the insolvency practitioner must ensure that the debtor is clearly advised that all such heritable property, including the debtor's home unless excluded, is covered by the Trust Deed. The debtor must also be advised that equity in the property requires to be realised for the benefit of the creditors.

33. The debtor should be asked to sign a separate statement confirming his understanding of the implications of and their decision in respect of heritable property being included or excluded from the Trust Deed. A copy of the statement should be sent to the debtor and one held on the case file.

34. The insolvency practitioner should be satisfied that a debtor has had adequate time to think about the consequences and alternatives before signing a Trust Deed. Insolvency practitioners are reminded that once signed, a Trust Deed is a binding obligation between debtor and Trustee and cannot be revoked.

### Dealing with Heritable Property & other Assets

35. The Trustee should obtain evidence of the ownership of any heritable property. If the debtor advises that he 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 obtained e.g. production of a rent book or written confirmation from the landlord.

36. If the debtor owns any heritable property, in whole or in part, the Trustee should obtain a professional valuation.

37. The Trustee's attention is drawn to the provisions in the Accountant in Bankruptcy's guidance notes relating to heritable property.

38. A Trustee should try to reach agreement, as soon as possible, as to how the equity in heritable property will be realised. In realising the equity the Trustee should aim to achieve the best return to creditors in the circumstances of the case. The Trustee should record on the case file the reasons for his decisions in relation to the heritable property.

39. The Trustee should consider seeking legal advice when dealing with an unequal split of a jointly owned heritable property.

40. If the Trustee disposes of or abandons his interest in heritable property, and a formal disposition or other conveyance has not been executed, he should issue a letter to the debtor stating the position and confirming that the property has been abandoned to the debtor.

## Contributions

41. The insolvency practitioner should verify the debtor's income and major outlays, and agree in writing with the debtor the amount and frequency of any income contributions.

## Third Party Payments

42. Where any third party payments are to be paid the insolvency practitioner should try to enter into an enforceable written agreement with the third party for payment. The Trustee should recommend that the third party obtains independent legal advice.

43. The Trustee should advise the creditors that all or part of the payments are to be paid by a third party. He should advise whether an enforceable agreement has been entered into with the third party. He should also advise that if there is no enforceable agreement and the third party fails to make payment, the third party cannot be forced to pay.

## Trading

44. If the debtor owns or has an interest in 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.

45. Where the Trustee decides to continue trading the debtor's business, 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

actions are in the best interests of creditors. The Trustee will be responsible for any ongoing trading of the debtor's business, and must introduce appropriate controls. The Trustee should be aware that he may be personally liable for loss incurred where he continues trading after the Trust Deed has been signed and as a result the value of the estate is diminished.

### Meeting of creditors

46. There is no statutory requirement to call a meeting of creditors. If however the Trustee considers that it is in the interests of creditors such a meeting can be called.

47. The Trustee should record in the Sederunt Book all requests by creditors to hold a creditors' meeting. If the Trustee considers a meeting would be in the interest of 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 his decision.

### Accounting, reporting and remuneration

48. The Trust Deed should set out the basis on which the Trustee will be remunerated.

49. Where the Trustee's fee is not fixed as per section 183 of the Act the Trustee should set out the basis and procedure for approval of remuneration and outlays and the rights of creditors to appeal.

50. Where the Trustee's fees have not been fixed the Trustee should advise creditors of their right to have the accounts audited and fees fixed by the Accountant in Bankruptcy. The Trustee should delay payment of his fee until 14 days after the issue of the report to creditors.

51. Where there is a fixed fee (including a percentage of contributions and/or realisations) approval of the Trust Deed is deemed to be approval of the fees. In fixed fee cases fees should not be taken until 14 days have elapsed since the issue of the relevant circular and in any event not before the expiry of the 5 week period for objections to the Trust Deed becoming protected. In all other cases the Trustee is reminded that the notification to

creditors of the Trustee's estimated fee as referred to in paragraph 13(c) 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 paid.

52. Where creditors were informed that the debtor had undertaken to pay regular contributions from income and payments equivalent to three consecutive months' contributions have not been received, without a formal payment break being agreed, the creditors must be informed of this in the next annual report. The creditors should be advised of the reasons for non-payment, what action the Trustee has taken in respect of the missed contributions and the impact on the expected final return to creditors.

53. Copies of all written communications to creditors must be sent to the debtor.

54. At the conclusion of a Trust Deed which is not protected a final statement of intromissions must be sent to creditors and the debtor.

55. The acceptance of commissions from a third party by a Trustee during a Trust Deed represents a significant threat to objectivity. Such commissions should only be accepted for the benefit of the Trust Deed estate and not for the benefit of the insolvency practitioner, his firm or any associate of either (as defined in section 229 of the Act or section 435 of the Insolvency Act 1986). Such payments should be reflected in the case accounts.

## Trust deeds for entities

56. In addition to Trust Deeds for individuals, insolvency practitioners should be aware that partnerships, trusts and corporate and unincorporated bodies may enter into Trust Deeds.

Partnership Trust Deeds

57. 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 an individual.

## 2.5 SIP 3.3 (SCOTLAND)

58. The Trust Deed is entered into by the partnership and requires the consent of all the existing partners for the Trust Deed to be granted. As such, the estate conveyed to the Trustee is that of the partnership, not the estate of the partners as individual debtors, and does not extend to the partners' personal assets. Similarly, only the partnership's liabilities are included.

59. The granting of a partnership Trust Deed allows a Trustee to take swift control of the partnership's assets and provides the opportunity to preserve the business and perhaps achieve a going-concern solution.

60. It is open, in appropriate circumstances, for some or all of the partners of the partnership to sign individual Trust Deeds. If the insolvency practitioner considers that there is a possible conflict of interest, the insolvency practitioner should consider whether it is appropriate to accept appointment to all or any of the individual partners.

### Ending of the trust deed

Protected Trust Deed achieving its purpose

61. Where the Trust Deed contains provisions on bringing the Trust Deed to a close these should be followed in so far as they do not conflict with statutory provisions.

Protected Trust Deed not achieving its purpose

62. If the Trustee considers 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.

Trust Deed failing to become protected

63. If the Trust Deed has failed to become protected, the Trustee should immediately inform the debtor in writing and advise the debtor of his options. The Trustee should also notify creditors of the position.

64. If the debtor's estate is subsequently sequestrated, the Trustee should conclude the Trust Deed and seek his discharge from creditors. If he is appointed Trustee in the subsequent sequestration he should take steps to ensure that the Trust is terminated (see 66 and 67).

65. 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.

Ending of the Trust, and subsequent sequestration

66. The granting of a Trust Deed creates a Trust. The Trustee should ensure that all assets are distributed in terms of the Trust Deed. It is generally accepted where there is a subsequent procedure such as sequestration that the Trust Deed is suspended and may revive on completion of the other procedure. The Trustee should therefore ensure that the style of Trust Deed used contains provisions for termination of the Trust in appropriate circumstances and he should adhere to those provisions.

67. In view of the possibility of the Trust reviving after the sequestration process has been completed the Trustee must have processes in place to deal with such an eventuality.

Trust Deed not completed but no further process.

68. If the Trustee concludes that the terms of the Trust Deed will not be met

    (a) he should seek his own discharge and bring the Trust Deed to a conclusion;

    (b) in the case of an unprotected Trust Deed the Trustee should also consider whether to discharge the debtor.

Trust Deed contains provisions on termination

69. It is generally accepted that where the Trust Deed contains provisions on termination, such provisions if complied with will be effective in terminating the Trust Deed. Trustees should ensure that the style of Trust Deed used contains provisions for ending the Trust on sequestration and on final distribution.

**Effective Date: 01 July 2014**

(updated on 30 November 2016 to include references to Bankruptcy (Scotland) Act 2016)

## 2.6 STATEMENT OF INSOLVENCY PRACTICE 6 DEEMED CONSENT AND DECISION PROCEDURES IN INSOLVENCY PROCEEDINGS

### INTRODUCTION

1. Insolvency practitioners play a key role in ensuring that persons entitled to participate in the making of decisions are able to make informed decisions and that their participation is properly facilitated. Stakeholder involvement in the making of decisions is essential to the maintenance of trust and confidence in insolvency proceedings.

2. This Statement of Insolvency Practice applies to the use of deemed consent and qualifying decision procedures conducted under the Insolvency Act 1986 (as amended) and applies in England and Wales with effect from 1 January 2018 and in Scotland with effect from 6 April 2019.

### PRINCIPLES

3. An insolvency practitioner should facilitate participation in deemed consent and decision procedures by those stakeholders with an entitlement to participate.

4. An insolvency practitioner should take reasonable steps to ensure that those entitled to participate in deemed consent and decision procedures are treated fairly and able to participate on an informed basis.

5. Requests for additional information should be viewed upon their individual merits and treated by an insolvency practitioner in a fair and reasonable way. The provision of additional information should be proportionate to the circumstances of the case.

6. The formal record of a deemed consent or decision procedure should be an accurate and contemporaneous record, sufficient to explain the business conducted and the basis upon which any discretion was exercised.

## KEY COMPLIANCE STANDARDS

### PROVISIONS OF GENERAL APPLICATION

7. Information supplied in connection with a deemed consent or decision procedure should be presented in a manner which is transparent, consistent and useful to prospective participants, whilst being proportionate to the circumstances of the case.

8. An insolvency practitioner should have procedures in place to ensure that any deemed consent or decision procedure used is subject to sufficient and proportionate safeguards against participation by persons who are not properly entitled to participate.

9. When determining the authenticity of a prospective participant's authority to participate in a decision procedure, the insolvency practitioner should exercise their reasonable professional judgement to facilitate the participation of those who appear to be properly entitled.

### PROVISIONS OF SPECIFIC APPLICATION – CVL

10. Where an insolvency practitioner is assisting in the obtaining of deemed consent or the convening of a decision procedure, the insolvency practitioner should take reasonable steps to ensure that:

    a) the convener is made fully aware of their duties and responsibilities;

    b) that the instructions to the insolvency practitioner to assist are adequately recorded;

    c) the convener and /or chair is informed that it may be appropriate for them to obtain independent assistance in determining the authenticity of a prospective participant's authority or entitlement to participate and the amount for which they are permitted to do so, in the event these are called into question.

11. An insolvency practitioner should disclose the extent of their (and that of their firm and/or associates) prior involvement with the company or its directors or shareholders, any threats identified to compliance with the fundamental principles of the Insolvency Code of Ethics, and the safeguards applied to mitigate those threats. This disclosure should be made with the notices convening the deemed consent or decision procedure.

## 2.6 SIP 6

12. An insolvency practitioner should seek to ensure that the information available in advance of a deemed consent or decision procedure for the purposes of appointing a liquidator facilitates the making of an informed decision by those that are entitled to participate. Key information likely to be of interest to prospective participants (in addition to that required by statute), will commonly be:

    a) the date of the instructions to the insolvency practitioner to assist in the deemed consent or decision procedure and by whom those instructions were given;

    b) disclosure of any amounts paid by or on behalf of the company in respect of those instructions and to whom they were paid;

    c) a summary of the company's relevant trading activity and financial history, which would typically include (but may not be limited to):

        i) an explanation of the causes of the company's failure;

        ii) the name(s) and company number(s) of parent, subsidiary and associated companies;

        iii) extracts from the company's recent accounts (whether or not filed);

        iv) an explanation of any material transactions conducted in the preceding 12 months, other than in the ordinary course of business.

    d) By way of explanation of a statement of the company's affairs:

        i) a deficiency account reconciling the position shown by the most recent balance sheet to the deficiency in the statement of affairs;

        ii) the names and professional qualifications of any valuers whose valuations have been relied upon for the purpose of the statement of affairs and a summary of the basis of valuation adopted.

    Any information should ordinarily be available, on request, not later than the business day prior to the decision date and may be made available via a website.

13. An insolvency practitioner should not accept instructions to assist in a procedure for the purpose of winding up a company unless that practitioner reasonably believes that a liquidator will be appointed.

**Effective Date:** **01 January 2018 (England & Wales)**
**06 April 2019 (Scotland)**

## 2.7 STATEMENT OF INSOLVENCY PRACTICE 7 PRESENTATION OF FINANCIAL INFORMATION IN INSOLVENCY PROCEEDINGS

### INTRODUCTION

1. An office holder is required to report regularly to creditors and other interested parties[1].

2. The particular nature of an insolvency office holder's position renders transparency and fairness of primary importance in all their dealings.

3. The term associate is defined in insolvency legislation. For the purposes of this statement of insolvency practice, office holders should, in addition to the definition in the insolvency legislation, consider the substance or likely perception of any association between the insolvency practitioner, their firm, or an individual within the insolvency practitioner's firm and the recipient of a payment. Where a reasonable and informed third party might consider there would be an association, payments should be treated as if they are being made to an associate, notwithstanding the nature of the association may not meet the definition in the legislation.

### PRINCIPLES

4. Reports should be relevant to the interests of the creditors and other interested parties, be clear and informative, be consistent across periods and be sufficient to enable creditors and other interested parties to understand the nature and amounts of the receipts and payments. The office holder should consider what the creditors and other interested parties might reasonably regard as appropriate or significant in the circumstances of each insolvency appointment, whilst being proportionate to the insolvency appointment.

5. Payments made by an office holder should be fair and reasonable and proportionate to the insolvency appointment, and if significant in the context of the insolvency appointment, the office holder should report and explain why the expenditure was incurred.

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[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 a creditors' committee, the members (shareholders) of a company, or in personal insolvency, the debtor

6. 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.

## KEY COMPLIANCE STANDARDS

### Form and general presentation of accounts

7. 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.

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

9. Receipts and payments accounts should show categories of items under headings appropriate for the insolvency appointment, where practicable following headings used in prior statements of affairs or estimated outcome statements. An analysis should be provided to enable comparison with the "estimated to realise" figures in any previously issued document.

10. Certain statutory documents require a "statement of expenses incurred" in the period and should adopt, as far as possible, the principles of this statement but need only provide information for the period under review.

### Statement of funds held

11. Accounts should be reconciled to the balances at bank, the case records and to any amounts due to the office holder.

12. 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.

## 2.7 SIP 7

13. 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 than sterling;

    (b) the impact of currency holdings on the estate; and

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

### Value added tax (VAT)

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

### Payments to Insolvency office holders and their associates

15. 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 in respect of the supervision of trading;

    (c) all other amounts required to be approved in the same manner as remuneration;

    (d) amounts paid to the office holder from the estate in respect of pre-appointment costs;

    (e) any amounts paid to the office holder or their associates or firm other than out of the estate, giving the amounts paid, the name of payor, their relationship to the insolvent estate and the nature of the payment; and

    (f) amounts paid to sub-contractors for work that would otherwise have to be carried out by the office holder or their staff.

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

## Requests for additional information

17. 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 appointment.

18. Creditors and other interested parties may have the statutory right to seek further information about payments made by the office holder. Creditors and other interested parties may also have the right to apply to the court if they consider these costs to be excessive in all the circumstances.

19. 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.

20. When an office holder's appointment is followed by the appointment of another insolvency practitioner, whether or not in the same proceedings, the prior office holder should provide the successor with information in accordance with the principles and standards contained in this statement. This is in addition to any statutory obligations imposed on an office holder to provide information.

## Other presentational matters

### Receipts

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

22. 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.

23. When assets subject to charges are sold by or on the instructions of the chargeholder (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.

## 2.7 SIP 7

**Payments**

24. 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.

**Trading under office holder's control**

25. A separate trading receipts and payments account should be provided to the creditors and other interested parties to enable an appropriate understanding of what was done, why it was done and how much it cost, 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; and

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

**Alternative approaches to asset realisation**

26. From time to time the office holder may adopt an alternative method of asset realisation. Whatever alternative method is adopted, the requirements of this statement still apply; creditors and other interested parties should be provided with sufficient information to enable an appropriate understanding of what was done, why it was done and how much it cost. For example, 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.

27. A trading account for a hive-down company should be prepared adopting the same principles as set out above, as should trading accounts for other alternative approaches.

**Third party funds**

28. 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 disclosed, together with any agreed fee charged to the person entitled to the monies.

**Effective Date: 01 April 2021**

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

**This SIP is withdrawn for most insolvencies with effect from 6 April 2019 but remains in place for Scottish Limited Liability Partnership (LLP) insolvencies and special insolvency regimes which are not covered by the introduction of 2018 Rules and remain under the Insolvency (Scotland) Rules 1986 and other secondary legislation.**

## 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.

## 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.

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;

(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 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.

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.

(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.

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.

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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 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 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 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 details 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: 01 February 2002**

# 2.9 STATEMENT OF INSOLVENCY PRACTICE 8 (NI) SUMMONING AND HOLDING MEETINGS OF CREDITORS CONVENED PURSUANT TO ARTICLE 84 OF THE INSOLVENCY (NORTHERN IRELAND) ORDER 1989

## Introduction

1. This statement of insolvency practice is one of a series issued by the Council of the Society with a view to harmonising the approach of members to questions of insolvency practice. It should be read in conjunction with the Explanatory Foreword to the Statements of Insolvency Practice and Insolvency Technical Reminders issued in June 1996.

2. The statement has been prepared for the sole use of members in connection with liquidations of companies registered in Northern Ireland. Members are reminded that SPI Statements of Insolvency Practice are for the purposes of guidance only and may not be relied upon as definitive statements. No liability attaches to the Council or anyone involved in the preparation or publication of Statements of Insolvency Practice.

3. This statement concentrates on creditors' meetings held under Article 84 of The Insolvency (Northern Ireland) Order 1989 (The Order), 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.

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

## Instructions to convene meeting

5. 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.

6. If the advising member receives instructions which would require him to act in a matter 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.

7. 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.

8. 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.

9. 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. If, having accepted instructions, the advising member concludes that although a winding up is desirable, a voluntary winding up is inappropriate, he should advise the directors and shareholders that steps leading to a compulsory winding up should be taken. Such a situation could arise where a liquidator is unlikely to be appointed under the voluntary winding up, or where there is a strong case in favour of the liquidation commencing before a meeting of shareholders can be held.

10. Where any person is entitled to appoint an administrative receiver for the company the member should normally advise the company to inform the debenture holder, prior to the notices being despatched, that a meeting under Article 84 is being convened.

### Venue and time of meeting

11. 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, provided that the requirements of Rule 4.067(1) are satisfied. He may charge the company for the use of the room if he wishes.

12. The date and time of the meeting should 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.

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

### Notice of the meeting

14. The notice convening the meeting should, where possible, be sent simultaneously to all classes of known creditors (including employees). 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, lessors and former lessors and public utilities.

15. Although the legal requirement is to give a minimum of seven days' notice of the meeting, 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.

16. The notice advertised in the Belfast Gazette and local newspapers should appear as soon as possible and should not be deferred until shortly before the meeting. The advertised notice should meet the requirements of Article 84(2) of The Order.

17. Copies of the notice convening the shareholders' meeting should not be circulated to creditors. However a copy of the notice of the shareholders' meeting should be sent to the Enforcement of Judgments Office in order to meet the provisions of Article 88(2) of The Judgments Enforcement (Northern Ireland) Order 1981. In addition, notice of the creditors' meeting should be sent where practicable to solicitors or debt collection agencies acting for creditors.

18. When dealing with the issue of notices of the meeting, members should have regard to the provisions of Statement of Insolvency Practice 9 (NI) by ensuring that creditors are notified of the possibility that resolutions may be passed at the meeting to determine the amount of fees payable from the company's assets and, where relevant, by providing creditors with explanatory notes setting out the manner in which the remuneration of liquidators is fixed.

19. Article 84 of The Order 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.

## Provision of information prior to creditors' meeting

20. Where the directors have decided to arrange for an authorised insolvency practitioner to provide information to creditors under Article 84(2)(a) of The Order, 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. 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 he considers that:

- it is unreasonable to expect him to be in a position to supply such information within the time remaining before the meeting; or
- the information requested should remain confidential on the grounds that its release would be prejudicial to the company or its creditors.

21. If the directors have decided to make a list of creditors available for inspection under Article 84(2)(b) of The Order, the advising member should take steps to ensure that:
    - the list provides details of the names and addresses of all known creditors but not necessarily the amounts due to them;
    - the names are arranged in alphabetical order;
    - it is available at least between the hours of 10 a.m. and 4 p.m. on the two business days before the meeting;
    - sufficient copies are available for inspection to avoid undue delays to creditors' representatives; and
    - the place where the list is to be made available is, in all the circumstances, reasonably convenient for creditors.

### Proxies and other representation

22. 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.

23. Proxies to be used at the meeting are valid only if they are lodged by the time stated in the notice convening the meeting to the place specified in the notice.

24. 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:

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

25. 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.

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

27. A person may be authorised to represent a creditor which is a body corporate under Article 383 of The Companies (Northern Ireland) Order 1986. Where a person is so authorised he must produce to the Chairman a copy of the resolution from which he derives his authority. The copy must be under the seal of the corporation or certified by the secretary or a director of the corporation to be a true copy. Where 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 without the need for the submission of a proxy.

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### Proofs of debt

28. Creditors may submit proofs at any time before voting, even during the course of the meeting itself. The admission or rejection of proofs for voting purposes is the responsibility of the chairman of the meeting. A proof should be accepted as valid for voting purposes, provided it identifies both the creditor and the amount claimed by him with sufficient clarity. The amount for which the chairman should be advised to admit the proof for voting purposes should normally be the lower of:

    - the amount stated in the proof; and
    - 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.

    The amount for which the proof is admitted for voting purposes should be set out in writing and signed by the chairman. In most instances it is expected that the chairman will do this prior to the meeting.

### Availability of proxies and proofs for inspection

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

### Attendance at the creditors' meeting

30. A liquidator appointed by the shareholders before the creditors' meeting takes place and whose appointment has been certified by the chairman of the shareholders' meeting before the creditors' meeting, is required to attend the meeting of creditors personally. He must report to the meeting on any exercise of his powers under Articles 98, 140 or 141 of The Order. Such attendance is required even if the shareholders' appointment was made only shortly before the creditors' meeting. He must also attend any adjourned meeting.

31. 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 the relevant notice to attend be served.

32. 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.

33. 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.

## Information to be provided to the meeting

34. 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.

35. Information to be given to the meeting should include:
    - details of any prior involvement with the company or its directors by the advising member or, if a different person, the proposed liquidator;
    - 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 therefor 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:
    - the date and time to which the meeting had been adjourned; and

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- the fact that any resolutions passed at the Article 84 meeting will come into effect if and when the winding-up resolution is passed;
- 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;
- the details of the costs paid by the company or on its behalf in connection with:
- the preparation of the statement of affairs;
- the arrangements for the creditors' meeting; and
- advice to the company or its directors in the period from the time the advising members was first consulted by or on behalf of the company or its directors;
- the details for each category should include the name of the recipient, the amount, the source of the payment; and, in the case of (iii), the nature of the advice given.
- If no payments have been made in respect of these costs prior to the meeting, the estimated amount of the costs should be stated. If any of the costs have been or are proposed to be paid to someone other than the advising member, the nature of the relationship of the company or its directors to that person (e.g. auditor, solicitor, financial adviser) should be stated.
- a report on the company's relevant trading history which should include:
- date of incorporation and registered number;
- 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;
- names of major shareholders together with the details of their shareholdings;
- details of all classes of shares issued;
- nature of the business conducted by the company;
- location of the business and the address of the registered office;
- details of parent, subsidiary, or associated companies;
- the directors' reasons for the failure of the company;

- extracts from any statutory 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;
- a deficiency account reconciling the position shown by the most recent balance sheet to the deficiency in the statement of affairs;
- 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;
- such other information as the advising member considers necessary to give the creditors a proper appreciation of the company's affairs;
- if the company is in receivership, 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 the debenture holder, 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 an administrative receiver of a company whose shareholders pass a resolution for voluntary winding up, that member should assist the advising member by providing this information;
- an explanation of the contents of the statement of affairs.

36. 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 or any other associate of him or them (as defined in Article 4 of The Order) 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

There should 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.

37. 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 financial information which is contained in a report given orally to the meeting.

38. 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.

**Conduct of the Meeting**

39. 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.

40. 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.

41. 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 be construed as slanderous 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.

42. 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.

43. 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 to act as an insolvency practitioner in relation to the company.

44. 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 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.

45. 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 the rejection.

46. An absolute majority is required and if the first poll is not conclusive, the nominee receiving the least 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 votes remains in the next poll. The same procedure should be followed in all successive polls.

47. The meeting should always be invited to establish a liquidation committee. If it wishes to do so, the meeting should be advised of any shareholders' nominations to the committee and of the voting procedure which will be followed. It is accepted that, 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 or that of the creditor he represents. The provision of voting papers is the responsibility of the advising member.

48. When declaring the result the chairman should follow the same procedures as those outlined in paragraph 46 above.

49. 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.

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

## Provision of Information to Liquidator

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

## Report to Creditors Following the Meeting

52. The liquidator shall send to creditors and contributories a report of the proceedings at the meeting, together with a copy or summary of the statement of affairs. If a list of creditors is not supplied, the liquidator should undertake to supply or make available a copy to any creditor on request. 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.

## Solicitation to obtain nomination

53. Members are reminded of the provisions of Article 139 of The Order (corrupt inducement), Rule 4.158 of The Insolvency Rules (Northern Ireland) 1991 (solicitation) and their professional body's most recent guide to professional ethics.

**Issued: August 1997**

## 2.10 STATEMENT OF INSOLVENCY PRACTICE 9 (E&W) PAYMENTS TO INSOLVENCY OFFICE HOLDERS AND THEIR ASSOCIATES FROM AN ESTATE

### INTRODUCTION

1. The particular nature of an insolvency office holder's position renders transparency and fairness of primary importance in all their dealings. Creditors and other interested parties[1] with a financial interest in the level of payments from an estate should be confident that the rules relating to the approval and disclosure of payments to insolvency office holders and their associates have been properly complied with.

2. The term associate is defined in the insolvency legislation. For the purposes of this statement of insolvency practice, office holders should, in addition to the definition in the insolvency legislation, consider the substance or likely perception of any association between the insolvency practitioner, their firm, or an individual within the insolvency practitioner's firm and the recipient of a payment. Where a reasonable and informed third party might consider there would be an association, payments should be treated as if they are being made to an associate, notwithstanding the nature of the association may not meet the definition in the legislation.

3. This statement applies to all forms of insolvency proceedings under the Insolvency Act 1986, except for the following:

   (a) Moratoriums under Part A1

   (b) Members' voluntary liquidation unless those paying the fees require such disclosures

4. Nothing within this statement obligates an office holder to provide a fees estimate where one is not required by statute.

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

## PRINCIPLES

5. All payments from an estate should be fair and reasonable and proportionate to the insolvency appointment.

6. Payments to an office holder from an estate should be fair and reasonable reflections of the work necessarily and properly undertaken in an insolvency appointment.

7. Payments to the associates of an office holder from an estate should be fair and reasonable reflections of the work necessarily and properly undertaken in an insolvency appointment.

8. All payments should be directly attributable to the estate from which they are being made or sought.

9. Payments that could reasonably be perceived as presenting a threat to the office holder's objectivity or independence by virtue of a professional or personal relationship, including to an associate, should not be made from the estate unless disclosed and approved in the same manner as an office holder's remuneration or category 2 expenses.

10. Payments should not be approved by any party with whom the office holder has a professional or personal relationship which gives rise to a conflict of interest.

11. Those responsible for approving payments from an estate to an office holder or their associates should be provided with sufficient information to enable them to make an informed judgement about the reasonableness of the office holder's requests.

12. Disclosures by an office holder should be of assistance to creditors and other interested parties in understanding what was done, why it was done, and how much it cost.

13. Information provided by an office holder should be presented in a manner which is transparent, consistent throughout the life of the appointment and useful to creditors and other interested parties1, whilst being proportionate to the circumstances of the appointment.

## KEY COMPLIANCE STANDARDS

## PROVISIONS OF GENERAL APPLICATION

14. An office holder should disclose:

## 2.10 SIP 9 (E&W)

(a) all payments, arising from an insolvency appointment to the office holder or their associates;

(b) the form and nature of any professional or personal relationships between the office holder and their associates.

15. An office holder should inform creditors and other interested parties of their rights under insolvency legislation. Creditors should be advised how they may access suitable information setting out their rights within the first communication with them and in each subsequent report. An insolvency practitioner is not precluded from providing information, including a fees estimate, within pre-appointment communications (such as when assisting directors in commencing an insolvency process).

16. Where an office holder sub-contracts work that could otherwise be carried out by the office holder or their staff, this should be drawn to the attention of creditors and other interested parties with an explanation of why it is being done, what is being done, and how much it will cost.

17. The key issues of concern to creditors and other interested parties will commonly be:

(a) the work the office holder anticipates will be done and why that work is necessary;

(b) the anticipated payment for that work;

(c) whether it is anticipated that the work will provide a financial benefit to creditors, and if so what anticipated benefit (or if the work provides no direct financial benefit, but is required by statute);

(d) the work actually done and why that work was necessary;

(e) the actual payment for the work, as against any estimate provided;

(f) whether the work has provided a financial benefit to creditors, and if so what benefit (or if the work provided no direct financial benefit, but was required by statute).

18. When providing information about payments from an estate the office holder should do so in a way which clearly explains the key issues. Narrative explanations should be provided to support any numerical information supplied. Such an approach allows creditors and other interested parties to better recognise the nature of an office holder's role and the work they intend to undertake, or have undertaken, in accordance with the key issues.

19. The following are not permissible as either remuneration or an expense:

    (a) an expense or any other charge calculated as a percentage of remuneration;

    (b) an administration fee or charge additional to an office holder's remuneration;

    (c) the recovery of any overheads other than those absorbed in the charge out rates.

## PROVISIONS OF SPECIFIC APPLICATION

### Basis of remuneration

20. The office holder should provide an indication of the likely return to creditors when seeking approval for the basis of their remuneration.

21. When approval for a set fee or a percentage basis is sought, the office holder should explain why the basis requested is expected to produce a fair and reasonable reflection of the work that the office holder anticipates will be undertaken. Where a set amount or a percentage basis is being used, an explanation should be provided of the direct costs included. The office holder should not seek to separately recover sums already included in a set amount or percentage basis fee and should be transparent in presenting any information.

22. Where remuneration is sought on more than one basis, it should be clearly stated to which part of the office holder's activities each basis relates.

23. When providing a fees estimate the office holder should supply that information in sufficient time for creditors (including when acting through a committee) to be able to make an informed judgement about the reasonableness of the office holder's requests. Fees estimates should be based on all of the information available to the office holder at the time that the estimate is provided.

## 2.10 SIP 9 (E&W)

24. When providing a fees estimate of time to be spent, creditors and other interested parties1 may find a blended rate[2] (or rates) and total hours anticipated to be spent on each part of the anticipated work more easily understandable and comparable than detail covering each grade or person working on the appointment. The estimate should also clearly describe what activities are anticipated to be conducted in respect of the estimated fee. When subsequently reporting to creditors, the actual hours and average rate (or rates) of the costs charged for each part should be provided for comparison purposes.

25. The information provided in the fees estimate may not be presented on the basis of alternative scenarios and/or provide a range of estimated charges. However for other payments that an office holder anticipates will, or are likely to be, made, it is acceptable to provide a range, or repeat a range quoted by a third party, for example legal costs in litigation in any expense estimates.

26. To provide creditors and other interested parties1 with sufficient information to make an informed judgement, office holders should divide the narrative explanations and any fees estimate provided, into areas such as:

    (a) administration (including statutory reporting)

    (b) realisation of assets

    (c) creditors (claims and distribution)

    (d) investigations

    (e) trading (where applicable)

    (f) appointment specific matters (where applicable).

27. These are examples of common activities and not an exhaustive list. Alternative or further sub- divisions may be appropriate, depending on the nature and complexity of the appointment and the bases of remuneration sought and/or approved. It is unlikely that the same divisions will be appropriate in all appointments and an office holder should consider what divisions are likely to be appropriate and proportionate in the circumstances of each appointment.

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[2] "A blended rate" is calculated as the prospective average cost per hour for the appointment (or category of work in the appointment), based upon the estimated time to be expended by each grade of staff at their specific charge out rate.

28. This statement does not mandate any particular fee basis. An insolvency practitioner's business model may influence the fee basis they choose. However, whatever the business model, the insolvency practitioner's commercial approach cannot override the principle that any work done for which payment is sought must be necessarily and properly undertaken in the context of an insolvency appointment.

## EXPENSES

29. Expenses are any payments from the estate which are neither an office holder's remuneration nor a distribution to a creditor or a member. Expenses also includes disbursements. Disbursements are payments which are first met by the office holder, and then reimbursed to the office holder from the estate.

30. Expenses are divided into those that do not need approval before they are charged to the estate (category 1) and those that do (category 2).
    - Category 1 expenses: These are payments to persons providing the service to which the expense relates who are not an associate of the office holder. Category 1 expenses can be paid without prior approval.
    - Category 2 expenses: These are payments to associates or which have an element of shared costs. Before being paid, category 2 expenses require approval in the same manner as an office holder's remuneration. Category 2 expenses require approval whether paid directly from the estate or as a disbursement.

31. When seeking approval of category 2 expenses, an office holder should explain for each expense the basis on which the expense is being charged to the estate.

32. Any shared or allocated payments incurred by the office holder or their firm are to be treated as category 2 expenses and approval sought before payment. This is irrespective of whether the payment is being made to an associate, because the office holder will be deciding how the expenses are being shared or allocated between insolvency appointments. Requiring approval of these payments enables those who are approving the expenses to confirm that the approach being taken by the office holder is reasonable.

## 2.10 SIP 9 (E&W)

33. If an office holder has obtained approval for the basis of category 2 expenses, that basis may continue to be used in a sequential appointment where further approval of the basis of remuneration is not required, or where the office holder is replaced.

### REPORTS TO CREDITORS AND OTHER INTERESTED PARTIES

34. Any disclosure by an office holder of payments should be of assistance to those who have a financial interest in the level of payments from an estate in understanding what was done, why it was done, and how much it costs.

35. Reports to creditors and other interested parties should include a narrative update in respect of the office holder's activity during the period being reported upon, using consistent divisions for each part of the work reported upon, as far as possible.

36. When reporting payments during a period, the office holder should use a consistent format throughout the appointment and provide figures for both the period being reported upon and on a cumulative basis.

37. An office holder should endeavour to use consistent divisions throughout the appointment. The use of additional categories or further division may become necessary where a task was not foreseen at the commencement of the appointment.

38. Requests for additional information about payments 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 appointment.

### PRE-APPOINTMENT COSTS

39. Where recovery of pre-appointment costs is expressly permitted by statute and approval is sought from creditors for payment from the estate of these costs, disclosure should follow the principles and standards contained in this statement.

### PROVISION OF INFORMATION

40. In order to facilitate information requests under statute or to support the reporting of the office holder's remuneration, time recording systems used by office holders should record time in units of not greater than six minutes for each grade of staff used.

41. Where realisations are sufficient for creditors to be paid in full with interest, the creditors will not have the principal financial interest in the level of payments from the estate. Once this has been established by the office holder, they should provide the beneficiaries of the anticipated surplus, on request, with information in accordance with the principles and standards contained in this statement.

42. When an office holder's appointment is followed by the appointment of another office holder, whether or not in the same proceedings, the prior office holder should provide the successor with information in accordance with the principles and standards contained in this statement. This is in addition to any statutory obligations imposed on an office holder to provide information.

**Effective Date: 01 April 2021**

# 2.11 STATEMENT OF INSOLVENCY PRACTICE 9 (SCOTLAND) PAYMENTS TO INSOLVENCY OFFICE HOLDERS AND THEIR ASSOCIATES

## Introduction

1. The particular nature of an insolvency office holder's position renders transparency and fairness of primary importance in all their dealings. Creditors and other interested parties[1] with a financial interest in the level of payments from an estate should be confident that the rules relating to the approval and disclosure of payments to insolvency office holders and their associates have been properly complied with.

2. The term associate is defined in the insolvency legislation. For the purposes of this statement of insolvency practice, office holders should, in addition to the definition in the insolvency legislation, consider the substance or likely perception of any association between the insolvency practitioner, their firm, or an individual within the insolvency practitioner's firm and the recipient of a payment. Where a reasonable and informed third party might consider there would be an association, payments should be treated as if they are being made to an associate, notwithstanding the nature of the association may not meet the definitions in legislation.

3. This statement applies to all forms of insolvency proceedings under the Insolvency Act 1986 and the Bankruptcy (Scotland) Act 2016, except for the following

   (a) Moratoriums under Part A1 of the Insolvency Act 1986

   (b) Members' voluntary liquidation unless those paying the fees require such disclosures.

## Principles

4. All payments from an estate should be fair and reasonable and proportionate to the insolvency appointment.

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

5. Payments to an office holder from an estate should be fair and reasonable reflections of the work necessarily and properly undertaken in an insolvency appointment.

6. Payments to the associates of an office holder from an estate should be fair and reasonable reflections of the work necessarily and properly undertaken in an insolvency appointment.

7. All payments should be directly attributable to the estate from which they are being made or sought.

8. Payments that could reasonably be perceived as presenting a threat to the office holder's objectivity or independence by virtue of a professional or personal relationship, including to an associate, should not be made from the estate unless disclosed and approved in the same manner as an office holder's remuneration or category 2 expenses.

9. Payments should not be approved by any party with whom the office holder has a professional or personal relationship which gives rise to a conflict of interest.

10. Those responsible for approving payments from an estate to an office holder or their associates should be provided with sufficient information to enable them to make an informed judgement about the reasonableness of the office holder's requests.

11. Disclosures by an office holder should be of assistance to creditors and other interested parties in understanding what was done, why it was done, and how much it cost.

12. Information provided by an office holder should be presented in a manner that is transparent, consistent throughout the life of the appointment and useful to creditors and other interested parties, whilst being proportionate to the circumstances of the appointment.

## Key Compliance Standards

## Provisions of General Application

13. An office holder should disclose:

    (a) all payments, arising from an insolvency appointment to the office holder or their associates; and

## 2.11 SIP 9 (SCOTLAND)

(b) the form and nature of any professional or personal relationships between the office holder and their associates.

14. An office holder should inform creditors and other interested parties of their rights under insolvency legislation. Creditors should be advised how they may access suitable information setting out their rights within the first communication with them and in each subsequent report. An insolvency practitioner is not precluded from providing information within pre-appointment communications (such as when assisting directors in commencing an insolvency process).

15. Where an office holder sub-contracts work that could otherwise be carried out by the office holder or their staff, this should be drawn to the attention of creditors and other interested parties with an explanation of why it is being done, what is being done, and how much it will cost.

16. The key issues of concern to creditors and other interested parties will commonly be:

(a) the work the office holder anticipates will be done and why that work is necessary;

(b) the anticipated payment for that work;

(c) whether it is anticipated that the work will provide a financial benefit to creditors, and if so what anticipated benefit (or if the work provides no direct financial benefit, but is required by statute);

(d) the work actually done and why that work was necessary;

(e) the actual payment for the work;

(f) whether the work has provided a financial benefit to creditors, and if so what benefit (or if the work provided no direct financial benefit, but was required by statute).

17. When providing information about payments from an estate the office holder should do so in a way which clearly explains the key issues. Narrative explanations should be provided to support any numerical information supplied. Such an approach allows creditors and other interested parties to better recognise the nature of an office holder's role and the work they intend to undertake, or have undertaken, in accordance with the key issues.

18. The following are not permissible as either remuneration or an expense:

    (a) an expense or any other charge calculated as a percentage of remuneration;

    (b) an administration fee or charge additional to an office holder's remuneration;

    (c) the recovery of any overheads other than those absorbed in the charge out rates.

## Provisions of specific application

### Basis of remuneration

19. The office holder should provide an indication of the likely return to creditors when seeking approval for the basis of their remuneration.

20. When approval for a set fee or a percentage basis is sought, the office holder should explain why the basis requested is expected to produce a fair and reasonable reflection of the work that the office holder anticipates will be undertaken. Where a set amount or a percentage basis is being used, an explanation should be provided of the direct costs included. The office holder should not seek to separately recover sums already included in a set amount or percentage basis fee and should be transparent in presenting any information.

21. When approval for remuneration is sought on a time costs basis, an office holder should provide details of the minimum time units used and current charge-out rates, split by grades of staff, of those people who have been or that the office holder anticipates are likely to be involved in the time costs aspects of the case.

22. Where remuneration is sought on more than one basis, it should be clearly stated to which part of the office holder's activities each basis relates.

23. To provide creditors and other interested parties with sufficient information to make an informed judgement, office holders should divide the narrative explanations into areas such as:

    (a) administration (including statutory reporting)

    (b) realisation of assets

## 2.11 SIP 9 (SCOTLAND)

(c) creditors (claims and distribution)

(d) investigations

(e) trading (where applicable)

(f) appointment specific matters (where applicable).

24. These are examples of common activities and not an exhaustive list. Alternative or further sub-divisions may be appropriate, depending on the nature and complexity of the appointment and the bases of remuneration sought and/or approved. It is unlikely that the same divisions will be appropriate in all appointments and an office holder should consider what divisions are likely to be appropriate and proportionate in the circumstances of each appointment.

25. This statement does not mandate any particular fee basis. An insolvency practitioner's business model may influence the fee basis they choose. However, whatever the business model, the insolvency practitioner's commercial approach cannot override the principle that any work done for which payment is sought must be necessarily and properly undertaken in the context of an insolvency appointment.

**Expenses**

26. Expenses are any payments from the estate which are neither an office holder's remuneration nor a distribution to a creditor or a member. Expenses also includes disbursements. Disbursements are payments which are first met by the office holder, and then reimbursed to the office holder from the estate.

27. Expenses are divided into those that do not need advance approval before they are charged (category 1) and those that do (category 2).

- Category 1 expenses: These are payments to persons providing the service to which the expense relates who are not an associate of the office holder. Category 1 expenses can be paid without prior approval.
- Category 2 expenses: These are payments to associates or which have an element of shared costs. Before being paid, category 2 expenses require approval in the same manner as an office holder's remuneration. Category 2 expenses require approval whether paid directly from the estate or as a disbursement.

28. When seeking approval of category 2 expenses, an office holder should explain for each expense the basis on which the expense is being charged to the estate.

29. Any shared or allocated payments incurred by the office holder or their firm are to be treated as category 2 expenses and approval sought before payment. This is irrespective of whether the payment is being made to an associate, because the office holder will be deciding how the expenses are being shared or allocated between insolvency appointments. Requiring approval of these payments enables those who are approving the expenses to confirm that the approach being taken by the office holder is reasonable.

30. If an office holder has obtained approval for the basis of category 2 expenses, that basis may continue to be used in a sequential appointment where further approval of the basis of remuneration is not required, or where the office holder is replaced.

## Reports to creditors and other interested parties

31. Any disclosure by an office holder of payments should be of assistance to those who have a financial interest in the level of payments from an estate in understanding what was done, why it was done, and how much it costs.

32. Reports to creditors and other interested parties should include a narrative update in respect of the office holder's activity during the period being reported upon, using consistent divisions for each part of the work reported upon, as far as possible.

33. When reporting payments during a period, the office holder should use a consistent format throughout the appointment and provide figures for both the period being reported upon and on a cumulative basis.

34. An office holder should endeavour to use consistent divisions throughout the appointment. The use of additional categories or further division may become necessary where a task was not foreseen at the commencement of the appointment.

35. Requests for additional information about payments 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 appointment.

## 2.11 SIP 9 (SCOTLAND)

### Pre-appointment costs

36. Where recovery of pre-appointment costs is expressly permitted by statute and approval is sought from creditors for payment from the estate of these costs, disclosure should follow the principles and standards contained in this statement.

### Provision of information

37. In order to facilitate information requests under statute or to support the reporting of the office holder's remuneration, time recording systems used by office holders should record time in units of not greater than six minutes for each grade of staff used.

38. Where realisations are sufficient for creditors to be paid in full with interest, the creditors will not have the principal financial interest in the level of payments from the estate. Once this has been established by the office holder, they should provide the beneficiaries of the anticipated surplus, on request, with information in accordance with the principles and standards contained in this statement.

39. When an office holder's appointment is followed by the appointment of another office holder, whether or not in the same proceedings, the prior office holder should provide the successor with information in accordance with the principles and standards contained in this statement. This is in addition to any statutory obligations imposed on an office holder to provide information.

**Effective Date: 01 April 2021**

# 2.12 STATEMENT OF INSOLVENCY PRACTICE 9 (NI) PAYMENTS TO INSOLVENCY OFFICE HOLDERS AND THEIR ASSOCIATES FROM AN ESTATE

## Introduction

1. The particular nature of an insolvency office holder's position renders transparency and fairness of primary importance in all their dealings. Creditors and other interested parties[1] with a financial interest in the level of payments from an estate should be confident that the rules relating to the approval and disclosure of payments to insolvency office holders and their associates have been properly complied with.

2. The term associate is defined in the insolvency legislation. For the purposes of this statement of insolvency practice, office holders should, in addition to the definition in the insolvency legislation, consider the substance or likely perception of any association between the insolvency practitioner, their firm, or an individual within the insolvency practitioner's firm and the recipient of a payment. Where a reasonable and informed third party might consider there would be an association, payments should be treated as if they are being made to an associate, notwithstanding the nature of the association may not meet the definition in the legislation.

3. This statement applies to all forms of insolvency proceedings under the Insolvency (Northern Ireland) Order 1989 except for the following:

   Moratoriums under Part A1

   Members' voluntary liquidation unless those paying the fees require such disclosures.

## Principles

4. All payments from an estate should be fair and reasonable and proportionate to the insolvency appointment.

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

## 2.12 SIP 9 (NI)

5. Payments to an office holder from an estate should be fair and reasonable reflections of the work necessarily and properly undertaken in an insolvency appointment.

6. Payments to the associates of an office holder from an estate should be fair and reasonable reflections of the work necessarily and properly undertaken in an insolvency appointment.

7. All payments should be directly attributable to the estate from which they are being made or sought.

8. Payments that could reasonably be perceived as presenting a threat to the office holder's objectivity or independence by virtue of a professional or personal relationship, including to an associate, should not be made from the estate unless disclosed and approved in the same manner as an office holder's remuneration or category 2 expenses.

9. Payments should not be approved by any party with whom the office holder has a professional or personal relationship which gives rise to a conflict of interest.

10. Those responsible for approving payments from an estate to an office holder or their associates should be provided with sufficient information to enable them to make an informed judgement about the reasonableness of the office holder's requests.

11. Disclosures by an office holder should be of assistance to creditors and other interested parties in understanding what was done, why it was done, and how much it cost.

12. Information provided by an office holder should be presented in a manner which is transparent, consistent throughout the life of the appointment and useful to creditors and other interested parties, whilst being proportionate to the circumstances of the appointment.

## KEY COMPLIANCE STANDARDS

### Venue and time of meeting

13. An office holder should disclose:

    all payments, arising from an insolvency appointment to the office holder or their associates; and

    the form and nature of any professional or personal relationships between the office holder and their associates.

14. An office holder should inform creditors and other interested parties of their rights under insolvency legislation. Creditors should be advised how they may access suitable information setting out their rights within the first communication with them and in each subsequent report. An insolvency practitioner is not precluded from providing information within pre-appointment communications (such as when assisting directors in commencing an insolvency process).

15. Where an office holder sub-contracts work that could otherwise be carried out by the office holder or their staff, this should be drawn to the attention of creditors and other interested parties with an explanation of why it is being done, what is being done, and how much it will cost.

16. The key issues of concern to creditors and other interested parties will commonly be:

    the work the office holder anticipates will be done and why that work is necessary;

    the anticipated payment for that work;

    whether it is anticipated that the work will provide a financial benefit to creditors, and if so what anticipated benefit (or if the work provides no direct financial benefit, but is required by statute);

    the work actually done and why that work was necessary;

    the actual payment for the work;

    whether the work has provided a financial benefit to creditors, and if so what benefit (or if the work provided no direct financial benefit, but was required by statute).

## 2.12 SIP 9 (NI)

17. When providing information about payments from an estate the office holder should do so in a way which clearly explains the key issues. Narrative explanations should be provided to support any numerical information supplied. Such an approach allows creditors and other interested parties to better recognise the nature of an office holder's role and the work they intend to undertake, or have undertaken, in accordance with the key issues.

18. The following are not permissible as either remuneration or an expense:

    an expense or any other charge calculated as a percentage of remuneration;

    an administration fee or charge additional to an office holder's remuneration;

    the recovery of any overheads other than those absorbed in the charge out rates.

## PROVISIONS OF SPECIFIC APPLICATION

### Basis of remuneration

19. The office holder should provide an indication of the likely return to creditors when seeking approval for the basis of their remuneration.

20. When approval for a set fee or a percentage basis is sought, the office holder should explain why the basis requested is expected to produce a fair and reasonable reflection of the work that the office holder anticipates will be undertaken. Where a set amount or a percentage basis is being used, an explanation should be provided of the direct costs included. The office holder should not seek to separately recover sums already included in a set amount or percentage basis fee and should be transparent in presenting any information.

21. When approval is sought on a time costs basis, an office holder should provide details of the minimum time units used and current charge-out rates, split by grades of staff, of those people who have been or that the office holder anticipates are likely to be involved in the time costs aspects of the case.

22. Where remuneration is sought on more than one basis, it should be clearly stated to which part of the office holder's activities each basis relates.

23. To provide creditors and other interested parties with sufficient information to make an informed judgement, office holders should divide the narrative explanations into areas such as:

24. These are examples of common activities and not an exhaustive list. Alternative or further sub-divisions may be appropriate, depending on the nature and complexity of the appointment and the bases of remuneration sought and/or approved. It is unlikely that the same divisions will be appropriate in all appointments and an office holder should consider what divisions are likely to be appropriate and proportionate in the circumstances of each appointment.

25. This statement does not mandate any particular fee basis. An insolvency practitioner's business model may influence the fee basis they choose. However, whatever the business model, the insolvency practitioner's commercial approach cannot override the principle that any work done for which payment is sought must be necessarily and properly undertaken in the context of an insolvency appointment.

## 2.12 SIP 9 (NI)

### Expenses

26. Expenses are any payments from the estate which are neither an office holder's remuneration nor a distribution to a creditor or a member. Expenses also includes disbursements. Disbursements are payments which are first met by the office holder, and then reimbursed to the office holder from the estate.

27. Expenses are divided into those that do not need approval before they are charged to the estate (category 1) and those that do (category 2).

28. When seeking approval of category 2 expenses, an office holder should explain for each expense the basis on which the expense is being charged to the estate.

29. Any shared or allocated payments incurred by the office holder or their firm are to be treated as category 2 expenses and approval sought before payment. This is irrespective of whether the payment is being made to an associate, because the office holder will be deciding how the expenses are being shared or allocated between insolvency appointments. Requiring approval of these payments enables those who are approving the expenses to confirm that the approach being taken by the office holder is reasonable.

30. If an office holder has obtained approval for the basis of category 2 expenses, that basis may continue to be used in a sequential appointment where further approval of the basis of remuneration is not required, or where the office holder is replaced.

    - Category 1 expenses: These are payments to persons providing the service to which the expense relates who are not an associate of the office holder. Category 1 expenses can be paid without prior approval.
    - Category 2 expenses: These are payments to associates or which have an element of shared costs. Before being paid, category 2 expenses require approval in the same manner as an office holder's remuneration. Category 2 expenses require approval whether paid directly from the estate or as a disbursement.

### Reports to creditors and other interested parties

31. Any disclosure by an office holder of payments should be of assistance to those who have a financial interest in the level of payments from an estate in understanding what was done, why it was done, and how much it costs.

32. Reports to creditors and other interested parties should include a narrative update in respect of the office holder's activity during the period being reported upon, using consistent divisions for each part of the work reported upon, as far as possible.

33. When reporting payments during a period, the office holder should use a consistent format throughout the appointment and provide figures for both the period being reported upon and on a cumulative basis.

34. An office holder should endeavour to use consistent divisions throughout the appointment. The use of additional categories or further division may become necessary where a task was not foreseen at the commencement of the appointment.

35. Requests for additional information about payments 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 appointment.

## Pre-appointment costs

36. Where recovery of pre-appointment costs is expressly permitted by statute and approval is sought from creditors for payment from the estate of these costs, disclosure should follow the principles and standards contained in this statement.

## Provision of information

37. In order to facilitate information requests under statute or to support the reporting of the office holder's remuneration, time recording systems used by office holders should record time in units of not greater than six minutes for each grade of staff used.

38. Where realisations are sufficient for creditors to be paid in full with interest, the creditors will not have the principal financial interest in the level of payments from the estate. Once this has been established by the office holder, they should provide the beneficiaries of the anticipated surplus, on request, with information in accordance with the principles and standards contained in this statement.

## 2.12 SIP 9 (NI)

39. When an office holder's appointment is followed by the appointment of another office holder, whether or not in the same proceedings, the prior office holder should provide the successor with information in accordance with the principles and standards contained in this statement. This is in addition to any statutory obligations imposed on an office holder to provide information.

**Effective Date: 1 April 2021**

## 2.13 STATEMENT OF INSOLVENCY PRACTICE 10 (SCOTLAND) PROXY FORMS

**This SIP is withdrawn for most insolvencies with effect from 6 April 2019 but remains in place for Scottish Limited Liability Partnership (LLP) insolvencies and special insolvency regimes which are not covered by the introduction of 2018 Rules and remain under the Insolvency (Scotland) Rules 1986 and other secondary legislation.**

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.

## 2.13 SIP 10 (SCOTLAND)

### 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 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**

# 2.14 STATEMENT OF INSOLVENCY PRACTICE 10 (NI) PROXY FORMS

## NORTHERN IRELAND

1. This statement of insolvency practice is one of a series issued by the Council of the Society with a view to harmonising the approach of members to questions of insolvency practice. It should be read in conjunction with the Explanatory Foreword to the Statements of Insolvency Practice and Technical Reminders issued in June 1996. Members are reminded that SPI Statements of Insolvency Practice are for the purpose of guidance only and may not be relied upon as definitive statements. No liability attaches to the Council or anyone involved in the preparation or publication of Statements of Insolvency Practice.

2. This statement applies to Northern Ireland only.

3. Rule 8.2 of the Insolvency Rules (Northern Ireland) 1991 stipulates that, when notice is given of a meeting to be held in 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.

4. 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 proceedings, which may be inserted for the convenience of the person completing the form).

5. 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 persons whom the 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 as given advice consistent with the law.

**Issue: August 1996**

# 2.15 STATEMENT OF INSOLVENCY PRACTICE 11 THE HANDLING OF FUNDS IN FORMAL INSOLVENCY APPOINTMENTS

## Introduction

1. This statement of insolvency practice concerns the handling of funds by insolvency practitioners in connection with their appointment as an office holder. Creditors and other interested parties[1] should be confident that funds are held appropriately and securely and that their interests are adequately protected.

2. Insolvency Practitioners will typically handle the following types of funds:

   a) Estate money

      Estate money is all money deriving from the realisation of an asset, income or trading receipt of the insolvent estate received by the office holder in their capacity as such. It is held for the prevailing statutory purposes of the insolvency case. Office holders are at all times responsible for estate money and for any deductions made from the funds so held.

   b) Client Money

      Client money is money belonging to a third party that is permitted to be held in accordance with the client money rules and regulations as may from time to time be in force by virtue of the insolvency practitioner's authorisation by a Recognised Professional Body. It may include (but is not limited to) third party money provided other than in consideration for the acquisition of an asset of the estate; funds held by the insolvency practitioner prior to or following their appointment as an office holder; or monies coming into the hands of an insolvency practitioner which are the property of individuals or entities for which they are acting other than in the capacity as office holder.

   c) Money belonging to the office holder or an entity in which they are working

[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.

## Principles

3. An insolvency practitioner should clearly differentiate and segregate estate money, client money and the money belonging to the office holder or an entity in which they are working.

4. Estate money and client money must only be handled for their proper purposes, held securely and be subject to appropriate financial controls. Estate money must be held in accordance with the principles and standards of this SIP.

## Key compliance standards

### Records

5. Office holders should ensure that records are maintained to identify estate money (including any interest earned thereon) for each case for which they are the office holder and document transactions involving such funds.

### Account criteria

6. Subject to the rules relating to the payment of funds into the Insolvency Services Account, estate money should be held in account(s) which meet the following criteria:

   a) all funds standing to the credit of an estate is held as estate money and must be readily identifiable to that estate;

   b) the account provider must not be entitled to combine estate money with any other funds or exercise any right to set off or counterclaim against any individual estate in respect of any money owed to it by any other individual estate, or for any other reason;

   c) interest payable on estate money must be credited to the estate by which it was earned;

   d) the account provider must describe estate accounts in its records to make it clear that the funds held do not belong to the office holder or an entity in which they are working.

7. Where an office holder receives estate money in a manner such that it cannot be paid directly into an estate account, such money may be cleared through an account maintained in the name of the office holder or an entity

in which they are working. Such accounts should be operated in accordance with the client money rules and regulations as may from time to time be in force by virtue of that office holder's authorisation. Funds paid into such accounts should be paid out to the estate to which they relate as soon as is reasonably practicable.

**Safeguards**

8. Office holders are responsible for safeguarding estate funds from misapplication or misappropriation. Access to estate money should only be afforded to persons in respect of whose actions adequate safeguard arrangements are in place. Those arrangements should include appropriate financial controls and may include insurance.

9. Office holders should ensure that estate money is at all times held subject to appropriate financial controls. These controls may include (but are not limited to):

   a) ensuring transactional processing is conducted in a timely manner;

   b) seeking to ensure that solicitors and agents holding estate money account for those funds in a timely manner;

   c) allowing only appropriate persons within the entity to conduct transactions;

   d) adequate supervision of personnel with access to funds;

   e) limiting the size of transactions that can be processed by different grades of staff;

   f) implementing secure and robust authorisation procedures within the entity;

   g) regular reconciliation of estate and client accounts;

   h) periodic risk assessment of transactional processes within the entity;

   j) requiring joint signatories or joint authentication.

10. Financial controls and safeguards applied should be proportionate to the number of estates being administered, the quantum of funds held (individually and cumulatively), the number of transactions processed and the structure and ownership of the entity.

## 2.15 SIP 11

11. Financial controls and safeguards, including levels of insurance cover, should be fully documented and reviewed by the office holder for their adequacy, as and when appropriate (and at a minimum annually).

**Effective Date: 01 January 2018**

# 2.16 STATEMENT OF INSOLVENCY PRACTICE 12 (E,W & NI) RECORDS OF MEETINGS IN FORMAL INSOLVENCY PROCEEDINGS

## 1. INTRODUCTION

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

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 England and Wales only. References to the Act are to the Insolvency Act 1986, and references to the Rules are to the Insolvency Rules 1986.

## 2. THE STATUTORY PROVISIONS

### 2.1 Meetings of creditors - administration

The chairman of the meeting shall cause minutes of its proceedings to be entered in the company's minute book. The minutes shall include a list of the creditors who attended (personally or by proxy) and, if a creditors' committee has been established, the names and addresses of those elected to be members of the committee. (Rule 2.28)

### 2.2 Meetings of creditors - administrative receivership

The chairman of the meeting shall cause a record to be made of the proceedings and kept as part of the records of the receivership. The record shall include a list of the creditors who attended (personally or by proxy) and, if a creditors' committee has been established, the names and addresses of those elected to be members of the committee. (Rule 3.15)

### 2.3 Meetings of creditors and contributories - liquidation

At any meeting of creditors or contributories the chairman shall cause minutes of the proceedings to be kept. The minutes shall be signed by him and retained as part of the records of the liquidation. The chairman shall also cause to be made up and kept a list of all the creditors or, as the case may be, contributories who attended the meeting. The minutes of the meeting shall include a record of every resolution passed. In the case of compulsory liquidations, it is the chairman's duty to see to it that particulars of all such resolutions, certified by him, are filed in court not more than 21 days after the date of the meeting. (Rule 4.71)

### 2.4 Meetings of creditors - bankruptcy

The chairman at any creditors' meeting shall cause minutes of the proceedings at the meeting, signed by him, to be retained by him as part of the records of the bankruptcy. He shall also cause to be made up and kept a list of all the creditors who attended the meeting. The minutes of the meeting shall include a record of every resolution passed. It is the chairman's duty to see to it that the particulars of all such resolutions, certified by him, are filed in court not more than 21 days after the date of the meeting. (Rule 6.95)

### 2.5 Meetings of creditors and members - voluntary arrangements

Where, in the case of a company, meetings of the company and its creditors are held under section 3 of the Act, or, in the case of an individual, a meeting of creditors is held under Section 257 of the Act, a report of the meeting or meetings shall be prepared by the chairman. The report shall -

a) state 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 the meetings, and the decision on each one;

c) list the creditors and, in the case of a company, the members of the company, (with their respective values) who were present or represented at the meetings, 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.

## 2.16 SIP 12 (E,W & NI)

### 2.6 Meetings of committees of creditors

2.6.1 At all meetings of committees of creditors established under the Act every resolution passed shall be recorded in writing, either separately or as part of the minutes of the meeting. A record of each resolution shall be signed by the chairman and kept with the records of the proceedings (or, in the case of administrations, placed in the company's minute book). (Rules 2.42 (administration); 3.26 (administrative receivership); 4.165 (compulsory liquidation); 4.166 (creditors' voluntary liquidation); 6.161 (bankruptcy))

2.6.2 Where resolutions of the committee are taken by post, a copy of every resolution passed, and a note that the committee's concurrence was obtained, shall be kept with the records of the proceedings (or, in the case of administrations, placed in the company's minute book). (Rules 2.43 (administration); 3.27 (administrative receivership); 4.167 (liquidation); 6.162 (bankruptcy))

2.6.3 The Act contains no provisions for the establishment of committees in voluntary arrangements, but the terms of a proposal may provide for the establishment of a committee and may lay down procedures for keeping a record of its proceedings.

### 2.7 Minutes as evidence of proceedings

A minute of proceedings at a meeting of creditors, or the members or contributories of a company, held under the Act or Rules, signed by a person describing himself as or appearing to be the chairman of the meeting, is admissible in insolvency proceedings without further proof. The minute is prima facie evidence that -

a) the meeting was duly convened and held,

b) all resolutions passed at the meeting were duly passed, and

c) all proceedings at the meeting duly took place (Rule 12.5)

## 3. BEST PRACTICE

3.1 Records should be kept of all meetings of creditors, committees of creditors, or members or contributories of companies, held under the Act or Rules or under provisions contained in a voluntary arrangement approved by the creditors. The record should include, as a minimum, the following information:

a) The title of the proceedings

b) The date, time and venue of the meeting

c) The name and description of the chairman and any other person involved in the conduct of the meeting

d) A list, either incorporated into the report or appended to it, of the creditors, members or contributories attending or represented at the meeting

e) The name of any officer or former officer of the company attending the meeting if not attending in one of the above capacities

f) The exercise of any discretion by the chairman in relation to the admissibility or value of any claim for voting purposes

g) 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

h) Where a committee is established, the names and addresses of the members

i) 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.

## 2.16 SIP 12 (E,W & NI)

3.2 The record should be signed by the chairman and be either

a) retained with the record of the proceedings, or

b) entered in the company's minute book, with a copy retained with the record of the proceedings, whichever is appropriate. 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 8.4 and, where a poll is taken, the poll cards, should be kept with the record of the proceedings.

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 record.

**Issued: August 1996**

This Statement of Insolvency Practice was withdrawn with effect from 6 April 2017 except for limited liability partnerships where it was withdrawn with effect from 1 January 2018. SIP 12 remains in effect for certain special insolvency regimes.

# 2.17 STATEMENT OF INSOLVENCY PRACTICE 12 (SCOTLAND) RECORDS OF MEETINGS IN FORMAL INSOLVENCY PROCEEDINGS

**This SIP is withdrawn for most insolvencies with effect from 6 April 2019 but remains in place for Scottish Limited Liability Partnership (LLP) insolvencies and special insolvency regimes which are not covered by the introduction of 2018 Rules and remain under the Insolvency (Scotland) Rules 1986 and other secondary legislation.**

## 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.

# 2.17 SIP 12 (SCOTLAND)

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

(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:

a) The title of the proceedings

b) The date, time and venue of the meeting

c) The name and description of the chairman and any other person involved in the conduct of the meeting

d) A list, either incorporated into the report or appended to it, of the creditors, members or contributories attending or represented at the meeting

e) The name of any officer or former officer of the company attending the meeting if not attending in one of the above capacities

f) The exercise of any discretion by the chairman in relation to the admissibility or value of any claim for voting purposes

g) 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

h) Where a committee is established, the names and addresses of the members

i) 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**

## 2.18 STATEMENT OF INSOLVENCY PRACTICE 13 DISPOSAL OF ASSETS TO CONNECTED PARTIES IN AN INSOLVENCY PROCESS

### Introduction

1. The disposal of assets in an insolvency process to connected parties may give rise to concerns that assets or groups of assets may have been disposed of at less than market value and/or on more favourable terms than would have been available to a third party.

2. It is recognised that connected party transactions may be in the best interests of creditors but require adequate disclosure to creditors and other interested parties[1] as soon as reasonably practicable. Transparency in all dealings is of primary importance.

3. It is equally important that the insolvency practitioner acts and is seen to be acting in the interests of the creditors as a whole and is able to demonstrate this.

4. This statement of insolvency practice applies to both personal and corporate insolvency appointments, with the exception of members' voluntary liquidations. In administrations where the disposal is substantial and to a connected person[2] there are additional statutory obligations placed on the purchaser and the administrator.

5. In this Statement of Insolvency Practice, a connected party means a person with any connection to the directors, shareholders or secured creditors of the company or their associates and includes any connected person.

### Principles

6. An insolvency practitioner should be clear about the nature and extent of the role of advisor in the pre-appointment period. The roles are to be explained to the debtor, the company directors and the creditors. For the

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

[2] Connected person has the meaning given to it in paragraph 60(A)(3) of Schedule B1 to the Insolvency Act 1986 or, for Northern Ireland, paragraph 61A(3) of Schedule B1 to the Insolvency (Northern Ireland) Order 1989.

purposes of this Statement of Insolvency Practice only, the role of "insolvency practitioner" is to be read as relating to the advisory engagement that an insolvency practitioner or their firm and or/any associates may have in the period prior to commencement of the insolvency process. The role of "office holder" is to be read as the formal appointment as an office holder. An insolvency practitioner should recognise that a different insolvency practitioner may be the eventual office holder. When instructed to advise a debtor, a company or companies in a group, the insolvency practitioner should make it clear that the role is not to advise any parties connected with the purchaser, who should be encouraged to take independent advice. This is particularly important when there is a possibility that a connected party may acquire an interest in the business or assets.

7. The office holder should provide creditors and other interested parties with sufficient information such that a reasonable and informed third party would conclude that the transaction was appropriate and that the office holder has acted with due regard for the creditors' interests. As this is a connected party transaction the level of detail needs to be greater than in the reporting of a third party transaction.

## Key compliance standards

8. An insolvency practitioner should exercise professional judgement in advising the client whether a formal valuation of any or all of the assets is necessary. Where a valuation is relied on, other than one undertaken by an appropriate independent valuer and/or advisor with adequate professional indemnity, this should be disclosed. The rationale for doing so and an explanation of why the officer holder was satisfied with the valuation should also be disclosed.

9. In relation to an administration, the insolvency practitioner should ensure that any connected person[2] considering purchasing the business or assets of the company involving a substantial disposal is made aware that if the disposal takes place within 8 weeks of the day on which the company enters administration unless the connected person[2] purchaser obtains a qualifying report from an evaluator, the substantial disposal cannot be effected without creditor approval.

## 2.18 SIP 13

10. An office holder should keep a detailed record of the reasoning behind both the decision to make a sale to a connected party and all alternatives considered. When considering the manner of disposal of the business or assets the office holder should be able to demonstrate that their duties under the legislation have been met.

### Disclosure

11. The office holder should demonstrate that they have acted with due regard to creditors' interests by providing creditors with a proportionate and sufficiently detailed justification of why a sale to a connected party was undertaken, including the alternatives considered. Such disclosure should be made in the next report to creditors after the transaction has been concluded.

12. Additionally, where a qualifying report has been provided to an administrator by a connected person, the administrator is required to send the qualifying report to creditors with the proposals.

13. Where legislation permits an office holder not to disclose information in certain limited circumstances, this Statement of Insolvency Practice will not restrict the effect of those statutory provisions.

**Effective Date: 30 April 2021 (England, Wales and Scotland)**

**25 June 2021 (Northern Ireland)**

# 2.19 STATEMENT OF INSOLVENCY PRACTICE 14 (E,W & NI) A RECEIVER'S RESPONSIBILITY TO PREFERENTIAL CREDITORS

## 1. INTRODUCTION

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

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:

a) ensure that members are familiar with the statutory provisions;

b) set out best practice with regard to the application of the statutory provisions;

c) 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, members acting as liquidators (or in any other relevant capacity) should have due regard to the principles which it contains.

1.3 The statement has been produced in recognition of the likelihood that creditors whose debts are preferential may be concerned about the categorisation of assets as between fixed and floating charges and the manner in which costs incurred during a receivership are charged against the different categories of assets.

1.4 The statement is divided into the following sections:

a) the statutory provisions

b) the categorisation of assets and allocation of proceeds as between fixed and floating charges

c) the apportionment of costs incurred in the course of the receivership

d) the determination of claims for preferential debts

e) the payment of preferential debts

f) disclosure of information and responses to queries raised by creditors whose debts are preferential

g) other matters

## 2. THE STATUTORY PROVISIONS

2.1 The rights of creditors whose debts are preferential in a receivership derive from section 40 of the Insolvency Act 1986 ('the Act').

Where a receiver is appointed on behalf of the holders of any debentures of a company secured by a charge which, as created, was 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 debentures. Where the receiver is appointed under both fixed and floating charges, this requirement does not extend to assets coming into the receiver's hands pursuant to the fixed charge(s).

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. 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 Members 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 cooperate 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.

2.3 There are no statutory provisions requiring creditors with preferential debts in a receivership to prove those debts in any formal manner and no statutory obligation is imposed on a receiver to advertise for claims.

## 3. CATEGORISATION OF ASSETS AND ALLOCATION OF PROCEEDS

3.1 In order to ascertain what assets are subject to the statutory rights of creditors whose debts are preferential, it is necessary to distinguish, on a proper interpretation of the charging document(s), which assets are subject to a fixed charge and which are subject to a floating charge. In this statement this process is referred to as 'categorisation'.

3.2 The overriding principle, as laid down by the courts, is that it is not of itself sufficient for the charging document to state that an asset is subject to a fixed charge for it to be subject to such a charge. There have been cases where the courts have struck down charges that purported to be fixed and held that they were floating.

3.3 It is the duty of a receiver to effect the right categorisation and legal advice should be taken in cases of doubt. In some instances where there is doubt as to the correct categorisation it may be possible to consult preferential creditors and reach agreement with them and the chargeholder. However, if this is not possible and the receiver, in conjunction with his legal advisers, cannot determine the correct categorisation, it may be necessary to apply to the court for directions.

3.4 Members are reminded that:

a) 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 into a fixed charge prior to or 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;

b) the conversion, during receivership, of assets (for example, stock) subject at the date of appointment of the receiver to a floating charge into assets (for example, book debts) subject to a fixed charge, will not remove them from the pool of assets which is available to pay preferential debts.

3.5 Section 40 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 the debenture holder. The effect is that a receiver is under a liability in tort to the preferential creditors if, having had available assets in

hand, he fails to apply them in 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 fixed 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 fixed charges 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. It is dependent, therefore, not only on the correct categorisation of the assets but also on the appropriate allocation of costs incurred in effecting realisations.

4.2 These costs will normally fall into one of three categories:

a) liabilities incurred by the company (the receiver being its agent until winding up supervenes) 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);

b) the costs of the receiver in discharging his statutory duties;

c) the remuneration and disbursements of the receiver.

4.3 Liabilities incurred by the company and the receiver's reasonable costs are sometimes readily identifiable as applicable to either the fixed charge 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 It is in the nature of receiverships, and particularly receiverships where trading is continued, that there will be continuation of employment of the company's directors and staff, ongoing occupation of its premises, purchase of supplies for manufacturing and other purposes and much of the other expenditure normally associated with a company's operations. In these circumstances it may be difficult to arrive at an appropriate allocation of costs. Many of the activities in a trading receivership will enhance the realisations of assets in both of the categories identified above. They may of necessity be incurred before full categorisation has been completed.

These factors do not affect the duty of a receiver 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 (including any trading losses) are:

a) 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;

b) the provisions of the charging document(s);

c) 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:

a) the objectives for which costs were incurred, it being recognised that certain types of costs may, properly, be allocated to the 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.

b) 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.

c) whether the benefits to those interested in assets subject to a fixed charge has 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 or book debts subject to a fixed charge).

d) 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 receiver will incur costs in complying with his statutory duties. The extent of those duties depends upon the nature of his appointment and they are more onerous in the case of administrative receivers.

An administrative receivership arises only when there is a floating charge and the charges under which the receiver is appointed are over the whole or substantially the whole of the company's assets. There are no decided cases as to how the additional costs incurred by an administrative receiver (as opposed to a receiver not so designated) should be allocated.

In apportioning the costs of fulfilling their statutory duties and in the absence of any guidance from the courts, members 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.

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[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.

## 5. DETERMINATION OF PREFERENTIAL DEBTS

5.1 As stated in paragraphs 2.2 and 2.3 of this statement it is a receiver's obligation to pay preferential debts out of assets available for that purpose and no proof of debt or advertisement for creditors is required.

5.2 Following 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.

5.5 Members 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 1996, 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. Members are reminded that a receiver is not obliged to accept the preferential claim of the Secretary of State without satisfying himself that it is correct. If a member 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, members should take steps to pay them. Under the statutory provisions preferential debts do not attract interest and payments to creditors should not be unnecessarily delayed. A receiver who does not comply timeously with his obligations under section 40 and against whom judgment is obtained may find himself ordered to pay interest by the court. While members 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 arrangements 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 (unless he has already written to them as suggested in paragraph 5.2) send those creditors a statement setting out:

a) the assets which have, in accordance with the charging document, been categorised as subject to the floating charge;

b) the costs charged against the proceeds of the realisation of those 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 members 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. Where a receiver decides to account to the next person entitled to such monies he should bear in mind his overriding obligation to pay preferential debts. He should make such arrangements as he considers appropriate to enable him to recover the funds from the party to whom he has paid them so that he will be able to discharge his obligation to any preferential creditor who subsequently asserts his claim to payment.

**Issued: June 1999**

# 2.20 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:

a) Ensure that insolvency practitioners are familiar with the statutory provisions;

b) Set out best practice with regard to the application of statutory provisions;

c) 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:

a) The statutory provisions

b) Categorisation of Assets and Allocation of Proceeds

c) Apportionment of Costs

d) Determination of preferential debts

e) Payment of preferential debts

f) Disclosure to creditors with preferential debts

g) 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.

4.2 These costs will normally fall into one of three categories:

a) 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);

b) The costs of the receiver in discharging his statutory duties;

c) 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:

a) 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;

b) The provisions of the charges

c) 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.

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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:

a) 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.

b) 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.

c) 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).

d) 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.

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.

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[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.

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.

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**

# 2.21 STATEMENT OF INSOLVENCY PRACTICE 15 REPORTING AND PROVIDING INFORMATION ON THEIR FUNCTIONS TO COMMITTEES AND COMMISSIONERS

## INTRODUCTION

1. The interests of creditors are of significant importance to office holders in fulfilling their duties. Legislation provides for creditors to assist office holders in the performance of their duties through representatives elected by creditors.

2. Legislation refers to such representatives using different terms: creditors' committee (administration, administrative receivership, receivership and bankruptcy), liquidation committee (company winding up), and commissioners (sequestration in Scotland). For the purposes of this statement the term "committee" is used to refer to the appropriate body in respect of each relevant insolvency procedures.

3. This SIP also applies where a committee is proposed or formed (as appropriate) in an individual, partnership or company voluntary arrangement or trust deed (in Scotland).

4. For the purposes only of this SIP the term "office holder" includes an insolvency practitioner providing advice or assistance to directors in connection with the appointment of a liquidator in a creditors voluntary liquidation.

## PRINCIPLES

5. Office holders should ensure that those considering nomination to committees and those who are elected to committees are provided with sufficient information for them to consider nomination and be able to carry out their duties and functions.

6. Information provided by an office holder should be presented in a manner which is transparent and useful to the committee, whilst being proportionate to the case. Requests for additional information should be treated by an office holder in a fair and reasonable way.

7. Office holders should exercise professional judgement according to the circumstances of the case whilst having regard to the views of the committee. Office holders should ensure that such views do not fetter their decision making.

## KEY COMPLIANCE STANDARDS

8. Creditors should be able to make an informed decision on whether they wish to be nominated to serve on a committee. Office holders should advise creditors (or in relation to a creditors voluntary liquidation, ensure that creditors are advised) in writing how they may access suitable information on the rights, duties and the functions of the committee prior to inviting nomination of committee members.

9. At the committee's first meeting, office holders should discuss with committee members how frequently they wish to receive reports and obtain their directions. These directions are likely to depend on the circumstances of the case. Office holders should also discuss with committee members the type of matters which they wish to have reported to them so that matters of particular concern to them are identified. The first meeting of the committee should be held as early as practical after the committee is established.

10. Office holders should on each occasion they report, identify what matters (in addition to those already identified) should be included in the report, exercising professional judgement as to which aspects of the proceedings may be of concern to the committee.

11. Office holders should ensure that any arrangements which are made for reporting to a committee are properly documented and adhered to.

12. The frequency of reporting and directions obtained at the outset of the case may not be appropriate throughout the course of the proceedings. The office holder should therefore consider throughout the lifetime of the case whether circumstances have altered which may change the committee's requirements for reporting frequency or their directions. Where circumstances have altered, the office holder should when next reporting to the committee set out the change of circumstances and obtain new agreement on reporting frequency and any new directions necessary.

13. Where an office holder considers their professional judgement should override the views of a committee, the office holder should clearly document why it is inappropriate to follow the views of the committee and provide an explanation to the committee. The office holder should also consider whether it is appropriate, in matters of contention to seek the views of creditors more widely or to seek the direction of the court or the Accountant in Bankruptcy (in Scotland).

**Effective Date: 01 March 2017**

# 2.22 STATEMENT OF INSOLVENCY PRACTICE 16 PRE-PACKAGED SALES IN ADMINISTRATIONS

## INTRODUCTION

1. The term 'pre-packaged sale' 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 transaction or transactions immediately on or shortly after appointment.

2. The particular nature of an insolvency practitioner's position in these circumstances renders transparency in all dealings of primary importance. Administration is a collective insolvency proceeding - creditors and other interested parties should be confident that the insolvency practitioner has acted professionally and with objectivity; failure to demonstrate this clearly may bring the insolvency practitioner and the profession into disrepute.

3. An insolvency practitioner should recognise the high-level interest the public and the business community have in pre-packaged sales in administration. The insolvency practitioner should assume, and plan for, greater interest in and possible scrutiny of such sales where the directors and/or shareholders of the purchasing entity are the same as those of, or are connected to, the insolvent entity.

4. It is equally important that the insolvency practitioner acts and is seen to be acting in the interests of the company's creditors as a whole and is able to demonstrate this.

5. This Statement of Insolvency Practice applies to all pre-packaged sales in administrations, irrespective of the who the purchaser may be. Where the sale involves a substantial disposal to a connected person, there are additional statutory obligations placed on the purchaser and the administrator, and additional information will need to be disclosed.

6. In this Statement of Insolvency Practice, the expression connected is used to mean a person with any connection to the directors, shareholders or secured creditors of the company or their associates and includes any connected person[1].

## PRINCIPLES

7. An insolvency practitioner should differentiate clearly the roles that are associated with an administration that involves a pre-packaged sale, that is, the provision of advice to the company before any formal appointment and the functions and responsibilities of the administrator following appointment. The roles are to be explained to the directors and the creditors. For the purposes of this Statement of Insolvency Practice only, the role of "insolvency practitioner" is to be read as relating to the advisory engagement that an insolvency practitioner or their firm and or/any associates may have with a company in the period prior to the company entering administration. The role of "administrator" is to be read as the formal appointment as administrator after the company has entered administration. An insolvency practitioner should recognise that a different insolvency practitioner may be the eventual administrator.

8. The administrator should provide creditors with sufficient information ("the SIP 16 statement") such that a reasonable and informed third party would conclude that the pre-packaged sale was appropriate and that the administrator has acted with due regard for the creditors' interests. Where the purchaser is connected to the insolvent entity the level of detail will need to be greater.

## KEY COMPLIANCE STANDARDS

### Preparatory work

9. An insolvency practitioner should be clear about the nature and extent of the role of advisor in the pre-appointment period. When instructed to advise the company or companies in a group, the insolvency practitioner should make it clear that the role is not to advise the directors or any

[1] Connected person has the meaning given to it in paragraph 60(A)(3) of Schedule B1 to the Insolvency Act 1986 or, for Northern Ireland, paragraph 61A(3) of Schedule B1 to the Insolvency (Northern Ireland) Order 1989.

parties connected with the purchaser, who should be encouraged to take independent advice. This is particularly important if there is a possibility that the directors may acquire an interest in the business or assets in a pre-packaged sale.

10. An insolvency practitioner should bear in mind the duties and obligations which are owed to creditors in the pre-appointment period. The insolvency practitioner should recognise 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.

11. The insolvency practitioner should ensure that any connected person considering a pre - packaged purchase involving a substantial disposal is made aware that unless the connected person purchaser obtains a qualifying report from an evaluator, the substantial disposal cannot be effected without creditor approval.

12. Where the purchaser is connected to the insolvent entity, the insolvency practitioner should make the purchaser aware of the potential for enhanced stakeholder confidence in preparing a viability statement[2] for the purchasing entity.

13. An insolvency practitioner should keep a detailed record of the reasoning behind both the decision to undertake a pre-packaged sale and all alternatives considered.

14. The insolvency practitioner should advise the company that any valuations obtained should be carried out by appropriate independent valuers and/or advisors, carrying adequate professional indemnity insurance for the valuation performed.

15. If the administrator relies on a valuation or advice other than by an appropriate independent valuer and/or advisor with adequate professional indemnity insurance this should be disclosed and with the reason for doing so and the reasons that the administrator was satisfied with the valuation, explained.

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[2] A viability review can be drawn up by a person connected to the insolvent entity wishing to make a pre-packaged purchase, stating how the purchasing entity will survive for at least 12 months from the date of the proposed purchase. The prospective purchaser should consider providing a short narrative detailing what the purchasing entity will do differently in order that the business will not fail ("the viability statement").

**Marketing**

16. Marketing a business is an important element in ensuring that the best available consideration is obtained for it in the interests of the company's creditors as a whole, and will be a key factor in providing reassurance to creditors. The insolvency practitioner should advise the company that any marketing should conform to the marketing essentials as set out in the appendix to this Statement of Insolvency Practice.

17. Where there has been deviation from any of the marketing essentials, the administrator is to explain how a different strategy has delivered the best available outcome.

**After appointment**

18. When considering the manner of disposal of the business or assets the administrator should be able to demonstrate that the duties of an administrator under the legislation have been met.

**Disclosure**

19. An administrator should provide creditors with a detailed narrative explanation and justification (the SIP 16 statement) of why a pre-packaged sale was undertaken and all alternatives considered, to demonstrate that the administrator has acted with due regard for their interests. The information disclosure requirements in the appendix should be included in the SIP 16 statement unless there are exceptional circumstances, in which case the administrator should explain why the information has not been provided. In any sale where the purchaser is connected to the insolvent entity, it is very unlikely that commercial confidentiality alone would outweigh the need for creditors to be provided with this information.

20. The explanation of the pre-packaged sale in the SIP 16 statement should be provided with the first notification to creditors and in any event within seven calendar days of the transaction(s). If the administrator has been unable to meet this requirement, the administrator will provide a reasonable explanation for the delay. The SIP 16 statement should be included in the administrator's statement of proposals filed at Companies House.

21. The administrator should recognise that, if creditors have had to wait until, or near, the statutory deadline for the proposals to be issued there may be some confusion on the part of creditors when they do receive them, the

## 2.22 SIP 16

sale having been completed some time before. Accordingly, when a pre-packaged sale has been undertaken, the administrator should seek any requisite approval of the proposals as soon as practicable after appointment and, ideally, the proposals should be sent with the notification of the sale. If the administrator has been unable to meet this requirement the proposals should include an explanation for the delay.

22. The Insolvency Act 1986 and the Insolvency (Northern Ireland) Order 1989 permit 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 Date: 30 April 2021 (England, Wales and Scotland)**

**25 June 2021 (Northern Ireland)**

## Appendix

### Marketing essentials

Marketing a business is an important element in ensuring that the best available consideration is obtained for it in the interests of creditors, and will be a key factor in providing reassurance to creditors. Any marketing should conform to the following:

- **Broadcast** – the business should be marketed as widely as possible proportionate to the nature and size of the business – the purpose of the marketing is to make the business's availability known to the widest group of potential purchasers in the time available, using whatever media or other sources are likely to achieve this outcome.
- **Justify the marketing strategy** – the statement to creditors should not simply be a list of what marketing has been undertaken. It should explain the reasons underpinning the marketing and media strategy used.
- **Independence** – where the business has been marketed by the company prior to the insolvency practitioner being instructed, this should not be used as a justification in itself to avoid further marketing. The administrator should be satisfied as to the adequacy and independence of the marketing undertaken.
- **Publicise rather than simply publish** – marketing should have been undertaken for an appropriate length of time to satisfy the administrator that the best available outcome for creditors as a whole in all the circumstances has been achieved. Creditors should be informed of the reason for the length of time settled upon.
- **Connectivity** – include online communication alongside other media by default. The internet offers one of the widest populations of any medium. If the business is not marketed via the internet, this should be justified.
- **Comply or explain** – particularly with sales to those connected to the insolvent entity, where the level of interest is at its highest, the administrator needs to explain how the marketing strategy has achieved the best available outcome for creditors as a whole in all the circumstances.

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**Information disclosure requirements in the SIP 16 statement**

The administrator should include a statement explaining the statutory purpose pursued, confirming that the transaction(s) enable(s) the statutory purpose to be achieved and that the outcome achieved was the best available outcome for creditors as a whole in all the circumstances.

The following information should be included in the administrator's explanation of a pre-packaged sale, as far as the administrator is aware after making appropriate enquiries:

**Initial introductions**

The source (to be named) of the initial introduction to the insolvency practitioner and the date of the administrator's initial introduction.

**Pre-appointment matters**

The extent of the administrator's (and that of their firm, and/or any associates) involvement prior to appointment.

The alternative options considered, both prior to and within formal insolvency by the insolvency practitioner and the company, and on appointment the administrator with an explanation of the possible outcomes.

Whether efforts were made to consult with major or representative creditors and the upshot of any consultations. If no consultation took place, the administrator should explain the reasons.

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. If no such requests were made, explain why.

Details of registered charges with dates of creation.

If the business or business assets have been acquired from an insolvency process within the previous 24 months, or longer if the administrator deems that relevant to creditors' understanding, the administrator should disclose both the details of that transaction and whether the administrator, administrator's firm or associates were involved.

**Marketing of the business and assets**

The marketing activities conducted by the company and/or the administrator and the effect of those activities. Reference should be made to the marketing essentials above. Any divergence from these essentials is to be drawn to creditor's attention, with the reasons for such divergence, together with an explanation as to why the administrator relied upon the marketing conducted.

**Valuation of the business and assets**

The names and professional qualifications of any valuers and /or advisors and confirmation that they have confirmed their independence and that they carry adequate professional indemnity insurance. In the unlikely event that valuers and /or advisors who do not meet these criteria have been employed, the reasons for doing so should be explained.

The valuations obtained for the business or its underlying assets. Where goodwill has been valued, an explanation and basis for the value given.

A summary of the basis of valuation adopted by the administrator or the valuers and/or advisors.

The rationale for the basis of the valuations obtained and an explanation of the value achieved of the assets compared to those valuations.

If no valuation has been obtained, the reason for not having done so and how the administrator was satisfied as to the value of the assets.

**The transaction(s)**

The date of the transaction(s).

Purchaser and related parties

- The identity of the purchaser.
- Any connection between the purchaser and the directors, shareholders or secured creditors of the company or their associates.
- The names of any directors, or former directors (or their associates), of the company who are involved in the management, financing, or ownership of the purchasing entity, or of any other entity into which any of the assets are transferred.
- In transactions impacting on more than one related company (e.g. a group

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transaction) the administrator should ensure that the disclosure is sufficient to enable a transparent explanation (for instance, allocation of consideration paid).

- 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.
- Where a viability statement has been provided, it should be attached to the SIP 16 statement.

Assets

- Details of the assets involved and the nature of the transaction(s).

Sale consideration

- The consideration for the transaction(s), terms of payment and any condition of the contract that could materially affect the consideration.
- The consideration disclosed under broad asset valuation categories and split between fixed and floating charge realisations (where applicable) and the method by which this allocation of consideration was applied.
- Any options, buy-back agreements, deferred consideration or other conditions attached to the transaction(s).
- Details of any security taken by the administrator in respect of any deferred consideration. Where no such security has been taken, the administrator's reasons for this and the basis for the decision that none was required.
- If the sale is part of a wider transaction, a description of the other aspects of the transaction.

**Connected Party transactions only**

Where a sale involving a substantial disposal has been undertaken to a connected person the additional details below should be included in the SIP 16 statement.

**Qualifying report**

A copy of the qualifying report provided by the connected person to the administrator is to be included within the SIP 16 statement unless the proposal is being sent to creditors at the same time as the SIP 16 statement.

# 2.23 STATEMENT OF INSOLVENCY PRACTICE 17 (E,W & NI) AN ADMINISTRATIVE RECEIVER'S RESPONSIBILITY FOR THE COMPANY'S RECORDS

## INTRODUCTION

This document was issued as SIP 1 (Version 2 England and Wales) in August 1997. It was re-numbered as SIP 17 (without updating of the text) with effect from 2 May 2011.

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

2. This statement has been prepared to summarise what is considered to be the best practice in circumstances where administrative 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 an administrative receiver and with regard to those records prepared after the administrative receiver's appointment.

## COMPANY RECORDS MAINTAINED PRIOR TO APPOINTMENT OF AN ADMINISTRATIVE RECEIVER

3. The records which a company maintains prior to the appointment of an administrative receiver may be classified under two main headings.

4. 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).

5. The second category of records maintained by a company prior to the appointment of an administrative 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:

### Statutory records

6. The company's statutory records should be kept at its registered office (see paragraph 11 below) having regard to the provisions of the Companies Act 1985, sections 288, 353, 383 and 407 (registers of directors, members, minute books and charges).

## 2.23 SIP 17 (E,W & NI)

7. Directors' powers to cause entries to be made in these statutory records do not cease on the appointment of an administrative receiver. Indeed, the directors' statutory duties to maintain them are unaffected by his appointment.

8. An administrative 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 paragraph 1 of Schedule 1 to 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.

9. 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 administrative receiver to take possession of it.

10. On appointment, an administrative 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 administrative 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 administrative 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.

11. The administrative 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 10 (ii) above followed.

12. Any statutory records (and if applicable any seals) taken into an administrative receiver's possession (see paragraphs 8 and 9) should be returned to the directors (or liquidator) on the receiver's ceasing to act.

**Statutory accounting and non-statutory records**

13. All such records as are necessary for the purposes of the receivership and for the discharge of the administrative receiver's statutory duties should be taken into the administrative receiver's possession and/or control and any which he will definitely not require may be left with the directors. If the administrative 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 an administrative 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 administrative 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.

14. An administrative 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.

15. If an administrative 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.

16. When making sales of certain assets (e.g. book debts or plant and machinery) it may be necessary for the administrative receiver to hand over to the purchaser company records (eg debtors' ledgers or plant registers) relating to those assets. In such circumstances, the administrative 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 administrative 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.

## 2.23 SIP 17 (E,W & NI)

17. If an administrative 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.

18. This is a wide-ranging obligation. It applies regardless of whether the VAT registration is itself transferred or whether the transfer is treated as a supply of neither goods nor services.

19. The categories of records covered by Schedule 11 paragraph 6 are wide-ranging. They include orders and delivery notes, purchase and sales records, annual accounts, VAT accounts and credit and debit notes.

**Entitlement of liquidator to records**

20. The case of *Engel v South Metropolitan Brewing & Bottling Company* ([1892] 1 Ch 442) is authority 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 an administrative receiver, 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).

21. An administrative 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.

## POST APPOINTMENT RECORDS

### Statutory accounting records

#### (i) Relating to the period prior to the appointment of a liquidator

22. The administrative receiver should establish appropriate accounting records as from the date of his appointment. The 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).

23. An administrative receiver is also under obligation to make returns of his receipts and payments pursuant to Rule 3.32 of the Insolvency Rules 1986. The statutory requirements and the best practice to be followed in the preparation of insolvency office holders' receipts and payments accounts are summarised in the statement of insolvency practice entitled "Preparation of Insolvency Office Holders' Receipts and Payments Accounts", to which members are referred for further information.

24. When a liquidator is appointed, the *Engel* case would seem to apply so that the liquidator becomes entitled to possession of records (see paragraph 20 above).

25. Administrative 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.

#### (ii) Relating to the period after the appointment of a liquidator

26. As from the commencement of liquidation, the administrative receiver loses his status as agent of the company (section 44(1)(a) Insolvency Act 1986). The administrative receiver's obligation to make returns of receipts and payments and to maintain accounting records (paragraph 23 above) remains in force.

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27. Section 41 Insolvency Act 1986 allows any member, creditor, the Registrar of Companies or the liquidator to enforce these duties.

**Other records**

28. The remaining records, books and papers relating to a receivership may be subdivided between "company records", "receiver's personal records" and "chargeholder's records".

**(i) Company records**

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 13 to 21 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. In the 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.

**(ii) Chargeholder's records**

As explained above, in the *Gomba* case quoted in paragraph 28(i) above it was held that documents containing advice and information to the appointor and "notes, calculations and memoranda" prepared to enable the administrative 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 administrative receiver. They do not belong to the company.

**(iii) Administrative receiver's personal records**

An administrative 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.

## BEST PRACTICE

29. It is considered best practice that all records mentioned above, with the exception of a receiver's personal records (paragraph 28 (iii) above) and the appointor's records (paragraph 28 (ii) above) should be made available on request to the company acting by its directors or if it is in liquidation, its liquidator unless the administrative 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 appointor, 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.

30. Disclosure of the administrative receiver's personal records is a matter for his discretion, although in any legal action brought against him it could be that if such records have not been disclosed they may be held to be discoverable.

31. Where there is no liquidator and the directors cannot be traced (or the administrative 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 1 to the Insolvency Act 1986. Whether or not a liquidator is appointed, the administrative 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 six 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 an administrative receiver is required to keep by the Regulations must be preserved for a period of ten years from the later of the date upon which the administrative receiver ceases to hold office or any security or caution maintained in respect of the company ceases to have effect (Regulation 20).

**Issued: August 1997**

**Reissued: 02 May 2011**

# 2.24 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

## 2.24 SIP 17 (SCOTLAND)

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).

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.

## 2.24 SIP 17 (SCOTLAND)

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**

**Reissued: 02 May 2011**

# 2.25 STATEMENT OF INSOLVENCY PRACTICE 17 (NI) AN ADMINISTRATIVE RECEIVER'S RESPONSIBILITY FOR THE COMPANY'S RECORDS NORTHERN IRELAND

## Introduction

**This document was issued as SIP 1 (Northern Ireland) in June 1998. It was re-numbered as SIP 17 (without updating of the text) with effect from 2 May 2011.**

1. This statement of insolvency practice is one of a series issued by the Council of the Society with a view to harmonising the approach of members to questions of insolvency practice. It should be read in conjunction with the Explanatory Foreword to the Statements of Insolvency Practice and Insolvency Technical Reminders issued in June 1996. The statement has been prepared for the sole use of members in dealing with administrative receiverships in Northern Ireland. Members are reminded that SPI Statements of Insolvency Practice are for the purpose of guidance only and may not be relied upon as definitive statements. No liability attaches to the Council or anyone involved in the preparation or publication of Statements of Insolvency Practice. This statement applies to Northern Ireland only.

2. This statement has been prepared to summarise what is considered to be the best practice in circumstances where administrative 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 an administrative receiver and with regard to those records prepared after the administrative receiver's appointment.

## Company records maintained prior to appointment of an administrative receiver

3. The records which a company maintains prior to the appointment of an administrative receiver may be classified under two main headings.

4. The first comprises the non-accounting records which the directors are required to maintain by The Companies (Northern Ireland) Order 1986 (as amended) (the statutory records). These consist of various registers (eg of members) and minute books (eg of directors' meetings).

## 2.25 SIP 17 (NI)

5. The second category of records maintained by a company prior to the appointment of an administrative 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: appointment of an administrative 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:

6. Payments to the associates of an office holder from an estate should be fair and reasonable reflections of the work necessarily and properly undertaken in an insolvency appointment.

7. All payments should be directly attributable to the estate from which they are being made or sought.

8. Payments that could reasonably be perceived as presenting a threat to the office holder's objectivity or independence by virtue of a professional or personal relationship, including to an associate, should not be made from the estate unless disclosed and approved in the same manner as an office holder's remuneration or category 2 expenses.

9. Payments should not be approved by any party with whom the office holder has a professional or personal relationship which gives rise to a conflict of interest.

10. Those responsible for approving payments from an estate to an office holder or their associates should be provided with sufficient information to enable them to make an informed judgement about the reasonableness of the office holder's requests.

11. Disclosures by an office holder should be of assistance to creditors and other interested parties in understanding what was done, why it was done, and how much it cost.

12. Information provided by an office holder should be presented in a manner which is transparent, consistent throughout the life of the appointment and useful to creditors and other interested parties, whilst being proportionate to the circumstances of the appointment.

## Statutory Records

6. The company's statutory records must be kept at the same office as its register of members, having regard to the provisions of the Companies (Northern Ireland) Order 1986. Articles 296, 361, 391 and 445 (registers of directors, members, minute books and charges). This will usually be the registered office (see paragraph 11 below), except where the provisions of Articles 361(1)(a) or (b) apply.

7. Directors' powers to cause entries to be made in these statutory records do not cease on the appointment of an administrative receiver. Indeed, the directors' statutory duties to maintain them are unaffected by his appointment.

8. An administrative 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 paragraph 1 of Schedule 1 to The Insolvency (Northern Ireland) Order 1989). He is not, however, placed under an obligation to maintain those records after his appointment and should not normally do so.

9. The abolition by Article 65 of The Companies (Northern Ireland) Order of 1990 of the requirement for a company formed under the Companies Orders 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 administrative receiver to take possession of it.

10. On appointment, an administrative receiver has two possible options:

    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.

    To take possession of the statutory records for safe keeping. In such circumstances, the administrative 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 administrative

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.

11. The administrative receiver may change the company's registered office to that of his own firm, in which case, the statutory records, if they are kept there, should also be transferred to the new registered office and the procedure outlined in paragraph 10 (ii) above followed.

12. Any statutory records (and if applicable any seals) taken into an administrative receiver's possession (see paragraphs 8 and 9) should be returned to the directors (or liquidator) on the receiver's ceasing to act.

**Statutory Accounting and Non-Statutory Records**

13. All such records as are necessary for the purposes of the receivership and for the discharge of the administrative receiver's statutory duties should be taken into the administrative receiver's possession and/or control and any which he will definitely not require may be left with the directors. If the administrative receiver encounters difficulty in obtaining possession of the records, the provisions of Articles 198-200 of the Insolvency (Northern Ireland) Order 1989 may be of assistance. These are the provisions allowing an administrative 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 administrative 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.

14. An administrative 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.

15. If an administrative 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.

16. When making sales of certain assets (eg book debts or plant and machinery) it may be necessary for the administrative receiver to hand over to the purchaser company records (eg debtors' ledgers or plant

registers) relating to those assets. In such circumstances, the administrative 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 administrative 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.

17. If an administrative 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.

18. This is a wide-ranging obligation. It applies regardless of whether the VAT registration is itself transferred or whether the transfer is treated as a supply of neither goods nor services.

19. The categories of records covered by Schedule 11 paragraph 6 are wide-ranging. They include orders and delivery notes, purchase and sales records, annual accounts, VAT accounts and credit and debit notes.

## Entitlement of Liquidator to Records

20. The English case of *Engel v South Metropolitan Brewing & Bottling Company* ([1892]) 1 Ch 442) is authority 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 charge holder 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 an administrative receiver, 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).

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21. An administrative 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.

## POST APPOINTMENT RECORDS

### Statutory Accounting Records

**(i) Relating to the period prior to the appointment of a liquidator**

22. The administrative 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 Articles 229, 233, 234, 235 and 249 Companies (Northern Ireland) Order 1986 (preparation and approval of accounts).

23. An administrative receiver is also under obligation to make returns of his receipts and payments pursuant to Rule 3.33 of the Insolvency Rules (Northern Ireland) 1991. The statutory requirements and the best practice to be followed in the preparation of insolvency office holders' receipts and payments accounts are summarised in the statement of insolvency practice entitled 'Preparation of Insolvency Office Holders' Receipts and Payments Accounts', to which members are referred for further information.

24. When a liquidator is appointed, the *Engel* case would seem to apply so that the liquidator becomes entitled to possession of records (see paragraph 20 above).

25. Administrative 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.

**(ii) Relating to the period after the appointment of a liquidator**

26. The administrative 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 Articles 229, 233, 234, 235 and 249 Companies (Northern Ireland) Order 1986 (preparation and approval of accounts).

27. Article 51 of The Insolvency (Northern Ireland) Order 1989 allows any member, creditor, the registrar or the liquidator to enforce these duties.

## 2.25 SIP 17 (NI)

### Other Records

28. The remaining records, books and papers relating to a receivership may be subdivided between 'company records', 'charge holder's records' and 'receiver's personal records'.

**(i) Company Records** 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 13 to 21 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. 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.

**(ii) Chargeholder's Records** As explained above, in the *Gomba* case quoted in paragraph 28(i) above it was held that documents containing advice and information to the appointor and 'notes, calculations and memoranda' prepared to enable the administrative 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 administrative receiver. They do not belong to the company.

**(iii) Administrative Receiver's Personal Records** An administrative 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 15 of the Insolvency Practitioners' Regulations (Northern Ireland) 1991 ('the Regulations'). The record must take the form set out in Schedule 3 to the Regulations.

## BEST PRACTICE

### Statutory Accounting Records

29. It is considered best practice that all records mentioned above, with the exception of a receiver's personal records (paragraph 28 (iii) above) and the appointer's records (paragraph 28 (ii) above) should be made available on request to the company acting by its directors or if it is in liquidation, its liquidator unless the administrative 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 appointor, 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.

30. Disclosure of the administrative receiver's personal records is a matter for his discretion, although in any legal action brought against him it could be that if such records have not been disclosed they may be held to be discoverable.

31. Where there is no liquidator and the directors cannot be traced (or the administrative 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 1 to the Insolvency (Northern Ireland) Order 1989. Whether or not a liquidator is appointed, the administrative 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 six 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 an administrative receiver is required to keep by the Regulations must be preserved for a period of ten years from the later of the date upon which the administrative receiver ceases to hold office or any security or caution maintained in respect of the company ceases to have effect (Regulation 18).

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**Re-issued: 2 May 2011**

# Section 3

## Insolvency Guidance Papers

# SECTION 3 - 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**

- 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

**Competent authorities**

- Department for the Economy (Northern Ireland)

# 3.1 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:

a) delegation of work to staff in the practitioner's own office, or to sub-contractors;

b) delegation of work to staff within a firm but in another location;

c) taking a reduced role on an appointment taken jointly with an insolvency practitioner in the practitioner's office;

d) taking a reduced role on an appointment taken jointly with an insolvency practitioner within the same firm but in another location;

e) allowing a specialist insolvency practitioner within a firm to take responsibility for all work of a specific type;

f) allowing a specialist within a firm to handle work of a specific type (e.g. tax);

g) sharing work on an agreed basis on an appointment taken jointly with a practitioner from another firm;

h) employing another firm to give specialist advice (e.g. tax), or to undertake specific work (e.g. an investigation); and

i) 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:

a) the structure within a firm, and the qualifications and experience of staff;

b) 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;

c) the procedures within a firm to ensure consultation by joint appointees, other practitioners, and staff;

d) the extent to which levels of responsibility are defined, and the circumstances in which a reference to, or approval by, the practitioner is required;

e) whether there are clear guidelines within a firm to deal with the administration of cases at locations remote from the practitioner;

f) the ways in which compliance and case progress are monitored, and then reported to the practitioner;

g) the frequency of case reviews, and who carries them out;

h) the systems for dealing with correspondence received and, in particular, complaints;

i) 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

j) 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'.

**Issue Date: July 2005**

# 3.2 INSOLVENCY GUIDANCE PAPERS 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.

**Issue Date: July 2005**

## 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.

## 3.2 IGP SUCCESSION PLANNING

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.

# 3.3 INSOLVENCY GUIDANCE PAPERS 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:

a) the debtor's spouse, former spouse, or unmarried partner;

b) members of the debtor's immediate family;

c) a joint legal owner;

d) anyone who has contributed towards the purchase of a property (including making mortgage payments);

e) anyone in occupation of the property other than under a formal tenancy agreement; and

f) a trustee under a previous bankruptcy.

## 3.3 IGP BANKRUPTCY – THE FAMILY HOME

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):

a) an explanation of the trustee's interest, and why that interest may continue after discharge from bankruptcy;

b) the circumstances in which the property will revert to the debtor, and why it may not revert;

c) an explanation of why the trustee needs to realise the property;

d) the way in which the property and the trustee's interest would be valued;

e) an explanation of how any changes in the value of the property, and payments under a mortgage, may be treated;

f) how any mortgage, or other security for the repayment of any loan, may be treated;

g) details of the steps that the trustee can take, and any timetable, for realising the property; and

h) a copy of the Insolvency Service leaflet "What will happen to my home".

3.2 It is also recommended that a trustee:

a) seeks offers from affected parties as appropriate, giving sufficient time for responses and explaining any deadlines;

b) be prepared, in appropriate circumstances, to meet the debtor and other affected parties to discuss any problems that may arise; and

c) 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):

a) whether the trustee's intentions have changed, and the effect on the likely timetable for realisation;

b) any changes in the value of the property and the trustee's interest;

c) any changes to the positions of the affected parties; and

d) 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.

## 3.3 IGP BANKRUPTCY – THE FAMILY HOME

### 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 guidance "family homes" is available via https://www.gov.uk/government/publications/family-homes-insolvency-practitioner-guidance-paper/insolvency-guidance-paper-family-homes

### 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.

**Issue Date: October 2005**

# 3.4 INSOLVENCY GUIDANCE PAPERS 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:

a) the practitioner's initial enquiries to establish the nature and location of records;

b) the steps taken to safeguard records;

c) requests made of directors and others to deliver up records;

d) what records have been taken under the practitioner's control, and when and how this was done;

e) the location of the records;

f) whether third parties have had access to the records, and for what purpose; and

g) 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.

**Issue Date: 14 March 2006**

# 3.5 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) A complaint should be acknowledged promptly.

b) The insolvency practitioner should ascertain the background facts as quickly as possible and seek additional information from the complainant as required.

c) 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.

d) If an error has been made, the insolvency practitioner should rectify the error promptly and offer an apology.

e) 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.

# 3.5 IGP DEALING WITH COMPLAINTS

## 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:

a) The desirability of establishing a formal complaints procedure within the firm, set out in writing, which can be communicated to complainants.

b) Whether complaints should be reviewed by another principal in the firm (where possible) or by an independent practitioner.

c) 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.

**Issue Date: October 2009**

# 3.6 INSOLVENCY GUIDANCE PAPER RETENTION OF TITLE

## RETENTION OF TITLE ("ROT") CLAIMS

This guidance can be applied to all ROT claims within any insolvency procedure.

## PRE-APPOINTMENT

At this stage, a formal appointment will not have been made. However, it remains the Insolvency Practioner's (IP's) responsibility to advise their clients or potential clients appropriately with regard to ROT. If there are the possibility of ROT claims in future, the responsible IP will have procedures in place to document their strategy for dealing with them if appointed.

If a sale of the business or its assets is envisaged post-appointment, the IP should consider making reference in the contract of sale to the way in which goods potentially subject to ROT are to be treated. Where appropriate, the IP should also agree in advance with any purchaser how any ROT claims might be dealt with.

## POST-APPOINTMENT

The IP should contact creditors at the earliest opportunity if the IP believes that there may be ROT claims. The IP should deal with such claims promptly and take any reasonable steps to allow or facilitate the identification by the claimant of any such goods.

The IP should secure any items that may be subject to any such claims if it is reasonable to do so.

## GENERAL

The IP should be prepared to communicate and cooperate within reason with any ROT claimant so long as it does not cause the IP to turn aside from the general conduct of the insolvency procedure.

Any claimant must be prepared to communicate expeditiously and cooperate within reason with the IP, make known its claim and provide sufficient evidence of the validity of any such claim and be able to demonstrate that the goods subject to the claim can be identified. Any claimant that fails do to do so should not be surprised that their claim is dismissed.

**Issue Date: 10 November 2014**

# Section 4

## Other Professional Guidance

# SECTION 4 - OTHER PROFESSIONAL GUIDANCE

## CONTENTS

# 4.1 A GUIDE TO THE INSOLVENCY PRACTITIONERS ASSOCIATION ETHICS CODE

## Foreword

The Joint Insolvency Committee (JIC) is undertaking[1] an on-going review of the Code of Ethics for Insolvency Practitioners. To date, that work has comprised of a number of work strands, including the revision of Statement of Insolvency Practice 1 (SIP 1), which came into effect on 1 October 2015.

The review process identified that increased awareness amongst stakeholders of the existing Code of Ethics to which practitioners work would aid stakeholders' understanding of an insolvency practitioner's work, and potentially promote transparency and trust within the profession.

SIP 1 was revised accordingly to include a provision that an insolvency practitioner should inform creditors at the earliest opportunity that they are bound by the Insolvency Code of Ethics when carrying out all professional work relating to an insolvency appointment.

Additionally, an insolvency practitioner should, if requested, provide details of any threats identified to compliance with the fundamental principles and the safeguards applied. If it is not appropriate to provide such details, the insolvency practitioner should provide an explanation why.

To assist members in fulfilling these new requirements, the IPA has produced a Guide to the Ethics Code, which its members are at liberty to use. It is intended as a useful summary which may be provided by members to interested parties, such as creditors and other stakeholders, or more junior staff. It may, for instance, be provided alongside any case-specific response to a SIP 1 enquiry, provided as part of a staff training or induction programme, or as part of an internal complaints handling procedure.

For the avoidance of doubt, there is no regulatory expectation that this Guide be supplied to any particular group of third parties; it is merely intended to assist members in explaining the complex framework within which they are expected

[1] The review of the Code of Ethics was completed in 2019 and the resulting new Insolvency Code of Ethics is reproduced in section 1.2 of this Handbook. The overview of principles and the 'Framework' approach of the Code set out in "A Guide to the IPA Ethics Code" however, remain applicable to the new Insolvency Code of Ethics.

to work in instances when they consider it would be useful to do so. Similarly, this Guide is not intended for use by members themselves, who should continue to refer to the full text of the Code.

The Guide is available in PDF from our website and members may reproduce the guide upon their own websites without further permission from the IPA.

## 1. Introduction

1.1 Insolvency Practitioners ("IPs") are in a position of trust in their dealing with the affairs of an insolvent company or individual. The professional bodies that regulate insolvency practitioners recognise this and operate under an agreement with the government whereby each body has agreed to apply an ethical code to its members, and will seek to ensure that those members work to common professional standards, to enable creditors and others to receive an efficient service at fair cost.

1.2 The regulators have, therefore, agreed an Ethics Code to ensure that all insolvency practitioners are held to high professional standards, and regulators will have regard to those standards as a benchmark when considering the conduct of IPs when undertaking their regulatory work or in relation to complaints made against IPs.

1.3 The Code gives five Fundamental Principles which should govern all of an IP's actions, the headings of which are as follow, with details in the code:

a) Integrity

b) Objectivity

c) Professional competence and due care

d) Confidentiality

e) Professional behaviour

## 2. Threats to the Fundamental Principles

2.1 The Code acknowledges that an IP's actual or perceived adherence with the Fundamental Principles may be threatened in certain circumstances. It identities that these threats typically fall under five main categories:

a) Self-interest threats – will the proposed action unfairly directly benefit the IP, his/her firm, a close or immediate family member or an individual within the IP's firm?

b) Self-review threats – will the IP find themselves reviewing the work or judgements of an individual connected with his/her firm (or their own work)?

c) Advocacy threats – is a position or opinion being promoted to the point where the IP's objectivity is subsequently compromised?

d) Familiarity threat – is an individual within the firm becoming too antagonistic or sympathetic to the interests of others as a result of a close relationship?

e) Intimidation threats – these may occur where an IP is deterred from acting objectively by threats either actual or perceived

## 3. The Framework Approach


3.1 Rather than endeavouring to anticipate every circumstance that may present a threat to the Fundamental Principles, the Code sets out a method (a "Framework Approach") which should be adopted by an IP to ensure their compliance with the Fundamental Principles.

3.2 An IP should consider the Fundamental Principles and threats to them in all of his / her activities, both before they accept an insolvency appointment and during the process of that appointment. Once an IP has identified any actual or potential threats to their compliance with the Fundamental Principles, s/he should then evaluate the severity of the threats that have been identified and respond appropriately. That response may in some circumstances be to decline an appointment, and in others of lesser severity, to take steps that will reduce the threat to an acceptable level.

3.3 A commonly encountered threat to accepting an insolvency appointment is a potential "conflict of interest" situation. This is most likely to be encountered where there have been some previous dealings between the parties.

3.4 Therefore, before accepting an insolvency appointment an IP should undertake thorough assessment to ensure that there is no prior relationship that would make it inappropriate to accept the appointment. The IP should also evaluate what s/he will be expected to do during the appointment and on whose behalf it will be done to ensure that not only will s/he be acting with independence and objectivity, but will be seen to be doing so by people with no specialist knowledge or understanding.

## 4.1 A GUIDE TO THE IPA ETHICS CODE

3.5 The Code itself provides a number of specific instances where accepting an appointment is absolutely prohibited. Outside of these prohibitions and in all other instances, the Code requires practitioners to identify any threats presented (including conflicts of interest) and evaluate their severity. It may be possible for some threats to be managed by the IP to an acceptable level and the Code provides a number of practical suggestions about how this might be achieved.

3.6 In instances where there is uncertainty on the IP's part whether or how to take an action or accept an appointment s/he may consult others to reduce the threat, or share the responsibility for those aspects of the work. S/he may, for example consult a creditors' committee, obtain legal advice or involve another IP to perform a part of the work undertaken (for example, an investigation into the directors' conduct).

3.7 The IP should document the steps they have taken to identify, evaluate and respond to any threats and the strategy behind their decisions. This process should be repeated if further information comes to light that would (for example) have made acceptance of the appointment inappropriate (had it been known at the time). In such circumstances, the IP may need to consider whether they should resign.

3.8 Since 01 October 2015, an IP should, if requested, provide details of any threats identified to compliance with the fundamental principles and the safeguards applied. If it is not appropriate to provide such details, the insolvency practitioner should provide an explanation why.

### Financial incentives

4.1 It is never acceptable for an IP to offer an inducement to obtain an insolvency appointment, although it is acceptable for an IP to pay an employee partly or wholly on the basis of introductions obtained by the efforts of the employee.

# 4.1 A GUIDE TO THE IPA ETHICS CODE

The purpose of the Guide is to assist stakeholders in understanding the ethical standards expected of Insolvency Practitioners and is not a definitive statement of expected professional standards. Nothing in this summary seeks to fetter the authority of the IPA's regulatory and disciplinary committees to make determinations about a Member's conduct. Members should refer to the full text of the Ethics Code and it remains encumbent upon them to be satisfied that his/her conduct meets the legal and professional requirements placed upon Office-Holders/Members.

## 4.2 APPROACH TO SIP9 REPORTING AND FEE ESTIMATES – R3 GUIDANCE

The IPA is pleased to support and endorse the following R3 guidance note and hopes it will provide the assistance that practitioners have requested when preparing fee estimates and reporting to creditors.

This guidance does not constitute legal advice nor does it seek to instruct or direct practitioners to take, or avoid taking, any action. Practitioners should be aware that any guidance endorsed by the IPA cannot fetter the authority of its regulatory and disciplinary committees to make determinations about a practitioner's conduct.

The IPA accepts no liability in respect of actions that practitioners may take in accordance with this guidance, as it must be for each practitioner to be satisfied that his/her conduct meets the legal and professional requirements placed upon Office Holders. Therefore, practitioners may consider it appropriate to seek independent professional advice in respect of the subject of the guidance, in appropriate cases.

### R3 GUIDANCE TO MEMBERS – APPROACH TO SIP 9 REPORTING AND FEE ESTIMATES ENGLAND AND WALES

### A. Overview – the Need for Narrative

1. The following guidance is intended to provide members with some ideas and examples of matters which might be relevant to include as part of a meaningful narrative explanation to stakeholders in relation to the time spent by members and their staff in dealing with an appointment. It is anticipated that the narrative will precede the time and charge-out summary and, whilst some aspects may be generic in nature, the broader narrative would need to be tailored and be proportionate to the specific circumstances of each case.

2. The interests of the recipient of the report are paramount. The provision of large volumes of generic information, particularly where the information provided is not or is unlikely to be relevant to the specific case should be avoided as it will not assist the readers understanding of what work has or is proposed to be undertaken and may confuse or cause misunderstanding. Whilst a number of potentially useful and computational tools exist, practitioners should consider whether the

provision of these to creditors is helpful, or whether they are ostensibly for internal use within their practice. Provision of a higher level of detail may be helpful when responding to a request for additional information.

3. The suggestions below are intended to show how a member might support and explain the numerical information provided in any table of time spent. Suggested categories of activity are attached; again, these will need tailoring to the nature of the engagement.

4. Population of a numerical table (or tables) alone will not be sufficient to comply with the legislative and best practice requirements in relation to disclosure of the member's fees, where these are based on time costs. A case specific narrative, in terms of scope and disclosure, will be required.

5. It is of paramount importance, and a fundamental principle of the narrative disclosure, that it clearly distinguishes between the following:

6. It should be clear to recipients what has been undertaken in the period being reported upon.

7. There are a number of differing points in the conduct of a case in which narrative will be required. These are:

   a) Resolutions to support all fees bases – These will require narrative explaining the work that will be undertaken

   b) The fees estimate, where fees are to be based on time costs – These will require both narrative and figures

   c) Progress reports – These will require narrative explaining the work undertaken in the period, supported by figures if fees are being taken on a time cost basis

   This guidance is intended to cover all of the above areas.

## B. General

8. Members should be aware that where fees are based on a fixed amount or percentage calculation, there will also be a need to provide some form of narrative explanation of the work done. It should be sufficiently detailed to ensure that creditors understand why the basis requested is expected to produce a fair and reasonable reflection of the work done by the Office

## 4.2 APPROACH TO SIP9 REPORTING AND FEE ESTIMATES

Holder and his or her staff, and should cover the same or similar matters as those outlined below. Whilst it is not necessary to directly compare the fee proposed or charged to that which would have been charged had an alternative basis been used, it remains necessary to provide sufficient information to facilitate the making of informed judgements about the reasonableness of the office holder's requests. This might be achieved, for instance, by referring to prevailing market rates for collection activities or specific tasks or types of work.

9. When mixed bases for the calculation of remuneration are being used (or are proposed to be used), it will be particularly important to provide clear information about the tasks comprised in each of the categories, and the remuneration basis applicable to it. Reference can also usefully be made by Office Holders to the provisions of SIP 14 with regard to the apportionment of costs between fixed and floating charge realisations.

10. The narrative should provide an explanation if work has now been done that was not originally anticipated, for example, if a creditors' committee was appointed after the fee estimate had been prepared. The impact and implications of any variances from the fee estimate should be explained in the narrative statement.

11. Where significant amounts of time in a category are allocated to a particular grade of staff, the narrative should contain an explanation as to why, for example, the complexity of the work requires the involvement of that particular grade of staff (and, where the grade of staff might appear higher than might ordinarily be expected for the task, and explanation of the rationale for the more senior person doing that work), and the reason for the time spent. Similarly, it may be helpful to explain where any particular cost savings have been made in the grade of staff ultimately used, when compared to that previously anticipated.

12. Members should ensure that the narrative reports on matters arising during the period of the review and avoids repetition, save where it is required for contextual purposes. Where material is repeated, it will be helpful to note that the information was previously reported and when.

## C. Suggested categories of activity

13. The following are examples of typical workstreams that may be highlighted in a time and charge-out summary (these are not prescriptive or exhaustive). The numbered paragraphs below refer to the categories of activity set out in the illustrative time and charge-out summary below.

### C.1 Case Administration and Planning

14. This category of activity is likely to encompass work undertaken for both statutory and case strategy purposes. The narrative will provide an opportunity to explain the value to creditors of the work undertaken, bearing in mind that efficient case administration and planning adds value in terms of the time taken to carry out a job, the costs involved and ensuring, for example, a coherent planned process with as little duplication of effort as possible.

15. The narrative might usefully set out the nature and type of work, such as dealing with appointment and closure formalities, advertising, bonding, production of the statement of affairs, preparation of receipts and payments accounts and any fee estimates, submission of tax and VAT returns, winding up of pension schemes, non- statutory creditors' or shareholders' reports and/or meetings (unless there is a separate reporting category), liaising with creditors' committees, as well time spent determining or revising case strategy and general case management, including case reviews.

16. It may be helpful to set out the number and frequency of returns in relation to, say, the filing of receipts and payments accounts. Where assistance has been provided by any third party, say in relation to the preparation of the Statement of Affairs, or the winding up of the pension scheme, this should be explained in the narrative and the reasons why it was considered desirable and necessary to instruct a third party.

17. The narrative might also explain the reasons for any unanticipated costs being incurred, for example as a consequence of the company records being incomplete or inaccurate, a pension scheme being identified that was not known to exist at the date of appointment, or tax returns being brought up to date. Any revision in case strategy should be explained, together with the associated costs and the benefit to stakeholders in adopting the revised strategy.

18. Where appropriate, the narrative should explain the reasons for the production of any additional, non-statutory, reports (unless there is a separate reporting category), and the benefit derived as a consequence. Time spent liaising with a creditors' committee should be explained and it may be helpful to set out a brief explanation of the matters being considered by the committee in addition to the frequency of agreed reporting.

19. Consideration should be given to stating the anticipated duration of the case, and the impact this may have on the extent of work required.

### C.2 Reporting

20. Members may wish to include a narrative explanation setting out to whom they are reporting and the frequency. An office holder may have obligations to report to secured creditors, committees, creditors and shareholders, for both statutory and case management purposes. Reports may include administrators' proposals, progress reports and SIP 16 statements. Members may also wish to explain, in relation to any non-statutory reports, the reason for these being produced and the benefit to the estate, or recipient, in so doing.

### C.3 Enquiries and Investigations

21. The extent of disclosure in this section will be a matter for the discretion of the Office Holder and his or her legal advisers. Issues relating to privilege, disclosure prejudicial to the conduct of the insolvency process and 'tipping off', need to be considered when deciding what is disclosed here and in how much detail. This category will likely incorporate both the statutory obligation to review the directors' conduct as well as any necessary investigations to identify assets, and potential recovery actions in relation to antecedent transactions or voidable transactions.

22. Members should consider incorporating work done in relation to collecting and reviewing the company's accounting records, in order to identify potential assets and actions. If there has been a delay in the production of records, or they are incomplete or inaccurate, the impact on progress and costs may be commented upon within the narrative.

23. It may also be appropriate to comment on the co-operation of the directors or bankrupt in relation to any investigations.

## 4.2 APPROACH TO SIP9 REPORTING AND FEE ESTIMATES

24. Where a milestone approach has been used in relation to the fee estimate, members should set out the progress made to date, whether the milestone has been reached, and if the fee estimate has been exceeded, or is likely to be exceeded, the reasons for this.

25. If the review has identified any material antecedent transactions, or assets, that would warrant further investigation or legal action, these should be disclosed to creditors, together with a revised fee estimate if appropriate. This should help to ensure that all creditors will be satisfied that these areas have been investigated in a proportionate way even if there has been no monetary realisation as a result.

### C.4 Realisation of Assets

26. The narrative should be clear as to what work has been done by the Office Holder, as well as what, if any, aspects are being outsourced to a third party (for example use of debt collection agents, or use of agents to dispose of assets). This is particularly relevant in terms of asset realisations given the many options available for asset disposals. Further analysis, or categories, may be required to assist understanding where there are numerous assets or categories of assets.

27. The narrative should set out the marketing and disposal strategy adopted in relation to each asset (or category of assets), the anticipated timescale, and progress made to date. Members should set out the reasoning and impact behind the strategy adopted, in terms of time, cost and financial benefit to creditors.

28. Where the Office Holder has deemed it necessary to change strategy, the reasons for this should be explained in the narrative along with any impact on timing and costs as a result.

29. The narrative should make it clear what, if any, legal action will be required to facilitate any realisations, both in terms of securing and disposing of the assets. Any difficulties in realising assets should be set out; for example, sitting tenants, the need to procure a possession order, whether the strategy is time dependent, and the likelihood of achieving the timescale. Creditors should be advised of any likelihood of a revision to the fee estimate if the initial strategy is not implemented.

30. The narrative should also comment upon work done in relation to identifying, securing and insuring assets as well as the actual realisation and what, if any, aspects are anticipated to be outsourced to a third party (for example, use of agents to market or auction chattel assets), or whether litigation may be required in connection with, say, realisation of book debtors or directors' loan accounts.

31. Where appropriate, details should be provided of work done to facilitate the sale of a business, including preparation of a sales pack, dealing with interested parties, and contract negotiations. Where not included within a trading scenario (see C.5 below) members may also wish to comment here on work done in dealing with ROT claims, third party assets, negotiations with landlords, and dealing with tenants and utility companies in relation to properties.

32. The narrative should also make it clear what, if any, work will be required in terms of health and safety or environmental issues, in addition to work done in relation to dealing with utilities companies and other essential suppliers (if appropriate).

### C.5 Trading

33. The narrative should include the reasons for trading the business post insolvency, the duration of trading and, where trading continues at the time that the time cost summary and/or the fee estimate is provided, an estimate of any future duration. Where trading is likely to continue indefinitely to support an ongoing marketing strategy, the narrative should comment on the strategy adopted and progress made at the date of the report.

34. The narrative should explain the extent to which the Office Holder and his or her staff have been involved in the trading, both from a management control and financial perspective, as well as any statutory obligations. It will therefore likely include information in relation to work done regarding the preparation of cash flow forecasts, profit and loss accounts, management accounts, dealing with customers, suppliers (and related ROT matters), landlords and employees. It should be clear from the table and the narrative what the cost of the involvement of the Office Holder's staff in trading has been on a weekly or monthly basis as appropriate.

## C.6 Creditors

35. This category will include both statutory and non-statutory matters and members may wish to make a distinction in the narrative as well as making it clear what work has been done for the benefit of creditors (e.g. agreeing claims, paying a dividend) and to what extent this has been impacted by the quality of the books and records.

36. Members should identify any significant additional work in relation to agreeing claims, for example the need to employ lawyers or quantity surveyors to agree claims, as well as the nature of the dividend being paid (e.g. preferential, prescribed part, unsecured). The narrative should be clear as to whether any disputes, litigation or contentious matters have arisen, the extent to which members have engaged in such disputes, the reasons why and the overall benefit to creditors.

37. If not disclosed elsewhere this category may also include work done in relation to the production of statutory reports, or non-statutory reports. Where non statutory reports have been produced, the reasons for doing so, and the benefit, should be explained to the general creditor group.

38. This category might also include the general handling of communications with stakeholders such as customers and suppliers.

## C.7 Employees

39. The narrative should make it clear to what extent the Office Holder anticipates communicating with employees as well as the nature of the work being done, including liaising with the RPO and Job Centre Plus, providing support to employees in terms of completion of forms, liaising with (or appointing) union representatives and payroll providers, reviewing employment contracts, in addition to the admission of claims.

40. Where appropriate, the narrative might set out the level of interaction and queries the Office Holder has dealt with both in respect of employees, the RPO and any other relevant parties as this will be likely to vary from case to case depending on the number of employees, the nature of the business and type of appointment.

41. If there are likely to be claims for unfair dismissal and protective awards and the Office Holder has attended or contributed to Tribunals, the extent of involvement of the Office Holder and his or her staff, the reasons for the involvement and/or the benefit derived, should be set out in the narrative.

## 4.2 APPROACH TO SIP9 REPORTING AND FEE ESTIMATES

### C.8 Case Specific Matters

42. This will include any matters specific to the case not covered by one of the other categories of activity. These may include dealing with matters specific to the industry in which the business operates, or matters of an exceptional or time-consuming nature. Where not incorporated elsewhere, or specific to, say, investigations or asset realisations, the narrative may incorporate matters such as engagement with stakeholders generally, legal advice in relation to litigation, as well as general advice regarding validity of appointment and/or security, work done in relation to seeking an extension to an administration appointment or legal advice pertaining thereto.

## 4.2 APPROACH TO SIP9 REPORTING AND FEE ESTIMATES

### Illustrative time and charge-out summary

| | Hours | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Type of work | Partner | Manager | Other Senior Professional | Assistants & support staff | Total hours | Time cost £ | Average hourly rate £ | See notes on suggested scope in numbered paragraphs in section C above |
| Administration & Planning | | | | | | | | C.1. |
| Reporting | | | | | | | | C.2. |
| Enquiries and Investigations | | | | | | | | C.3. |
| Realisation of Assets | | | | | | | | C.4. |
| Trading | | | | | | | | C.5. |
| Creditors | | | | | | | | C.6. |
| Employees | | | | | | | | C.7. |
| Case specific matters (e.g. . . . ) | | | | | | | | C.8. |
| Total Hours | | | | | | | | |
| Total Anticipated Fees (£) | | | | | | | | |

**Notes**

- Population of the categories alone will not be sufficient to comply with the legislative requirements regarding a fee estimate, nor the disclosure requirements. A case specific narrative, in terms of scope and disclosure, will be required.
- Fixed fee / percentage resolutions will also require some form of narrative regarding the scope of the work to be done, albeit it is not anticipated that this will be as detailed as that required when producing a fee estimate in support of a time cost resolution, however it should be sufficiently detailed to ensure that creditors understand why the basis requested is expected to produce a fair and reasonable reflection of the work that the Office Holder anticipates will be undertaken.

## 4.2 APPROACH TO SIP9 REPORTING AND FEE ESTIMATES

- Members may find it more useful to differentiate between work that is required by statute and work that adds value, or is necessary to both realise assets and distribute funds.

# 4.3 CONNECTED PARTY SALES IN ADMINISTRATIONS - AIDE-MEMOIRE FOR INSOLVENCY PRACTITIONERS

## The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 (The Regulations)

### Introduction

The Regulations came into force on 30 April 2021[1] and apply to any disposal of what, in the Administrator's opinion, is all or a 'substantial' part of all the company in administration's business or assets to one or more connected persons within eight weeks of the date of administration to a connected party. In these circumstances the Administrator requires creditor approval or a 'Qualifying Report' from an 'Evaluator'.

### The Administrator's Obligations

The Regulations rely on the knowledge and experience of the Administrator to determine whether the sale is of a substantial part of the business or assets of the company in administration.

Although in some cases this may be self-evident the Administrator should consider documenting the reasons for deciding that the sale is of a substantial part or, more particularly where there may be some doubt, why it is not the sale of a substantial part and hence the Regulations do not apply.

### Re: The Evaluator

Under the Regulations the onus is on the connected party purchaser to obtain the Qualifying Report (QR).

The QR must, however, be such that the Administrator is satisfied that:

- having regard to the date on which the report was made, the individual making that report had sufficient relevant knowledge and experience to make a qualifying report;
- the individual has in place Professional Indemnity Insurance (PII) as set out in Regulation 11;

[1] Similar Regulations, The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations (Northern Ireland) 2021 came into effect in Northern Ireland on 25 June 2021.

## 4.3 AIDE-MEMOIRE FOR INSOLVENCY PRACTITIONERS

- the individual is independent as set out in Regulation 12 which in turn refers to Connected Persons per S 249 and Associates per S 435 of the Insolvency Act 1986 (IA 86);
- the individual is not otherwise disqualified from acting as an Evaluator, such as individuals with convictions for dishonesty, former bankrupts, and those subject to a disqualification order under the Company Directors Disqualification Act 1986.

The Administrator should therefore have in place procedures to assess:

- the adequacy of the Evaluator's knowledge and experience;
- that the Evaluator has PII in place;
- that the Evaluator is independent;
- that the Evaluator is not otherwise disqualified.

### Re: Information for the Qualifying Report (QR)

In order to prepare the QR the Evaluator will require information regarding the business and/or assets being sold.

Prior to the Appointment as Administrator the IP will not have the locus to provide information but may assist the directors to provide such information as is reasonably requested subject to any considerations of confidentiality and compliance with the Insolvency Code of Ethics.

### Other Obligations

The Administrator is required to send a copy of the QF to the Registrar of Companies and all creditors after completing the disposal and at the time they are required to file and circulate their Proposals.

A negative QR (stating that the grounds for disposal or the consideration are not reasonable) does not prevent the Administrator from completing the disposal but if they proceed, they must make a statement setting out their reasons for doing so.

## 4.3 AIDE-MEMOIRE FOR INSOLVENCY PRACTITIONERS

### Evaluators

A number of commercial providers of Evaluator services have been established and the Pre-Pack Pool which was originally set up in response to a series of recommendations contained in the Graham report on pre-packaged administrations continues in operation in an updated form following the introduction of the Regulations.

# Section 5

## IPA Regulations and Guidance

# SECTION 5 - IPA REGULATIONS AND GUIDANCE

## CONTENTS

# 5.1 IPA PROFESSIONAL INDEMNITY INSURANCE REGULATIONS

*(Adopted by Council on 14th July 2016 pursuant to Article 62.1 of the Association's Articles of Association)*

## 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 their 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 Association's Articles 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 upon request.

## 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

3.1.2 2.5 times their Gross Fee Income, subject to clause 3.3 below.

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 The required minimum cover under the policy need not exceed £1,500,000.

3.4 PII policies must comply with any IPA approved minimum terms for PII policies, as may be published from time to time, and 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.

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 them whilst at their previous practice in respect of the preceding period of not less than six years.

**Effective Date: 01 January 2017**

## 5.2 IPA PROFESSIONAL INDEMNITY INSURANCE 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 Principal (as defined by the PII Regulations).

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 (superseded by the Regulation & Conduct Committee w.e.f. 2019), 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.

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 they are provided with such information by the person responsible for such matters within your firm.

8. You should 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.

## 5.2 PII GUIDANCE

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. Self-certification of your PII arrangements will be requested by the Association as an item of your renewal of your Insolvency Authorisation. For the purposes of inspection, you will be asked to make your PII policy available to our inspectors. Alternatively, you may 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.

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 the IPA's Regulations, Guidance Notes and with any IPA approved minimum terms for PII policies, as may be published from time to time, and ask them to confirm that your PII policy meets the minimum requirements laid down by them.

# 5.3 IT SECURITY POLICY GUIDANCE

## 5.3 IPA DATA AND INFORMATION SECURITY POLICY GUIDANCE

**1. Introduction**

i. An IT security policy will help you to:

- Reduce the risk of IT problems
- Plan for problems and deal with them when they happen
- Keep working if something does go wrong
- Protect company, client and employee data
- Keep valuable company information, such as plans and designs secret
- Meet your legal obligations under the General Data Protection Regulations (GDPR) and other laws
- Meet your professional obligations towards our clients and customers

ii. IT security problems can be expensive and time-consuming to resolve. Prevention is much better than cure.

**2. Responsibility**

i. All staff have the responsibility of ensuring that they are adhering to the rules and regulations within the IT policy and taking appropriate actions when necessary.

ii. Appoint a specific senior member of staff to have day-to-day operation responsibility for implementing the IT policy.

iii. Appoint specialist IT organisations to help with your planning and support.

iv. Appoint a specific senior member of staff as the Data Protection Officer to advise on data protection and best practices.

v. Appoint a specific director or senior member of staff to take overall responsibility for IT security strategy.

**3. Review Process**

i. Review the IT policy at least annually.

**4. Information Classification**

i. Only classify information which is necessary for the completion of your duties. Have policies in place to limit access to personal data to only

those that need it for processing. Classify information into different categories so that you can ensure that it is protected properly and that you allocate security resources appropriately:

- **Unclassified:** This is information that can be made public without any implications for the company, such as information that is already in the public domain
- **Employee Confidential:** This includes information such as medical reports, pay and so on
- **Company Confidential:** Such as contracts, business plans, passwords for critical IT systems, client contact records, accounts etc
- **Client Confidential:** This includes personal identifiable information such as name or address, passwords to client systems, market sensitive information etc

**5. Access Controls**

i. Internally, as far as possible, operate on a 'need to share' rather than a 'need to know' basis with respect to company confidential information. This means that your bias and intention is to share information to help people do their jobs rather than needlessly raise barriers to access.

ii. As for client information, operate in compliance with the GDPR 'Right to Access. This is the right of data subjects to obtain confirmation as to whether you are processing their data, where you are processing it and for what purpose. Furthermore, there is an obligation to provide, upon request, a copy of their personal data, free of charge in an electronic format.

**6. Security software**

i. To protect your data, systems, users and customers use the following systems and processes:

- **Laptop and desktop anti-malware, Server anti-malware, intrusion detection and prevention, desktop firewall** – Use recognised software which is installed on every employee's laptop. This should be renewed and reviewed on at least an annual basis.
- **Cloud-hosted email spam, malware and content filtering** as well as **email archiving and continuity** is protected by only using recognised software such as Office 365 which is renewed and reviewed on an annual basis.

## 5.3 IT SECURITY POLICY GUIDANCE

- **Data protection and Encryption** – Ensure all staff have had GDPR training which emphasises the need for data protection and password encryption on all files containing sensitive data.
- Consider using an **in-house firewall** which has **Intrusion Prevention System** (IPS) enabled.

**7. Employees joining and leaving**

i. When a new employee joins the company, only add them to the systems to which they need access to perform their roles:

ii. Provide training to new staff and support for existing staff to implement this policy.

iii. This includes:

- An initial introduction to IT security, covering the risks, basic security measures, company policies and where to get help.
- Training on how to use company systems and security software properly.
- On request, a security health check on their computer, tablet or phone.

iv. When people leave a project or leave the company, promptly revoke their access privileges to company systems.

**8. Staff responsibilities**

i. Effective security is a team effort requiring the participation and support of every employee and associate. It is your responsibility to know and follows these guidelines.

ii. Staff are personally responsible for the secure handling of confidential information that is entrusted to them. Staff may access, use or share confidential information only to the extent it is authorised and necessary for the proper performance of their duties. Promptly report any theft, loss or unauthorised disclosure of protected information or any breach of this policy to the Data Protection Officer.

**9. Staff own device(s)**

i. It is also staff members' responsibility to use their own devices (computer, phone, tablet etc) in a secure way. However, the company should provide training and support to enable them to do so (see below).

At a minimum staff should:

- Remove software that they do not use or need from their computers;
- Update the operating system and applications on their devices regularly;
- Keep their computer firewall and any other virus applications switched on;
- Store files in official company storage locations so that it is backed up properly and available in an ;emergency
- Understand the privacy and security settings on their phone and social media accounts;
- Keep their work computer separate from any family or shared computers;
- If they have access to an administrator account, do not use it on their own computer for everyday use; and
- Make sure their computer and phone logs out automatically after 15 minutes and requires a password to log back in.

**10. Password Guidelines**

- Change default passwords and PINs on computers, phones and all network devices – This should be done when on indication or suspicion of compromise.
- Don't share your passwords with other people or disclose them to anyone else.
- Don't write down PINs and passwords next to computers and phones.
- Use strong passwords which as a rule should consist of a mixture of letters (upper and lower case), numbers and symbols.
- Don't use the same password for multiple critical systems.
- Factory setting passwords should always be changed to something else which falls within the strong password bullet point.
- Passwords should never be written down therefore if you are struggling to remember various passwords, save them all into one document which is password protected.

**11. Be alert to other security risks**

i. While technology can prevent many security incidents, your actions and habits are also important.

ii. With this in mind staff should:

## 5.3 IT SECURITY POLICY GUIDANCE

- Take time to learn about IT security and keep themselves informed. Get safe online is a good source for general awareness https://www.getsafeonline.org/
- Use extreme caution when opening email attachments from unknown senders or unexpected attachments from any sender
- Be on guard against social engineering, such as attempts by outsiders to persuade you to disclose confidential information including employee, client or company confidential information. Fraudsters and hackers can be extremely persuasive and manipulative
- Be wary of fake websites and phishing emails. Don't click on links in emails or social media if you are not certain of its origin. Don't disclose passwords and other confidential information unless you are sure you are on a legitimate website
- Use social media in a professional and responsible way without violating company policies or disclosing confidential information
- Take particular care of their computer and mobile devices when they are away from home or out of the office
- If a members of staff leaves the company, they will return any company property, transfer any company work-related files back to the company and delete all confidential information from their systems as soon as is practicable
- Where confidential information is stored on paper, it should be kept in a secure place where unauthorised people cannot see it and destroyed in confidential bins when no longer required

iii. The following things (amongst others) are, in general, prohibited on company systems and while carrying out your duties for the company may result in disciplinary action:

- Anything that contradicts the company policies
- Bypassing user authentication or security of any system, network or account
- Downloading or installing pirated software
- Disclosure of confidential information at any time

**12. Information on external stakeholders**

i. Any reports whether produced internally or externally which contain information regarding external stakeholders should be stored on the company's system. The person who is involved in overseeing the particular report is responsible for ensuring that this is stored correctly.

ii. The company should consider utilising up to date secure cloud technology with enhanced security features. Any information relating to an external stakeholder should only be stored on record for a maximum of 6 years.

iii. If it is to be found that this type of information has not been handled correctly, then please report the matter to the Data Protection Officer.

**13. Backup, disaster recovery and continuity**

i. Ensure there is a disaster recovery plan in place that covers backup and continuity which has been e-mailed to all staff and has also been saved in the 'housekeeping' file.

ii. Under GDPR, where a data breach is likely to result in a 'risk for the rights and freedoms of individuals' notify the customers and data controllers 'without undue delay'. Ensure they are informed within 72 hours.

**14. AML (Anti-money laundering)**

i. Definition – Processes by which proceeds of crime are controlled and disguised, so that money can be spent freely without arrest

ii. Examples of AML about which staff need to be vigilant are:

a) Identifying someone who is opening accounts at lots of different banks, depositing little cash at a time.

b) Identifying someone who is getting associates to deposit money and then transferring to criminals

c) Identifying someone who is using businesses to deposit cash at the bank along with normal takings

d) Identifying someone who is agreeing on purchase of investment and then concocting an explanation for needing to pay in cash

iii. Staff Responsibilities – Members of staff need to question cash deposits and how assets are bought in the first place.

iv. Staff are responsible for following AML procedures and reporting suspicions.

v. The obligations of members of staff with regards to AML are as follows:

- **Client Due Diligence (CDD)** – Under AML regulations, before the company can take on any new clients the following processes need to be adhered to and documented. This will allow the company to decide what level of due diligence needs to be applied from the outset.

  √ Assess risk of taking on new client by verifying ID and carrying out company searches on the business.

  √ Verify ID - For example passport or driving licence. It is the company's duty of care to ensure that the documents have not been tampered with and that the appearance is consistent with the person's date of birth.

  √ Know clients' business – By carrying out a company search and verifying the identification of directors and significant shareholders. Obtain a certified copy of trust deed and extracts from it and verify identification of settlors, trustees and beneficiaries.

- **Keeping records** – Under GDPR rules, the type of documents which are required to be checked to carry out the above works are legally allowed to be kept on files. Other documents that the company can keep on file are client instructions and financial instructions with dates, amounts, payers and/or payees.

- **Reporting suspicions** – Any suspicions should be reported to the Money Laundering Reporting Officer (MLRO), using the company 's secure systems as the information transported will be extremely confidential.

**15. Sensitive personal information**

i. The law requires that extra care should be taken when handling any of the following information. Unless the company has a procedure on this, then the following information should not be recorded in any circumstance:

- Racial/ethnic background
- Religious beliefs/affiliations
- Political views or trade union membership
- Physical/mental health and medical history
- Sexual orientation or activity
- Genetic/biometric data
- Criminal offences – convicted or alleged

ii. If staff have any questions regarding AML, please contact the company's money laundering reporting officer (MLRO).

**16. AML Policies**

i. For all staff that carry out activity on AML should refer to the company AML polices when carrying out this type of work, for example whistleblowing process, criminal reporting responsibilities (also contained within this policy) and escalation polices.

**17. Data Security**

i. Company employees, before keeping any information relating to external stakeholders should question themselves on the following:

√ Is the information needed?

√ It is accurate?

√ It is suitable for people to see?

√ It is secure?

ii. To eliminate data security risks as specified under GDPR the IPA has procedures in place to ensure that we are correctly adhering:

- **Make sure data is backed up in case of system failure**
- **Ensure data is destroyed if no longer needed**
- **Keep personal data safe from people who are not allowed to see it**
- **Any memory sticks should be locked in drawers** – Memory sticks and data discs can easily get lost, ensure that these are cleared when the data is no longer required and locked away when not in use. Memory sticks should be password protected.

## 5.3 IT SECURITY POLICY GUIDANCE

- **Sensitive data files being sent in the post to the wrong person** –This is a risk and therefore postage of these type of documents should only be on a last resort basis and should in every instance possible be e-mailed securely. Any type of document that is e-mailed containing sensitive data must be encrypted with a password and two factor authentications. The password relating to the document must then be sent in a separate e-mail to the original document e-mail.
- **Laptop left in public place** – This is also a major risk and therefore all laptops should be encrypted with passwords and two factor authentication enabled so that if this situation does arise then it will be very difficult for someone to gain access.
- **Only hold information about someone for legitimate business purposes** – all staff should be given training on data security which is to be updated on an annual basis.

**18. Sending personal data to another person**

i. Before sending anything that includes personal or confidential information, you need to consider both the means by which you send it, and whether you should be sending it at all.

- **Communicating to other parties** – Never provide personal information to another party, whether inside or outside of the company without first checking that they are authorised to receive it.
- **Sending personal data outside the EU** – GDPR prohibits the sending of personal data to countries that don't have equivalent standards so if you need to send outside of the EU, you must first check the correct procedure to follow.
- **Sending securely** – To ensure that your documents are being sent securely, all documents should be encrypted with a password and the password being sent in a separate document from the original e-mail (please refer to point 16. ii. in this document).

**19. Data Storage**

i. Staff carrying out certain areas of work may well have access to personal data; and or financial data that could breach GDPR, and lead to loss of livelihood or have other consequences. It is vital therefore that staff store only what is required for the company to carry out its functions, only share information in accordance with those functions, and do so securely, and destroy information (physically and electronically) as soon as it is no longer required.

ii. All staff are responsible for ensuring that any data that the company holds that exceeds a period of six years should be destroyed securely unless there is a specific and documented reason for retaining it for a longer period. In such circumstances the reasons for continuing to hold should be reviewed at least annually.

## 5.4 IPA WHISTLEBLOWING GUIDANCE

### Guidance for IPs

1. In certain circumstances, an Insolvency Practitioner ('IP') may be required to report to the IPA if a client, insolvent or associate thereof has not complied with any law or regulation or if any other matters occur which give rise to a reporting obligation.

2. An IP shall ensure that they are aware of the requirements identified in the relevant legislation and regulatory framework that assist the IP in identifying matters that must be reported.

3. Failure to report may constitute an offence and could render an IP liable to fines or even imprisonment.

4. Where an IP becomes aware of a suspected or actual non-compliance with law or regulation, which gives rise to a statutory right or duty to report, they shall report this to the proper authority immediately.

5. Where an IP becomes aware of a suspected or actual non-compliance with law or regulation and concludes that it is a matter that must be disclosed in the public interest, the IP shall notify the relevant parties in writing of their view. Except in circumstances where there is a real risk that disclosure to those parties might prejudice any investigation or court proceedings or is proscribed by law (for example, in the UK where it might constitute the offence of "tipping off" – see below for further details) the IP shall make their report to the proper authority without delay and without first informing the relevant parties.

### Circumstances indicating non-compliance with law or regulation

6. An IP shall have a general understanding of the laws and regulations that apply when dealing with an insolvent person or entity.

7. The laws and regulations may be specific to the insolvent's area of activity and include qualifications, licences or permits to carry on a particular activity. The following examples (a) & (b), highlight some circumstances where an entity may be in breach of a law or regulation under UK law:

   an entity whose main activity is waste disposal should hold the relevant licences to allow it to dispose of hazardous waste;

an entity whose main activity is financial services work, such as investment business, should hold appropriate authorisation to undertake this type of activity;

### Professional duty of confidence

8. Disclosure by an IP shall not constitute a breach of any obligation of confidence imposed by the fundamental principle of confidentiality provided that:

   a) disclosure is made in the public interest;

   b) disclosure is made to a proper authority; and

   c) there is no malice motivating the disclosure; or

   d) disclosure is made under compulsion of law.

9. An IP should take legal advice before making a decision on whether a disclosure of a suspected or actual non-compliance with law or regulation shall be made to a proper authority in the public interest.

### Method of reporting

10. An IP making a disclosure of a suspected or actual non-compliance with law or regulation directly to a proper authority should ensure that their report includes:

    a) the name of the entity;

    b) Who is involved;

    c) How long has the action been going on;

    d) Where this is happening;

    e) What the impact is/may be;

    f) the statutory authority under which the report is made;

    g) the context in which the report is made;

    h) the matters giving rise to the report; a request that the recipient acknowledge that the report has been received; and

    i) their name and the date on which the report was written;

## 5.4 WHISTLEBLOWING GUIDANCE

j) If there are supporting documents/information provided, some explanation of the documentation and whether this can be shared.

### Whistleblowing

11. Where required by law to disclose confidential information as a result of The Money Laundering, Terrorist Financing & Transfer of Funds (Information on the Payer) Regulations 2017 ('MLR17'), an IP should always disclose that information in compliance with relevant legal requirements.

12. In some circumstances, an IP may consider disclosing information when not obligated to do so by law or regulation, because it is considered that disclosure would be in the public interest. When considering such disclosure, an IP should, where appropriate, follow the internal procedures of their employer or firm in an attempt to rectify the situation. If the matter cannot be resolved, an IP should determine the following:

    a) legal constraints and obligations;

    b) whether members of the public are likely to be adversely affected;

    c) the gravity of the matter, for example the size of the amounts involved and the extent of likely financial damage;

    d) the possibility or likelihood of repetition;

    e) the reliability and quality of the information available;

    f) the reasons for the employer or firm's unwillingness to disclose matters to the relevant authority.

13. In deciding whether to disclose confidential information, the IP should also consider the following points:

    a) when the employer or firm gives authorisation to disclose information, whether or not the interests of all the parties, including third parties whose interests might be affected, could be harmed;

    b) whether or not all the relevant information is known and substantiated, to the extent this is practicable; when the situation involves unsubstantiated facts, incomplete information or unsubstantiated conclusions, professional judgement should be used in determining the type of disclosure to be made, if any;

c) the type of communication that is expected and to whom it is addressed; in particular, an IP should be satisfied that the parties to whom the communication is addressed are appropriate recipients; and

d) the legal or regulatory obligations and the possible implications of disclosure for the professional accountant in business.

14. The IPA, if in receipt of confidential information from an IP will process that information in accordance with its responsibilities and duties as a regulatory and, in the case of disclosure pursuant to anti-money laundering or anti-terrorist legislation as a Supervisory Authority under MLR17.

15. Confidential information from IPA members or other IPs not regulated by the IPA can be sent to the dedicated e-mail address for confidential disclosures that will ensure that matters are dealt with anonymously. The email address is: amlwhistleblowing@ipa.uk.com

16. IPs are reminded of the provisions of The Statement of Insolvency Practice 1 and their obligation to report misconduct where other IPs are not complying with relevant legislation or regulations or whose actions may bring discredit to the profession.

17. Save in circumstances where disclosure is required by law, the IPA will engage with the provider of confidential information regarding its use in regulatory or disciplinary processes and endeavour to protect the identity of the provider.

## Whistleblowing Guidance - public and third parties

18. The IPA welcomes disclosures from the public and third parties of alleged Money Laundering by members of the IPA who are licensed as IPs, general members of the IPA (fellow, ordinary or student members) or IPA Secretariat staff.

19. The IPA has set-up an email address which can be used to make a confidential disclosure to the IPA.

20. The address is: amlwhistleblowing@ipa.uk.com

21. Disclosures should provide as much detail as is available and at least the identity of the person against whom the allegation is being made and any documentary evidence or detail that would assist the IPA in carrying out relevant enquiries.

## 5.4 WHISTLEBLOWING GUIDANCE

22. Disclosures to these e-mail addresses is restricted to the IPA's Single Point of Contact, her Deputy and the IPA's Money Laundering Nominated Officer.

23. Disclosures will be treated confidentially and the identity of the party making the disclosure will be kept anonymous and will not be shared with the individual against whom the allegation has been made, any other member of the IPA Secretariat or any Committee who may consider any allegation, without the express consent and agreement of the party making the disclosure.

24. Disclosures will be dealt with by the IPA under our responsibilities as a Supervisory Authority under MLR17 and our duties as a regulator of insolvency matters.

25. Offences that may indicate Money Laundering include:

    a) Concealing, transferring, disguising or converting criminal property or removing such property from the UK

    b) Entering into, or becoming aware of arrangements which it is known would facilitate the acquisition or control of criminal property

    c) Acquiring or using or possessing criminal property

26. The IPA also supports disclosures to HMRC where the public believe that an IPA member is committing tax evasion or fraud or assisting with tax evasion or fraud. The HMRC tax fraud hotline is 0800 788 887. Disclosures to the HMRC hotline do not prevent a disclosure also being made to the IPA.

### Tipping-Off

27. 'Tipping-Off' is a specific offence under Proceeds of Crime Act 2002 ('POCA').

28. Tipping-off is reporting, informing or disclosing to the person whom an allegation has been received, or to a third party that a report of suspected Money Laundering has been made and/or that the person against whom an allegation is raised is being investigated.

29. All IPA staff and Committee members are subject to Money Laundering training and warned about the offence of tipping-off as any breach may lead to up to 5 years imprisonment, a fine or both.

30. Any member of the public or third party who is considering making a disclosure to the IPA should ensure that the disclosure is in the public interest and should seek their own independent legal advice on the disclosure.

## Confidentiality

31. If you're worried about your identity being revealed and you're contacting us to tell us about an issue with an IP, or an IPs firm or if you are an IP reporting a matter regarding a client or associate, tell us in writing when you contact us.

32. You can also make a complaint anonymously using a non-name-based email account, a private masked phone number, by post or via a representative (such as a trade association, Citizens Advice).

33. If you submit information anonymously avoid including information that could allow someone to guess your identity.

34. In any case, our aim is to keep your identity private while we look at the information you provided or the issue you have raised and decide on the best course of action to take.

35. If we decide to open a formal complaint or rely on information you've provided in any investigation we undertake, we will not disclose your identity to any other party without your express consent and agreement.

## 5.5 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; |

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:

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.

## 5.5 CLIENT MONEY REGULATIONS

### 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.

## 5.6 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.

## 5.6 CLIENT MONEY GUIDANCE

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 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.

## 5.7 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 may find it useful to carry out their own analysis of their knowledge and skills for the work

## 5.7 CPE GUIDANCE

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; and/or
- 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.

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 network-

ing 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.

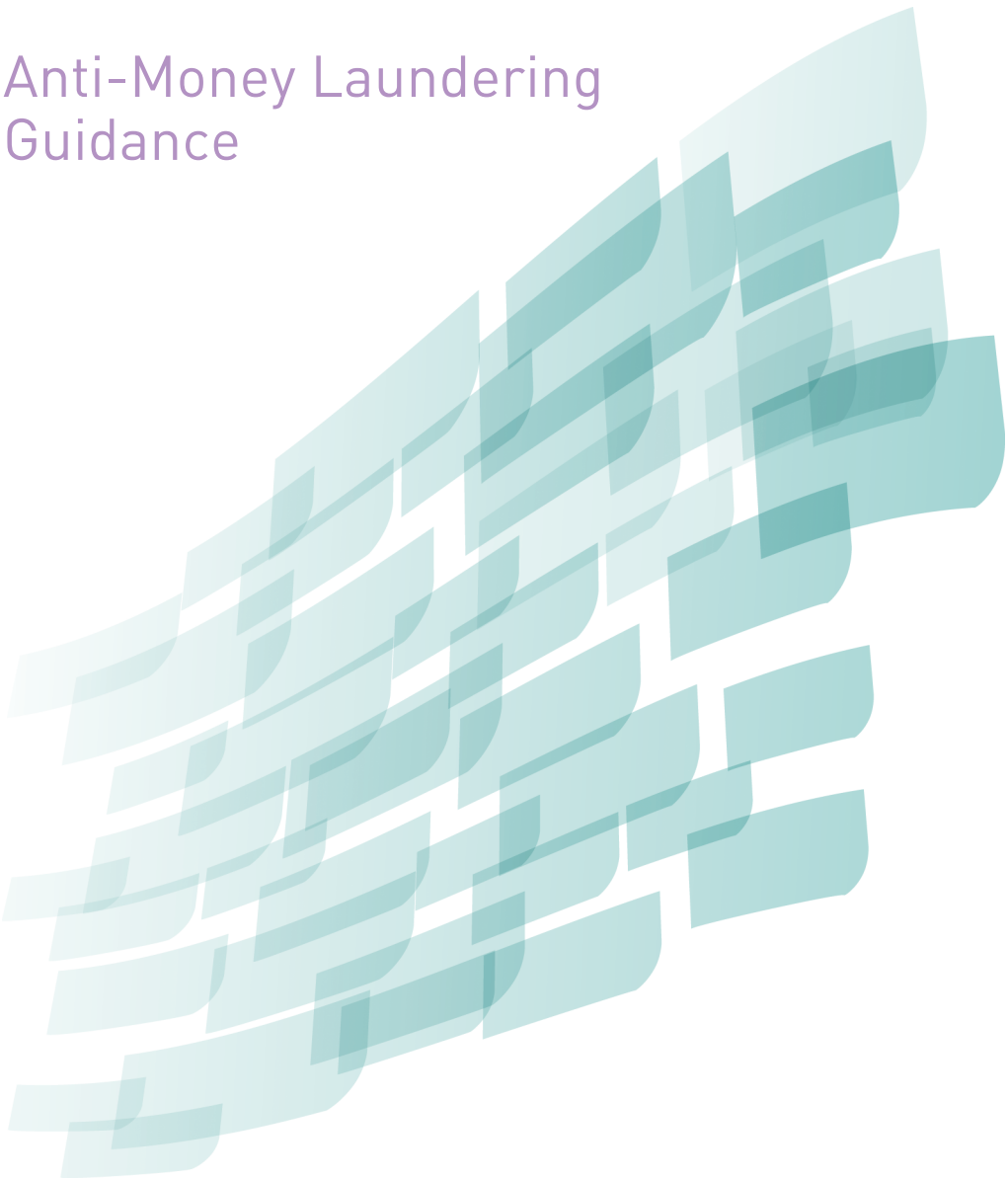
## OTHER MEMBERS

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.

**Approved by Council: 19 July 2007**

# Section 6

## Anti-Money Laundering Guidance



# SECTION 6 - ANTI-MONEY LAUNDERING GUIDANCE

## CONTENTS

# 6.1 ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING: GUIDANCE FOR IPA MEMBERS ON REQUIREMENTS UNDER THE MONEY LAUNDERING, TERRORIST FINANCING & TRANSFER OF FUNDS (INFORMATION ON THE PAYER) REGULATIONS 2010 ('MLR17') AND SPECIFIC MATTERS RELATING TO INSOLVENCY

## 1. Introduction

The Money Laundering, Terrorist Financing & Transfer of Funds (Information on the Payer) Regulations 2017 ('MLR17') were introduced in March 2017.

MLR17 applies to persons who carry on business in the 'regulated sector'. This includes acting as an Insolvency Practitioner ('IP') as per S388 of the Insolvency Act 1986 and Article 3 of the Insolvency (Northern Ireland) Order 1989.

Under MLR17, the IPA is listed as a Supervisory Authority ('SA') to monitor compliance with MLR17. You may be regulated by the IPA as an Insolvency Practitioner ('IP') but the IPA does not act as your SA. As part of the work in registering and approving beneficial owners, officers, managers ('BOOMs') in June 2018, you would have been advised as to whether the IPA acts as your SA.

As part of the IPA's role as a SA, the Secretariat have provided a strategy on how the IPA will deal with our role as a SA. This has been published on the IPA website.

Updates on Anti-Money Laundering ('AML') issues will be circulated to members via the IPA newsletter and the usual platforms.

The IPA has also setup a dedicated e-mail address to deal with AML queries from our members. To raise any AML specific complaints please use the email amlcomplaints@ipa.uk.com and complaints will be treated confidentially and in line with the IPA Whistleblowing Policy.

This guidance is designed to assist IPs and members with details of what is expected under MLR17 and is to support the upcoming appendix to the CCAB guidance which will highlight specific AML issues in relation to insolvency matters. This guidance is issued by the IPA as a supplement to the CCAB appendix and is not to be treated as formal regulatory and/or legal guidance or advice.

## 6.1 AML GUIDE TO MEMBERS 2021

The first 11 chapters cover general matters which apply to all members. Chapter 12 looks specifically at issues that arise in relation to insolvency matters and looks to assist members who deal with insolvency assignments whilst the CCAB appendix is finalised.

Members should also continue to seek assistance from their own compliance teams and colleagues who deal with AML matters (where applicable).

The guidance will provide some detail on what is expected from IPs and members under MLR17 and also provides guidance on matters that may assist with applying MLR17 to insolvency work.

A separate guide will be published to provide information on what members can expect to be reviewed by our Inspectors when they undertake regulatory visits, both in cases where the IPA is your SA and where the IPA is not your SA.

### 2. Nominated officer(s)

Under Regulation 21 of MLR17, you must have a nominated officer who acts for the firm in relation to Money Laundering matters. The Nominated Officer is more commonly known as the Money Laundering Reporting Officer ('MLRO').

The MLRO should have sufficient seniority, a sound understanding of MLR17 and be able to access all relevant information to assist in their role and with disclosures to the National Crime Agency ('NCA').

The MLRO should have their appointment confirmed in writing, and notification of the identity of the MLRO should be sent to your SA within 14 days of their appointment.

It is recommended that a deputy MLRO should also be appointed to ensure continuity in the role and that there is clear job description and responsibilities expected of the MLRO.

Depending on the size of your organisation, the board/partners/managers must create a culture that promotes, supports and resources the MLRO and Money Laundering work.

Dependent on the size of your organisation, Regulation 21 states that a member of the Board or equivalent management body must be appointed to work with the MLRO, ensure that the board/managers/partners are provided with reports on Money Laundering issues and help embed good compliance with the MLR17 in your firm. This person is commonly known as the Money Laundering Compliance Officer ('MLCO').

Again, should an MLCO be appointed, their details should be provided to your SA within 14 days of appointment.

### 3. Firm Risk Assessment

Under Regulation 18 of MLR17, you are required to produce a written risk assessment which identifies and assesses the risk to your business from Money Laundering and Terrorist Financing.

Members should note that insolvency was highlighted as a high-risk environment by the Financial Action Task Force ('FATF'), and OPBAS have stated that they also consider insolvency as having a high risk and this should be considered when setting-up or reviewing the written risk assessment.

You should consider and account for:

- Your clients and client base
- Any geographical areas in which you operate
- What products/services you are offering and to whom
- How you conduct transactions
- Size and nature of your business

This will require an understanding by your MLRO and/or MLCO as to your business, i.e. what types of appointment you seek (is it purely corporate insolvency, for example), whether you also act in turnaround and restructuring or general debt advice.

An understanding will also be required of whom you act for – do you act for clearing banks, directors, debtors, creditors, asset finance companies, factors etc.

You should also understand where your client, or potential clients, are based. Do you have any clients who live overseas? Is the beneficial owner of a corporate client based overseas – which may lead you to consider that there is a higher risk in respect of those aspects of your work.

A risk assessment of your business will assist in:

- Developing policies and procedures for your firm and work that you undertake
- Helping consider and apply a risk-based approach to detecting and preventing Money Laundering

- Helping to ensure that training is provided which explains and deals with areas of risk notified
- Inform your assessment of risk associated with certain areas of work, or with clients for which you undertaken work and to take an informed risk-based approach on client engagement

You should ensure that you keep an up-to-date record of the steps you have taken to produce your risk assessment and consider any steps that you may take to mitigate the risks of Money Laundering and Terrorist Financing for your firm.

You should also keep the risk assessment under regular review and be prepared to provide a copy to your SA on request.

### 4. Case Risk Assessments — Client Due Diligence

Regulation 27 of MLR17 requires Client Due Diligence ('CDD') when you are establishing a business relationship, carrying out an occasional transaction, suspect Money Laundering or Terrorist Financing, or doubt the veracity or adequacy of documents or information provided for CDD purposes.

Regulation 28 requires you to assess and obtain information on a prospective client and in relation to the work that is to be undertaken.

You should consider the purpose and nature of any engagement as well as the assets and proposed transactions and consider the risk in respect of each engagement with reference to your firm's risk assessment.

CDD details were more commonly known as the 'Know Your Client' ('KYC') requirement, but these have been enhanced under Regulation 33.

For all new clients:

- Identify the client
- Verify their identity by obtaining documents (usually you should obtain one of a passport, driving licence, UK identity card etc. as well as some secondary identification like a current utility bill for example)
- Identify beneficial owners – on a risk sensitive basis, take reasonable steps to verify the beneficial owners
- Obtain a copy of the Persons of Significant Control ('PSC') Register – remember under the 5th Money Laundering Directive where the information held

on Companies House as to the PSC differs from the details that you have obtained or been provided with, you have a duty to report any material discrepancy to Companies House

- Gather and understand information on the intended purpose and nature of the business relationship

For a corporate client, or where you are acting in relation to a corporate insolvency, you should obtain and verify the name of corporate body, company number and registered office address and principal place of business.

Businesses may choose electronic identification processes either on their own, or in conjunction with other paper-based evidence to assist in CDD work. Firms must understand the basis of the systems they intend to use and gain assurance that the information afforded to them is reliable, comprehensive and accurate.

Where the corporate body is not listed on a regulated market you should also be taking steps to determine and verify:

- The constitution of the corporate entity (articles of association etc.)
- Law under which it operates
- Full names of the board of directors and senior people who are responsible for operations
- Confirm and identify the name of the beneficial owner and ensure that their identity is verified
- If the beneficial owner is another company or a trust etc., ensure that you understand the ownership and control structure
- If the corporate body is owned by another person, you must identify the owner(s) and take reasonable measures to verify their identity, so you are satisfied as to the ownership structure.

You should also utilise Regulation 43, which imposes a duty on a corporate body which is not listed on a regulated market to provide you with the information you require to allow the client to be identified and verified.

CDD must be undertaken before the establishment of a business relationship. Whilst Regulation 30(3) allows verification to be completed after contact is first established, this should be in very limited circumstances. This is possibly only where there is a hostile appointment, or an emergency appointment is requested.

It is recommended that CDD is completed prior to signing any letter of engagement or taking on an appointment. Initial client identification with an initial assessment as to the risk of the assignment should be undertaken, reviewed and updated subsequent to the appointment.

You should ensure that all staff are aware of the policy on CDD and able to complete the required identification and verification.

If MLR17 does not apply, it is recommended that CDD checks are still undertaken.

### 5. Case Risk Assessment — Enhanced Due Diligence

Regulation 33 deals with Enhanced Due Diligence ('EDD') requirements and when EDD is required.

EDD is required when:

- You identify a high risk of Money Laundering or Terrorist Financing
- The business relationship or a transaction is with a person in a high-risk third country (you should ensure that you review the guidance issued on countries with unsatisfactory AML controls from FATF – www.fatf-gafi.org as well as the HM Treasury Sanctions List if there are concerns)
- If there are concerns regarding a client or potential client being a Politically Exposed Person ('PEP') (see 6 below for further information)
- A transaction is unusually large or complex – this can be in relation to a transaction that you uncover during your SIP2 enquiries that is outside the usual business of the company for example
- Transactions appear to have little economic or legal purpose

There are further details on when EDD is required and steps to take at Regulation 33(6), which should be reviewed if the circumstances require.

In relation to insolvency work, EDD should be undertaken:

- Where a debtor, company or beneficial owners are subject to criminal or civil proceedings
- If cashflow issues with the business indicate the possibility of fraud or dishonesty
- Where the debtor, company or beneficial owners are in a high-risk country or area

- Where the location of assets is in a high-risk area
- When payments are being asked to be made to a location that is a high-risk area
- Where there is no personal contact or personal contact is being avoided

These lists are not exhaustive and you should consider where you believe EDD is required depending on your firm's risk assessment and the nature of the engagement.

## 6. Politically Exposed Persons ('PEPS')

PEPs not only include a politically exposed person, but a family member or close known associate of a PEP.

You are required to ensure that your risk systems and checks are able to determine if a potential client or beneficial owner is a PEP and if so, that you are able to assess the level of risk and what EDD measures are required to be applied to that client.

Regulation 35 provides for further measures to undertake if there is a PEP in place and these include:

- Approval from Senior Management for establishing and/or continuing the relationship
- Establishing the source of wealth/funds involved with the PEP and in relation to any transaction
- Continuing EDD with the PEP and the relationship

## 7. Case Risk Assessment — Simplified Due Diligence

There are occasions when you may apply Simplified Due Diligence ('SDD'). This is where you determine that there is a low risk of Money Laundering or Terrorist Financing in relation to a business relationship or transaction.

You must still consider the CDD requirements under Regulation 28 and ensure that you keep the matter under review.

Regulation 37(3) provides matters to take into account and consider to assess whether there is a lower risk of Money Laundering or Terrorist Financing. However, one or more of the points listed is not indicative or proof that a lower risk applies, and a written assessment and conclusion of any decision must still be held on file.

## 8. Policies, Procedures & Controls

It is important that you have established written policies, written procedures and controls in place in order to effectively manage the Money Laundering and Terrorist Financing risks identified in your risk assessment and that the policies, procedures and controls can effectively mitigate such risks.

Any policies, procedures and controls should be proportionate to the size of your business and the nature of work that you undertake but must be approved by the senior management of your firm as set out under Regulation 19.

You should ensure that all policies and procedures are communicated effectively around your teams so that they are aware of what is required by them and the firm in dealing with the risks of Money Laundering and Terrorist Financing, and all policies and procedures should be subject to regular review, with any updates effectively communicated to all team members.

Regulation 19 advises what should be covered by any policies, procedures and controls, but these must cover:

- Risk management practices
- Regulation 21-24 controls (see further detail below)
- How CDD is carried out
- Reporting and record-keeping
- How Suspicious Activity Reports ('SAR') and disclosures to the National Crime Agency ('NCA') are dealt with
- Monitoring, communicating and managing compliance with internal policies
- Identification and EDD for large, complex and high-risk areas of work

It is recommended that a risk-based approach is taken and you should consider focusing resource and work on where your firm's risk assessment indicates that the greatest threat from Money Laundering and Terrorist Financing would occur.

Controls as per Regulation 21 are internal controls, which allow for an audit of your Money Laundering policies and procedures to test and consider their effectiveness. The audit does not have to be external, but it should be independent of the function being reviewed (where possible).

The appointment of an MLCO (as per part 2 of this guidance) may be an effective internal control – should the size of your firm allow an appointment to be made.

An internal control is also the screening of relevant employees appointed before and during the appointment.

## 9. Reporting Suspicions of Money Laundering or Terrorist Financing & Tipping-Off

SARs are the main defence to involvement in a potential Money Laundering offence under the Proceeds of Crime Act 2002 ('POCA') and it is therefore of high importance to you and your staff that you should have internal policies and procedures which provide all staff with the process for how to raise and who to report suspicions of Money Laundering or Terrorist Financing to.

It is important to ensure that all staff are aware of the requirement and that if they fail to report suspicions, there is the potential for them personally to be subject to action which could lead to a fine or imprisonment, or both.

Staff should also be advised about the ability for your MLRO to request a 'Defence Against Money Laundering' ('DAML') as part of any SAR report.

A DAML is a request made to the NCA for consent to proceed with a transaction or course of action for which the SAR has been lodged. If consent is granted by the NCA or there has been no response to a DAML within seven working days of receipt by the NCA of the request, the transaction can then proceed.

If consent is withheld, you may be prevented from completing the transaction for up to 31 calendar days (and the NCA can extend this by a further five 31 calendar day periods), so it is important that your MLRO has a policy in place for how to deal with such an eventuality which avoids tipping-off the subject of the SAR.

You should also ensure that your MLRO is able to securely hold details of SARs or DAMLs reported to the NCA and that access to those details is limited.

It is also important that if a SAR or DAML is lodged with the NCA, a copy of the details provided to the NCA is not kept on the case file, nor should any note that a SAR has been lodged with the NCA be kept on the case file as this could result in a third party inadvertently tipping-off the person, or persons, that a SAR has been submitted.

Again, it is recommended that your internal policies highlight to all staff the importance to avoid tipping-off due to the potential personal penalties that could be levied against someone for tipping-off.

## 10. Training

Training continues the requirement from the 2007 Regulations to ensure that appropriate measures are made to ensure that staff are made aware of the law and regulations relating to Money Laundering and Terrorist Financing, as well as how they can recognise and deal with transactions and other areas where Money Laundering and Terrorist Financing may occur.

All staff should also receive training that ensures that they are aware of internal policies and procedures and where they can obtain copies of any policies and procedures.

You should ensure that a written record is kept of all training provided – particularly when the training was provided, the type of training and who received the training.

There is no recommendation of what training should be given, but you should consider the size of your business and nature of the work undertaken and whether seminars, on-line sessions, conferences etc. work best to communicate and provide all staff with the appropriate information to comply with the Regulations and internal policies and procedures. However, it is recommended that training is made mandatory.

## 11. Record Keeping

You are required to keep records for a period of five years from the date that the business relationship is considered to be complete and/or the transaction which applies to records kept has been completed.

At the end of the five-year period, you must ensure that all personal data obtained for the purposes of MLR17 is destroyed unless you are required to maintain such records (under any enactment of Court proceedings) or you have specific consent to retain the data.

Regulation 41 has further details regarding data protection and MLR17.

You should have a written policy regarding records to be kept in respect of physical and electronic records and who would be able to have access to such records.

Records that you may wish to keep and cover in your policy are:

- Appointment of an MLRO and where relevant an MLCO
- PEP form

- MLRO query log
- SARs – internal reporting form
- Training records and log
- Compliance monitoring forms
- Enhanced compliance monitoring forms
- Annual and other reports to senior management

This list is not exhaustive and the records you wish to keep will depend on your internal policy and the size and nature of your business.

These records can form the basis of a defence against accusations of failing to carry out duties under POCA and the 2017 Regulations. Businesses should consider their retention policies taking into account both data protection and the potential for law enforcement contact.

## 12. Insolvency Specific Matters

The previous information provided general guidance on MLR17 to assist with your work managing and mitigating general risks from Money Laundering and Terrorist Financing. While we have written it from an insolvency perspective, much of it could also be applied to other businesses operating in a financial setting.

The checklist below lists points for Money Laundering matters as they may impact specifically on insolvency-only work and engagements. This guidance is being issued as the Insolvency Appendix to the CCAB guidance is being finalised and is yet to be released. This part of the guidance will be reviewed when the Appendix has been approved and published[1].

The CCAB Appendix will be published and details released to members as soon as the guidance has HM Treasury approval. Members should be aware that a draft has been finalised by the RPBs and Insolvency Service and is undergoing a legal review prior to being sent to HM Treasury for approval.

This guidance will be designed to assist you with your work regarding Money Laundering risks and considerations in respect of insolvency work. It is not

[1] The Supplementary Anti Money Laundering. Guidance for Insolvency Practitioners was published as Appendix F to the CCAB guidance in May 2022. No consequential revision of this guidance was necessary.

formal regulation and you should continue to review and consider matters with your MLRO/MLCO, your compliance officers/agents and team members to ensure that your policies and procedures deal with the risks from Money Laundering and Terrorist Financing that you have identified in your firm's risk assessment.

As this is not formal regulation and is not subject to agreement with the other RPBs, this guidance, whilst designed to assist members with consideration as to the risks and issues that arise from MLR17, should not be treated as such formal regulation/legal guidance or advice.

This part of the guidance should be read in conjunction with the published general CCAB Guidance, which is available on the IPA website.

It is expected to see CDD documents in relation to the following appointments/matters:

- Agreeing to act as a Liquidator in a solvent or insolvent company or LLP
- Agreeing to act as provisional Liquidator of a solvent or insolvency company or LLP
- Agreeing to an appointment as Administrator or Special Administrator
- Agreeing to accept the appointment as Administrative Receiver
- Agreeing to accept an appointment as a Receiver in Scotland
- Agreeing to act as a Nominee or Supervisor in an IVA
- Agreeing to act as a Nominee of Supervisor in a CVA where the CVA is not preceded by another insolvency appointment
- Agreeing to act as a Trustee or Interim Trustee in a Bankruptcy, Sequestration or a Trust Deed
- Accepting an instruction to prepare, or assist in the preparation of a proposal for a CVA or IVA where appointment as Nominee is to be sought
- Agreeing to act as Liquidator, Provisional Liquidator or Administrator of an insolvent partnership
- Agreeing to act as Trustee of a Partnership under Article 11 of the Insolvent Partnerships Order 1994
- Agreeing to act as Nominee or Supervisor in relation to a Partnership Voluntary Arrangement ('PVA')

It is paramount that IPs must consider each case over which an appointment is to be made individually on its own terms as to the assessed risk of Money Laundering/Terrorist Financing and ensure that sufficient checks to consider that risk are carried out.

File notes to confirm the case risk assessment and the work carried out to arrive at the case assessment are highly recommended to be made and held on the case file. It is also important that the case risk is reviewed throughout the appointment.

**Further details on CDD**

Where CDD cannot be completed before taking office, sufficient information should be gathered to enable you to form a general opinion and understanding of the entity over which the appointment is to be made. This can include details from on-line sources for example – but you should ensure that the information is reliable and current.

It is understood that CDD could not be completed in cases such as where an appointment is made at a decision procedure where an alternate IP is nominated or by a creditor's petition. It is recommended that CDD is completed as soon as practicable after appointment, and this would be expected to be within five working days of appointment. Information may be obtained again from on-line sources or prior office-holders.

**Appointments from Court, Accountant in Bankruptcy ('AiB') or Secretary of State**

As these appointments tend to be with no prior involvement with the insolvent, reliance can be placed, in part, on the order of appointment or initial Court Order to identify the insolvent.

This will not remove the requirement to consider the identity of the beneficial owner of the entity or the need to consider whether Money Laundering activity has taken place prior to your appointment. You should therefore take appropriate steps to ensure that you are confident that the identity of the individual, corporate entity and/or beneficial owner is, or can be, adequately confirmed and that there is sufficient information to be able to carry out a case risk assessment.

It should also be noted that whilst MLR17 places no requirement on the Official Receiver to carry out CDD checks on a bankrupt, in respect of a debtor's petition, the adjudicator does undertake enquiries to confirm the identity of the applicant.

Unless you can obtain copies of the verification work undertaken by the adjudicator, you may want to consider undertaking your own CDD checks to confirm that you are content that you hold sufficient detail to verify identity and to complete a case risk assessment.

The requirement to keep the risk under review throughout the appointment will also remain in place.

If you undertake an appointment as a Receiver in Scotland, or as an Administrative Receiver or Administrator under an appointment from a bank or institution itself subject to MLR17, you may be able to obtain the CDD undertaken by the institution for use in your own CDD checks. This should be obtained as soon as reasonably practicable.

You must satisfy yourself that the details you obtain provide sufficient detail and evidence of identity to assess the Money Laundering risk for the assignment, and you must carry out further CDD checks as necessary to allow the risk to be fully considered and evidenced.

**Asset sales**

In Bankruptcy, Sequestration and Trust Deed appointments, assets of an insolvent vest in the IP and asset sales are conducted by the IP as principal. As an IP is a relevant person within a regulated sector, the occasional transaction provision should be applied and CDD conducted on purchasers of assets for transactions amounting to €15k or more.

For appointments as Liquidator, Administrator, Administrator or other Receiver, or Supervisor of an IVA or CVA, your business relationship is with the debtor or entity over which you have been appointed and not the purchaser of assets.

Any appointment over an unregulated entity does not change the nature of the business of the debtor or entity. This means that if the insolvent entity was not regulated prior to the appointment, they are not a regulated entity due to the appointment of an IP. This means that the routine CDD checks of asset purchasers is not required.

However, you are reminded that where the transaction on an asset sale exceeds the high-value dealer threshold of €10k in cash, this may turn the entity into a 'High Value Dealer' and require HMRC supervision. HMRC advise that no-one should accept or make high value cash payments until they are registered as a high value dealer.

**Use of Agents for Asset Sales**

Where you use an agent or agency to sell assets and where CDD is required to be carried out on the purchaser of assets, you should ensure that your obligations for CDD requirements are able to be carried out effectively.

You should be carrying out CDD prior to any binding contract regarding the sale of assets being completed.

An agent may be a regulated entity – such as an estate agent – and reliance may be placed on the CDD the agent has undertaken subject to satisfying yourself that the details provided are adequate and enable an assessment of any risk to be undertaken.

Whilst you may ask the agent to undertake CDD on your behalf, any such arrangements should be formalised in writing, and the responsibility for completing CDD and ensuring that any checks are compliant will remain with the IP.

**Third Party Funds**

If funds are received from a third party – such as in an IVA or bankruptcy, you should carry out CDD on the third party and the source of funds and assess the Money Laundering risk.

**CDD on recipients of dividends/distributions**

A dividend or distribution payment does not form a business relationship and CDD is not usually required to be undertaken. However, a risk-based approach should be considered and consideration made to check the Office of Financial Sanctions Implementation lists to ensure payments are not made to parties subject to sanctions.

**Regulated Entity Appointments**

Appointments do occur over entities that are in a regulated sector. If this happens, the entity remains in the Money Laundering regime and you should inform their PBS of your appointment.

It is noted that there would then be more than one PBS with interest in the appointment (your PBS and the entity's PBS) and you should take your own appropriate advice on who the relevant PBS would be for activities in relation to the insolvent entity.

Such an appointment would not make you a BOOM of the entity for Money Laundering purposes.

**Further Considerations of Reporting Suspicions of Money Laundering or Terrorist Financing**

Where assets are to be sold or distributed (including in specie), or payments are to be made from an entity for which a suspicion exists, consideration must be made about whether to submit a Defence Against Money Laundering SAR ('DAML SAR') to the NCA. If a DAML SAR is approved, this will provide you with consent to continue with the transaction.

If the suspicion involves cash in a bank account, any funds that are suspected of being the proceeds of crime will taint all funds in an account and distributions, and other payments may require consent to protect you from committing an offence under POCA 2002.

Where you form a suspicion of Money Laundering or Terrorist Financing, you should report such suspicions via your MLRO and subject to your firm's written policy.

**Tipping-Off**

As well as the usual care that should be taking regarding tipping-off, care should also be taken to ensure that reports to creditors or other parties which may be liable to disclosure do not contain any information that may be considered to constitute tipping-off.

You will not be tipping-off by providing access to case files to your RPB in the course of usual monitoring and inspection activity. You should exercise care in ensuring that working papers and other records required to be maintained under insolvency legislation and regulation do not contain copies of reports made under MLR17.

If you have any concerns about tipping-off, due to the potential seriousness of any breach that is found against you, you should discuss this with your firm's MLRO or MLCO and check your internal guidance.

## 6.2 CHECKLIST FOR COMPLIANCE WITH MONEY LAUNDERING REGULATIONS 2017 ('MLR17')

### 1. Anti-Money Laundering ('AML') & Terrorist Financing ('TF') Compliance Checklist

This checklist has been issued to assist IPA members with your work in remaining in compliance with the MLR17. It may assist with considerations as to your current internal practices and policies and reviewing these to ensure that your practices and policies are robust.

Please also continue to consult with any outside compliance agents that you work with and it is important that all practices, policies and procedures are reviewed and discussed internally – and where appropriate are approved by the Board/Senior Management.

This checklist is designed to assist you with your work regarding Money Laundering risks and considerations in respect of insolvency work. It is not formal regulation and you should continue to review and consider matters with your Money Laundering Reporting Officer ('MLRO')]/Money Laundering Compliance Officer ('MLCO'), your compliance officers/agents and team members to ensure that your policies and procedures deal with the risks from Money Laundering and Terrorist Financing that you have identified in your firms risk assessment.

As this is not formal regulation and is not subject to agreement with the other RPBs, this guidance, whilst designed to assist members with consideration as to the risks and issues that arise from MLR17, should not be treated as such formal regulation/legal guidance or advice.

If general advice and assistance on AML matters is required, please remember that the IPA have a general helpline email at – amlhelpline@ipa.uk.com

### 2. FIRM RISK ASSESSMENT – Regulation 18

You must take steps to identify and assess the risks of money laundering to which your firm may be subject. The details completed below will provide an overview of your firm which you should then utilise to assist with completion of your risk assessment.

You should consider each 'type' of appointment taken and the risks associated with the different appointments to highlight where an appointment may have a higher risk of money laundering. For example, if you carry out corporate work only, do you consider that MVL cases have a higher risk than CVL cases?

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You should also consider the risk element for each part of the assessment and grade as 'High' or 'Low' risk. Members should note in the risk assessment the greater risk where contact and work is carried out on-line, which can raise the risk of your services being used for money laundering. Members should also consider the risks where an appointment commences with direct contact from the directors and ensure that suitable checks are made regarding identity.

Geographic checks should consider cases that are offered to you, or contact made directly, where the business traded, or the individual is resident in a different part of the UK to you/your office(s).

Matters to consider which may indicate a higher risk for your business include:

- undue client secrecy (e.g., reluctance to provide requested information and which may be heightened due to on-line contact);
- unnecessarily complex ownership structures;
- do you deal with any of the following business activities:
  - cash-based businesses – i.e. take-away business, restaurants etc.
  - money service bureaus
  - property transactions with unclear source of funds or where there are a number of large transactions
  - nail bars/salons
  - business that supply temporary workers
- rapid close down – where a company is set-up either off-shelf or after a buy-out of assets from a prior CVL, trades for a short period running up dents (especially large HMRC debts) and then closes down as insolvent
- work outside its normal range of goods and services;
- the source of funds is unusual or unknown;
- high net worth individuals;
- uncooperative clients;
- transactions are inconsistent with known business and personal information;
- multiple bank accounts, foreign accounts with no good reason, online banking not hosted in the UK; or
- altering professional advisors a number of times in a short space of time without legitimate reasons,

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- the service being requested was refused by another professional advisor without legitimate reasons

You should also be aware of Reg 18(4) and keep an up-to-date record, in writing, of all the steps taken to identify and consider the risks of money laundering to which your business is subject. These records are able to be reviewed as part of any inspection visit or compliance review.

| | |
|---|---|
| Name of Organisation: | |
| Licensed IPs and RPBs: | |
| Number of staff: | |
| Number of premises: | |
| Approximate number of ongoing assignments: | |
| Approximate number of new assignments p.a.: | |
| Value of transactions: | |
| Turnover: | |
| Main services provided (i.e. insolvency only, or also turnaround, business rescue etc.): | 1.<br>2.<br>3. |
| Main areas of insolvency dealt with (i.e. MVL/CVL/IVA etc.): | 1.<br>2.<br>3. |
| Any specific industries or type of client your organisation deals with? | 1.<br>2.<br>3. |
| Any other specific areas or issues in respect of assignments/appointments/work carried out? Consider:<br>• Client risk<br>• Country/geographic risk<br>• Product/Service risk<br>• Transaction risk<br>• Delivery Channel risk | |

*If you do not have a risk assessment for your organisation, you are in breach of Regulation 18 of MLR17. Please remember that your Supervisory Authority can request a copy of your organisations risk assessment at any time and they could potentially carry out a targeted visit to review all your AML/TF policies and proce-*

*dures and/or (depending on the Supervisory Authorities internal rules) commence regulatory action for a breach of MLR17.*

## 3. POLICIES – REGULATION 19

As well as having a current and up-to-date risk assessment for your organization, you should also have in place formal policies, which are proportionate to the size and nature of your organisation).

The following areas should be considered as to whether you have, or require a formal policy (please note that this is not prescriptive and your organisation should consider policies that deal with matters that affect your business):

| **Policy Area** | **Mark if policy in place?** | |
|---|---|---|
| AML policy | Yes | No |
| Risk Management | Yes | No |
| Internal Controls | Yes | No |
| CDD policy | Yes | No |
| Reporting & Record-Keeping | Yes | No |
| Suspicious Activity Reports ('SARs')/disclosures to National Crime Agency ('NCA') | Yes | No |
| Monitoring, communicating & managing compliance with internal policies | Yes | No |
| Identification and Enhanced Due Diligence ('EDD') for large, complex & high-risk areas of work | Yes | No |
| Whistleblowing policy | Yes | No |

For any where you have highlighted 'no' – it is recommended that you should consider drafting a policy to deal with that area. All are areas that appear in MLR17 and the IPA would expect some internal guidance or procedure to be in place that ensures all staff are aware of what is expected of them in relation to these areas.

The IPA would recommend that staff are asked to confirm their understanding of what is required from them in relation to a particular policy. If they are not able to explain what is needed from them, the policy should be reviewed to ensure that it is clear and effective.

When considering drafting a policy, it should consider the following areas to make your policy as robust as possible:

| | Mark when considered |
|---|---|
| Size of your organization and nature of business | |
| Will the policy be part of a manual, handbook or a single page statement? | |
| Does any policy require board/senior management approval? | |
| When will policies be reviewed and updated? | |
| Will you need to draft or include a form for staff to use (i.e. a Politically Exposed Person ('PEP') form, or SARs notification form)? | |
| How will new and updated policies be communicated to staff? | |

## 4. CONTROLS – REGULATION 21

It is a requirement under MLR17 that any organisation has controls in place in relation to money laundering and terrorist financing procedures and policies so that they are subject to review and testing for their effectiveness and robustness.

The following areas should be considered for controls (again these will need to be proportionate to the size of your organisation):

| | Mark when considered |
|---|---|
| Risk management profile review | |
| Has the NO been appointed and do they have sufficient seniority and knowledge of ML/TF issues? | |
| Does and has a Money Laundering Compliance Officer ('MLCO') been appointed? | |
| Are there regular reports (these should be at least annually) to the Board/Senior Management on AML/TF issues and do the Board/Senior Management approve all new, updated policies and procedures? | |
| Does your audit check, review and test the efficacy and robustness of policies and procedures? An audit can be carried out internally or by a compliance agent/third party | |
| How do you assess that your employees have the necessary skills, knowledge and expertise to carry out their functions in indentifying and mitigating the risks of AML/TF? This assessment needs to be undertaken before and during employment | |
| How will AML/TF issues be communicated to the staff and how will compliance be monitored? | |

## 6.2 AML CHECKLIST FOR MEMBERS 2022

| | Mark when considered |
|---|---|
| How will new members of staff be trained/introduced to the organisations AML/TF culture? | |
| Does the Board/Senior Management team look to promote and embed a culture of AML/TF compliance in the organisation? | |

### 5. RECORD KEEPING – REGULATION 40

One of the important areas of MLR17 is the need for any organisation to keep records of AML/TF matters.

1. The following are areas that it is recommended that formal records are in place and this should be considered to be included as either a stand-alone policy on record-keeping and/or included in relevant internal policies and procedures. These records can form the basis of a defence against accusations of failing to carry out duties under POCA and the 2017 Regulations. Businesses should consider their retention policies taking into account both data protection and the potential for law enforcement contact:

| Information | Mark if in place |
|---|---|
| Appointment of the NO and MLCO (as appropriate) – including notification of identity to your Supervisory Authority and how their identity(ies) are communicated to all staff | |
| PEP forms | |
| Training Records and Training Log – including evidence of how new and updated policies are communicated to all staff | |
| Annual and other reports to senior management | |
| SARS lodged | |
| Cases/assignments where you had to terminate the engagement due to not beings supplied or provided with appropriate initial due diligence information to verify identity | |

2. The following records should be retained for a period of **5 years** after the end of a business relationship (or an occasional transaction that is not carried out as part of a business relationship):

| Information | Held? |
|---|---|
| Copies of the evidence obtained to verify the client's identity (personal and corporate where required) | |
| Information on the purpose and nature of the business relationship/work to be carried out | |
| Information obtained on the transactions/activity subject to CDD (including ongoing monitoring) | |
| Full details of **internal** and **external** suspicious activity reports (SARs) and actions taken in respect of these (this includes information considered by the NO, the justification as to why an external SAR was or was not made, and communications with the National Crime Agency) – the MLRO query log | |
| If you keep any additional records, please specify these: | |

## 6. REPORTING PROCEDURES & TIPPING-OFF

A policy should be on place and circulated to all staff in your organisation that advises what they should do if they form the suspicion of money laundering by a client or third party and how this is discussed with your NO and a submission made to the NCA if it is considered that the a SAR needs to be submitted.

The policy should also include a reminder about 'tipping-off' as well as a reminder that work on that area of an assignment or piece of work for which a submission to the NCA has been made cannot be proceeded with until the NCA have either provided consent or not responded to a Defence Against Money Laundering SAR ('DAML') within 7 working days, A copy of your internal SARS form should be available for staff use.

The policy should also include reference to the recent dispensation from the NCA to IPs where for urgent issues an 'emergency DAML request' can be made. The request is only for those cases such as where an emergency/hostile appointment is made and funds are to be received where there is a suspicion the funds made be tainted. The request can cover urgent payments required from such funds (i.e. wages for trading Administrations).

It is also recommended that submissions of SARS are held on a secure database with access limited to the NO and MLCO (where appointed). As part of your SARS

policy and/or information you provide to your staff you may wish to consider the following matters:

| Are employees aware of the following? | Mark when included |
|---|---|
| What must be reported | |
| The failure to report an offence | |
| What is tipping-off | |
| Prejudicing and investigation offence | |
| How do you note the reasons for when a SAR is not lodged with the NCA? | |
| What is a DAML and why it is important | |
| What should happen after an external SAR is made | |
| Emergency DAML requests | |

## 7. CDD

Due diligence work is required to be carried out before the establishment of a business relationship. Simple provision of advice where there is no engagement requested would not ordinarily be a business relationship.

However, should the advice result in a request to undertake insolvency or associated work a business relationship will need to be established and due diligence work must be undertaken. The Insolvency Appendix to the CCAB guidance on AML matters will assist IPs with the requirement.

Consideration should be made as to whether you request due diligence details as part of the letter of engagement, or prior to commencing work to confirm an appointment by deemed consent or via a decision procedure.

It is recommended that whatever policy is used, that the letter of engagement is clear that you will not accept funds, hold or deal with assets, or progress the matter to a formal appointment until due diligence work is completed.

1. Do you include matters relating to AML in your Letters of Engagement? For example:

| | Included? |
|---|---|
| A description/full scope of work/services to be provided | |
| Your AML/TF obligations (including identity information the client must provide to you) | |

| | Included? |
|---|---|
| Data protection information (noting that under Reg 40 of the MLR17 records should be retained for 5 years from when the business relationship or transaction has concluded. However, Reg 40(5)(a) indicates that GDPR regulations can apply and records can be held for six years.) | |
| That no work will be undertaken, assets or funds held or dealt with until the required detail and information to enable due diligence to be completed is provided and reviewed | |

2. Is there a formal client risk assessment procedure for obtaining information on the business relationship and assessing the level of risk? Does it request and/or consider the following:

| | Included? |
|---|---|
| Obtaining of identification documentation and verifying documentation? | |
| If electronic means are used to verify, have you informed the proposed client that such checks are to be carried out or obtained permission to do so by the proposed client? | |
| Issues arising from the identification and verification of identity of the client? | |
| For corporate clients – identifying and verifying the company and the beneficial owner and the persons of significant control ('PSC')? | |
| Where there is a discrepancy in the PSC – ensuring Companies House are notified | |
| Issues arising from the identification and verification of identity of beneficial owners? | |
| Checks on the 'wealth' of the entity? i.e. do you understand where funds originated and/or where asset purchases arose? | |
| When EDD is required? | |
| What further checks are required for EDD? (for example – do you check the FAT-F list of countries with unsatisfactory controls etc.) | |
| How checks are performed for PEPs and EDD carried out if a client is a PEP? | |
| The intended nature and purpose of the work to be carried out, including: | |
| – Client risk factors (including the client's source of money/assets, area of business etc.) | |
| – Product/Services risk | |

## 6.2 AML CHECKLIST FOR MEMBERS 2022

| | Included? |
|---|---|
| – Geographical risk factors | |
| – Delivery Channel risk | |
| – Transaction risk | |
| – Has there only been contact on-line with the debtor or director and how you confirm identity | |
| What should happen if CDD is not able to be completed prior to an appointment/assignment under Reg 30 of MLR17? | |
| Termination of an appointment/assignment if CDD/EDD cannot be completed in a timely manner? | |
| How ML/TF matters on a case are to be subject to review during the life of the assignment? | |

### 8. ASSET SALES

Does your policy include details on what CDD or EDD is required if asset sales or payments are received from a third party? Consider the following points:

| | Included? |
|---|---|
| CDD on the identity of the payer/source of funds? | |
| In bankruptcy appointments if a sum of over €15,000 is to be paid – CDD on the purchaser must be undertaken. You should consider on a risk basis whether CDD is required on purchasers of assets for a sum of over €15,000 is required but this is not routinely required | |
| If the details obtained from the CDD checks raises questions and the assessment of the risk in respect of an asset sale indicates a higher potential risk – what EDD would be requested on the payer/funds? | |
| Is the sum to be paid over €10,000 in cash? If so, what procedure is in place to report to HMRC as a high value dealer? | |

# 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

## Introduction

Accountants are key gatekeepers for the financial system, facilitating vital transactions that underpin the UK economy. As such, they have a significant role to play in ensuring their services are not used to further a criminal purpose. As professionals, accountants must act with integrity and uphold the law, and they must not engage in criminal activity.

**This guidance is based on the law and regulations as of 26 June 2017. It covers the prevention of money laundering and the countering of terrorist financing. It is intended to be read by anyone who provides audit, accountancy, tax advisory, insolvency, or trust and company services in the United Kingdom and has been approved and adopted by the UK accountancy AML supervisory bodies.**

The guidance has been prepared jointly by the CCAB bodies:

Institute of Chartered Accountants in England and Wales

Association of Chartered Certified Accountants

Institute of Chartered Accountants of Scotland

Chartered Accountants Ireland

The Chartered Institute of Public Finance and Accountancy

It has been approved and adopted by the UK accountancy supervisory bodies:

Institute of Chartered Accountants in England and Wales – www.icaew.com/

Association of Accounting Technicians – www.aat.org.uk/

Association of Taxation Technicians – www.att.org.uk/

Association of International Accountants – www.aiaworldwide.com/

Institute of Certified Bookkeepers – www.bookkeepers.org.uk/

Chartered Institute of Management Accountants – www.cimaglobal.com/

Institute of Financial Accountants – www.ifa.org.uk/

International Association of Bookkeepers – www.iab.org.uk/

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

Association of Chartered Certified Accountants
www.accaglobal.com/uk/en.html

Chartered Institute of Taxation
www.tax.org.uk/

Insolvency Practitioners Association
www.insolvency-practitioners.org.uk/

Insolvency Service
www.gov.uk/government/organisations/insolvency-service

HM Revenue & Customs
www.gov.uk/government/organisations/hm-revenue-customs

Institute of Chartered Accountants in Scotland
www.icas.com

Chartered Accountants Ireland
https://www.charteredaccountants.ie/

# 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

## CONTENTS

# 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR



## 1. ABOUT THIS GUIDANCE

- What is the purpose of this guidance?
- Who is the guidance for?
- What is the legal status of this guidance?

### 1.1 What is the purpose of this guidance?

1.1.1 This *guidance*[1] has been prepared to help accountants (including tax advisers and insolvency practitioners) comply with their obligations under UK legislation to prevent, recognise and report money laundering. Compliance with it will ensure compliance with the relevant legislation (including that related to counter terrorist financing) and professional requirements.

[1] Words in italics are defined in the Glossary starting on page 463.

1.1.2 The term 'must' is used throughout to indicate a mandatory legal or regulatory requirement. *Businesses* may seek an alternative interpretation of the UK anti-money laundering and terrorist financing (AML) regime, but they must be able to **justify** their decision to their *anti-money laundering supervisory authority*.

1.1.3 Where the law or regulations require no specific course of action, 'should' is used to indicate good practice sufficient to satisfy statutory and regulatory requirements. *Businesses* should consider their own particular circumstances when determining whether any such 'good practice' suggestions are indeed appropriate to them. Alternative practices can be used, but *businesses* must be able to **explain** their reasons to their *anti-money laundering supervisory authority*, including why they consider them compliant with law and regulation.

1.1.4 The UK anti-money laundering regime applies only to defined services carried out by designated *businesses*. This *guidance* assumes that many businesses will find it easier to apply certain AML processes and procedures to all of their services, but this is a decision for the *business* itself. It can be unnecessarily costly to apply anti-money laundering provisions to services that do not fall within the *UK AML regime*.

1.1.5 This *guidance* refers, in turn, to guidance issued by bodies other than *CCAB*. When those bodies revise or replace their guidance, the references in this document should be assumed to refer to the latest versions.

1.1.6 *Businesses* may use AML guidance issued by other trade and professional bodies, including the *Joint Money Laundering Steering Group (JMLSG)*, where that guidance is better aligned with the specific circumstances faced by the *business*. Where the *business* relies on alternative *guidance*, they must (in accordance with 1.1.2 of this guidance) be in a position to justify this reliance to their *anti-money laundering supervisory authority*.

1.1.7 The law which comprises the *UK AML regime* is contained in the following legislation and relevant amending statutory instruments:

a) The Proceeds of Crime Act 2002 (POCA) as amended by the Serious Organised Crime and Police Act 2005 (SOCPA);

b) The Terrorism Act 2000 (TA 2000) (as amended by the Anti-Terrorism Crime and Security Act 2001 (ATCSA) and the Terrorism Act 2006 (TA 2006));

c) The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the 2017 Regulations);

d) Terrorist Asset-Freezing Act 2010;

e) Anti-terrorism, Crime and Security Act 2001;

f) Counter-terrorism Act 2008, Schedule 7;

g) The Criminal Finances Act 2017.

1.1.8 *POCA* and *TA 2000* contain the offences that can be committed by individuals or organisations. The *2017 Regulations* set out the systems and controls that *businesses* are obliged to possess, as well as the related offences that can be committed by *businesses* and key individuals within them.

**1.2 Who is this guidance for?**

1.2.1 This *guidance* is addressed to *businesses* covered by Regulations 8(2)(c) and 8(2)(e) of the *2017 Regulations*. This means anyone who, in the course of business in the UK, acts as:

a) Regulation 8(2)(e):

- A trust or company service provider (Regulation 12(2)).

b) Regulation 8(2)(c):

- An *auditor* (Regulation 11(a));
- An *external accountant* (Regulation 11(c));
- An *insolvency practitioner* (Regulation 11(b));
- A *tax adviser* (Regulation 11(d)).

For the purposes of this *guidance* the services listed above are collectively referred to as *defined services*. The scope of what would be considered carrying on business in the UK is broad, and would include certain cross border business models where day to day management takes place from UK registered office or UK head office.

1.2.2 Regulation 11(c) of the *2017 Regulations* defines an *external accountant* as someone who provides accountancy services to other persons by way of business. There is no definition given for the term accountancy services,

however for the purposes of this guidance it includes any service which involves the recording, review, analysis, calculation or reporting of financial information, and which is provided under arrangements other than a contract of employment.

1.2.3 This *guidance* does not cover any other services, guidance for which may be available from other sources. *Businesses* supervised by HMRC that provide both accountancy services and trust or company services should generally follow this *guidance* but also have regard to the HMRC 'Anti-money laundering guidance for trust or company services providers'. *Businesses* solely providing trust or company services and supervised by HMRC should follow the HMRC guidance.

1.2.4 Guidance related to secondees and subcontractors can be found in APPENDIX B.

### 1.3 What is the legal status of this guidance?

1.3.1 Because this *guidance* has been approved by HM Treasury, the UK courts must take account of its contents when deciding whether a *business* subject to it has committed an offence under the *2017 Regulations*, or Section 330-331 of POCA. This *guidance* is not intended to be exhaustive. If in doubt, seek appropriate advice or consult your *anti-money laundering supervisory authority*.

If an *anti-money laundering supervisory authority* is called upon to judge whether a *business* has complied with its general ethical or regulatory requirements, it is likely to 7 be influenced by whether or not the *business* has applied the provisions of this *guidance*.

## 2. MONEY LAUNDERING DEFINED

- What is money laundering?
- What is the legal and regulatory framework?

### 2.1 What is money laundering?

2.1.1 Money laundering is defined very widely in UK law. It includes all forms of using or possessing criminal property (as well as facilitating the use or possession) regardless of how it was obtained.

2.1.2 Criminal property may take any form, including:

a) Money or money's worth;

b) Securities;

c) A reduction in a liability; and

d) Tangible or intangible property.

Money laundering can involve the proceeds of offending in the UK but also of conduct overseas that would have been an offence had it taken place in the UK. There is no need for the proceeds to pass through the UK. For the purposes of this *guidance* money laundering also includes terrorist financing. There are no materiality or *de minimis* exceptions to money laundering or terrorist financing (*MLTF*) offences.

2.1.3 Money laundering activity can include:

a) A single act (for example, possessing the proceeds of one's own crime);

b) Complex and sophisticated schemes involving multiple parties;

c) Multiple methods of handling and transferring criminal property; or

d) Concealing criminal property or entering into arrangements to assist others to conceal criminal property.

2.1.4 *Businesses* need to be alert to the risks posed by:

a) *Clients*;

b) Suppliers;

c) Employees; and

d) The customers, suppliers, employees and associates of *clients*.

2.1.5 Neither the *business* nor its *client* needs to have been party to money laundering for a reporting obligation to arise (see Section six of this *guidance*).

**2.2 What is the legal and regulatory framework?**

2.2.1 The primary money laundering offences are defined by *POCA*, as amended by *SOCPA*. Inside or outside the *regulated sector* someone commits a money laundering offence if they:

a) Conceal, disguise, convert, transfer or remove criminal property from England and Wales, Scotland or Northern Ireland (Section 327 of POCA);

b) Enter into, or become involved in, an *arrangement* which they know or suspect facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person (Section 328 of POCA); or

c) Acquire, use or possess *criminal property* for which adequate consideration was not provided.

2.2.2 None of these offences is committed if:

a) The persons involved did not know or suspect that they were dealing with the proceeds of crime; or

b) A report of the suspicious activity is made promptly to:

- A *Money Laundering Reporting Officer (MLRO)* (i.e. an internal Suspicious Activity Report (*SAR*)); or
- The National Crime Agency (*NCA*) under the provisions of Section 338 of POCA (as an external *SAR*) and the SAR is made before the offence takes place so that the necessary *consent* to proceed (referred to as a defence against money laundering by the NCA) is obtained beforehand; or

c) There is a reasonable excuse for not reporting (this is likely to be defined narrowly, in terms of personal safety or security, and so very rare); or

d) The conduct which gave rise to the *criminal property* is, (a) reasonably believed to have happened in a location where it was legal (i.e., outside the UK), and (b) would have carried a maximum sentence of less than 12 months had it occurred in the UK. The requirements of this overseas conduct exception are complex, onerous and stringent; specialist legal advice may be needed.

2.2.3 The following offences apply **only within the *regulated* sector**:

a) Failure to report (Section 330 of *POCA*) a suspicion of money laundering (see above regarding 'reasonable excuse'). Remember: there is no *de minimis* threshold value for reporting.

b) Disclosing that a suspicious activity report (*SAR*) has been made, or is being contemplated, in a way that is likely to prejudice any subsequent

investigation. For further information on these so-called **'tipping off'** offences (Section 333 of POCA) see Section six of this *guidance*.

2.2.4 There are equivalent offences under the Terrorism Act 2000 (*TA 2000*) with no overseas conduct exemption or *de minimis* threshold amount.

2.2.5 Summaries of the relevant Sections of *POCA* can be found in APPENDIX A.

## 3. RESPONSIBILITY & OVERSIGHT

- What are the responsibilities of a *business*?
- How should sole practitioners implement these requirements?
- What are the responsibilities of *senior management/MLRO*?
- How might the *MLRO* role be split?
- What policies, procedures and controls are required?

### 3.1 What are the responsibilities of a business?

3.1.1 For *businesses* providing *defined services*, the *2017 Regulations* require anti-money laundering systems and controls that meet the requirements of the UK anti-money laundering regime. The *2017 Regulations* impose a duty to ensure that relevant employees (see Section eight of this *guidance*) are kept aware of these systems and controls and are trained to apply them properly. *Businesses* are explicitly required to:

a) Monitor and manage their own compliance with the *2017 Regulations*; and

b) Make sure they are always familiar with the requirements of the *2017 Regulations* to ensure continuing compliance.

3.1.2 If a *business* fails to meet its obligations under the *2017 Regulations*, civil penalties or criminal sanctions can be imposed on the *business* and any individuals deemed responsible. This could include anyone in a senior position who neglected their own responsibilities or agreed to something that resulted in the compliance failure.

3.1.3 The primary money laundering offences defined under *POCA* (see 2.2 of this *guidance*) can be committed by anyone inside or outside the *regulated sector* but POCA imposes specific provisions on the regulated sector.

3.1.4 *Businesses* must have systems and controls capable of: assessing the risk associated with a *client*; performing CDD; monitoring existing *clients*; keeping appropriate records; and enabling staff to make an internal *SAR* (i.e. to their *MLRO*).

3.1.5 *Relevant employees* must be trained appropriately so that they understand both their own personal AML obligations and the business-wide systems and controls that have been developed to prevent *MLTF*.

3.1.6 The AML skills, knowledge, expertise, conduct and integrity of *relevant employees* must be assessed.

3.1.7 Effective internal risk management systems and controls must be established and the relevant *senior management* responsibilities clearly defined.

**3.2 How should sole practitioners implement these requirements?**

3.2.1 Because it would not be appropriate to the size and nature of the business, a sole practitioner who has no *relevant employees* need not:

a) appoint a board member to be responsible for the *business*' compliance with the UK anti-money laundering regime, as the sole practitioner will be held responsible;

b) appoint a *nominated officer* because the sole practitioner will be responsible for submitting external reports to the NCA;

c) establish an independent audit function for AML policies, controls and procedures.

**3.3 What are the responsibilities of Senior Management/MLRO?**

3.3.1 The *2017 Regulations* define *senior management* as: an officer or employee of the *business* with sufficient knowledge of the business' *MLTF* risk exposure, and with sufficient authority, to take decisions affecting its risk exposure.

3.3.2 The *2017 Regulations* require that the approval of *Senior Management* must be obtained:

a) for the policies, controls and procedures adopted by the *business*. (Regulation 19(2)(b));

b) before entering into or continuing a business relationship with a Politically Exposed Person (*PEP*), a family member of a *PEP* or a known close associate of a *PEP* (Regulation 35(5)(a)).

3.3.3 Members of *senior management* undertaking such responsibilities should receive Continuing Professional Development (CPD) appropriate to their role.

3.3.4 Regulation 21(1)(a) of the 2017 Regulations requires that, where appropriate to the size and nature of the *business*, the *business* appoints a board member or member of *senior management* who must be responsible for the *business*' compliance with the UK anti-money laundering regime. The role requires the individual to have:

a) an understanding of the *business*, its service lines and its *clients*;

b) sufficient seniority to direct the activities of all members of staff (including senior members of staff);

c) the authority to ensure the *business*' compliance with the regime;

d) the time, capacity and resources to fulfil the role.

3.3.5 Regulation 21(3) of the *2017 Regulations* requires a business to appoint a *nominated officer*, who must be responsible for receiving internal *SARs* and making external *SARs* to the *NCA* (as the UK's FIU). The person appointed must have:

a) sufficient seniority to enforce their decisions;

b) the authority to make external reports to the *NCA* without reference to another person;

c) the time, capacity and resources to review internal *SARs* and make external *SARs* in a timely manner.

3.3.6 Within 14 days of the appointment of either the responsible board member/*senior management* and/or the *nominated officer*, the business' *anti-money laundering supervisory authority* must be informed of the identity of the individual(s).

3.3.7 Depending on the size, complexity and structure of a *business*, these two roles may be combined in a single individual provided that person has sufficient seniority, authority, governance responsibility, time, capacity

and resources to do both roles properly. This *guidance* primarily describes the situation in which one individual fulfils the combined role, referred to in this guidance as the *MLRO*, with alternative arrangements covered in 3.4 of this *guidance*. The role of the *MLRO* is not defined in legislation but has traditionally included responsibility for internal controls and risk management around *MLTF*, in accordance with sectoral guidance. *Businesses* with an *MLRO* should periodically review the *MLRO*'s brief to ensure that:

a) it reflects current law, regulation, guidance, best practice and the experience of the business in relation to the effective management of *MLTF* risk; and

b) the *MLRO* has the seniority, authority, governance responsibility, time, capacity and resources to fulfil the brief.

3.3.8 The *business* should ensure that there are sufficient resources to undertake the work associated with the *MLRO*'s role. This should cover normal working, planned and unplanned absences and seasonal or other peaks in work. Arrangements may include appointing deputies and delegates. When deciding upon the number and location of deputies and delegates, the business should have regard to the size and complexity of the *business*' service lines and locations. Particular service lines or locations may benefit from a deputy or delegate with specialised knowledge or proximity. Where there are deputies, delegates or both (or when elements of *business*' AML policies, controls and procedures are outsourced), the *MLRO* retains ultimate responsibility for the *business*' compliance with the UK anti-money laundering regime.

3.3.9 All *MLROs*, deputies and delegates should undertake CPD appropriate to their roles.

3.3.10 The *MLRO* should:

a) have oversight of, and be involved in, *MLTF* risk assessments;

b) take reasonable steps to access any relevant information about the *business*;

c) obtain and use national and international findings to inform their performance of their role;

d) create and maintain the business's risk based approach to preventing *MLTF*;

e) support and coordinate management's focus on *MLTF* risks in each individual business area. This involves developing and implementing systems, controls, policies and procedures that are appropriate to each business area;

f) take reasonable steps to ensure the creation and maintenance of *MLTF* documentation;

g) develop Customer Due Diligence (*CDD*) policies and procedures;

h) ensure the creation of the systems and controls needed to enable staff to make internal *SARs* in compliance with *POCA*;

i) receive internal *SARs* and make external *SARs* to the *NCA*;

j) take remedial action where controls are ineffective;

k) draw attention to the areas in which systems and controls are effective and where improvements could be made;

l) take reasonable steps to establish and maintain adequate arrangements for awareness and training;

m) receive the findings of relevant audits and compliance reviews (both internal and external) and communicate these to the board (or equivalent managing body);

n) report to the board (or equivalent managing body) at least annually, providing an assessment of the operations and effectiveness of the *business'* AML systems and controls. This should take the form of a written report. These written reports should be supplemented with regular ad hoc meetings or comprehensive management information to keep senior management engaged with AML compliance and up-to-date with relevant national and international developments in AML, including new areas of risk and regulatory practice. The board (or equivalent managing body) should be able to demonstrate that it has given proper consideration to the reports and ad hoc briefings provided by the *MLRO* and then take appropriate action to remedy any AML deficiencies highlighted.

**3.4 How might the MLRO role be split?**

3.4.1 Where the *MLRO* role as described above is split between two or more individuals, the allocation of the duties should be clear to the individuals assigned the duties, all *relevant employees* and the business' *anti-money laundering supervisory authority*.

3.4.2 *Businesses* may use their discretion as to how to assign duties between two or more individuals, depending on the size, complexity and structure of their business (subject to the basic legal requirements described in this *guidance*).

3.4.3 The matters listed in 3.3.10 of this *guidance* should be allocated to these individuals or others with the appropriate skills, knowledge and expertise. Regardless of the allocation of these duties, the individual identified in 3.3.4 of this *guidance* is ultimately responsible for the business' compliance with the UK anti-money laundering regime, including the actions of the *nominated officer*.

**3.5 What policies, procedures and controls are required?**

3.5.1 The *2017 Regulations* place certain requirements on *businesses* regarding *CDD* (Chapter two) and 'record keeping, procedures and training' (Chapter three). The following topics, all of which form part of the *MLTF* framework, need to be considered:

a) risk based approach, risk assessment and management;

b) *CDD*;

c) record keeping;

d) internal control;

e) ongoing monitoring;

f) reporting procedures;

g) compliance management;

h) communication.

3.5.2 The *2017 Regulations* provide different amounts of detail about the policies and procedures required in each area. *Businesses* must implement and document policies, controls and procedures that are proportionate to the size and nature of the *business*. These should be subject to regular review and update, and a written record of this exercise maintained.

3.5.3 *Businesses* with overseas subsidiaries or branches that are carrying out any of the activities listed in 1.2.1 of this *guidance* must establish group wide policies and procedures equivalent to those in the UK. If the law of the

overseas territory does not permit this then the *business* must inform its *anti-money laundering supervisory authority* and implement additional risk based procedures. Steps taken to communicate policies, controls and procedures to the group must also be recorded.

**Risk assessment and management**

3.5.4 Every *business* must have appropriate policies and procedures for assessing and managing *MLTF* risks. To focus resources on the areas of greatest risk, a risk based approach should be adopted. It is the ultimate responsibility of the board member or member of *senior management* responsible for compliance to identify the risks and then develop risk based procedures for taking on new *clients*. A risk assessment should be conducted at least annually, but with new and changing risks considered as and when they are identified. Resources like the Financial Action Task Force (*FATF*) mutual evaluations and Transparency International's corruption perception index can be useful when determining the *MLTF* risk faced by a given *business*. Information from the business' *anti-money laundering supervisory authority* must be taken into account. Further information on the risk based approach, types and categories of risk can be found in Section four of this *guidance*.

**Customer Due Diligence (*CDD*)**

3.5.5 Responsibility for developing *CDD* policies and procedures rests with the *MLRO*. These procedures should ensure that *relevant employees* are able to make informed decisions about whether or not to establish a *business relationship* or undertake an *occasional transaction*, in the light of the *MLTF* risks associated with the client and transaction To ensure that the correct procedures are being followed, *relevant employees* must be made aware of their obligations under the *2017 Regulations* and given appropriate training.

3.5.6 Many *businesses* already have procedures to help them avoid conflicts of interest and ensure they comply with professional requirements for independence. The requirements of the *2017 Regulations* can either be integrated into these procedures, to form a consolidated approach to taking on a new *client*, or addressed separately. For more on *CDD* see Section five of this *guidance*.

**Reporting**

3.5.7 Under *POCA* the reporting of knowledge or suspicion of money laundering is a legal requirement. It is the responsibility of the *MLRO* to develop and implement internal policies, procedures and systems that are able to satisfy the *POCA* reporting requirements. Those policies must set out clearly, (a) what is expected of an individual who becomes aware of, or suspects, money laundering, and (b) how they report their concerns to the *MLRO*. All *relevant employees* must be trained in these procedures.

More information on reporting suspicious activity can be found in Section six of this *guidance*.

**Record keeping**

3.5.8 All records created as part of the *CDD* process, including any non-engagement documents relating to the *client* relationship and ongoing monitoring of it, must be retained for five years after the relationship ends. All records related to an *occasional transaction* must be retained for five years after the transaction is completed. A disengagement letter could provide documentary evidence that a business relationship has terminated, as could other forms of communication such as an unambiguous email making it clear that the *business* does not wish to engage or is ceasing to act.

3.5.9 Although no comparable retention period is specified for information and communications relating to internal and external *SAR*s, a business may wish to retain these securely for five years as well.

3.5.10 *Senior management* must ensure that the *relevant employees* are made aware of these retention policies and that they remain alert to the importance of following them. There is more information on record keeping in Section seven of this *guidance*.

**Training and awareness**

3.5.11 The *2017 Regulations* require all *relevant employees* to be made aware of the law relating to *MLTF* and data protection and given regular training in how to recognise and deal with suspicious activity which may be related to *MLTF*.

The *MLRO* should establish training capable of ensuring that *relevant employees*:

a) Are aware of their legal and regulatory duties;

b) Understand how to put those requirements into practice in their roles; and

c) Are continuously updated about changes in, (a) the *business*' AML policies, systems and controls, and (b) the *MLTF* risks faced.

3.5.12 A formal training plan can help make sure that *relevant employees* receive the right training to enable them to comply with their AML obligations.

3.5.13 Training should be tailored to suit the particular role of the individual.

3.5.14 A business that fails to provide training for *relevant employees* could be in breach of the regulations and at risk of prosecution. It would also risk failing to comply with Section 338 of *POCA*, which requires *Businesses* in the regulated sector to disclose any suspicions of money laundering. Although Section 330 of *POCA* could provide a 'reasonable excuse' defence against a failure to disclose for the individual, the regulations are still likely to have been breached by the *business* because adequate training was not provided. For further information on training and awareness refer to Section eight of this *guidance*.

**Employee screening**

3.5.15 *Businesses* should consider the skills, knowledge, expertise, conduct and integrity of all *relevant employees* both before, and during the course of, their appointment, proportionate to their role in the business and the *MLTF* risks they are likely to encounter. An employee is relevant if his or her work is relevant to compliance with the *2017 Regulations* or is otherwise capable of contributing to the business' identification, mitigation, prevention or detection of *MLTF*. Most *businesses* may already undertake such an assessment as part of their recruitment, appraisal, training, independence, fit and proper and compliance procedures. However, it is important that *businesses* have a mechanism for evidencing *MLTF* knowledge within such procedures for example, a test for which the results are recorded can evidence knowledge and expertise. Similarly, regular recorded ethics training can be useful in assessing integrity.

**Monitoring policies and procedures**

3.5.16 The *MLRO* and appropriate *senior management* should together monitor the effectiveness of policies, procedures and processes so that improvements can be made when inefficiencies are found. Risks should be moni-

tored and any changes must be reflected in changes to policies and procedures; keeping them up-to-date, in line with the risk assessment of the *business*. For more information, see Section four of this *guidance*.

3.5.17 In their efforts to improve AML policies, controls and procedures, and better understand where problems can arise, *senior management* should encourage *relevant employees* to provide feedback. When changes are made to policies, procedures or processes these should be properly communicated to *relevant employees* and supported by appropriate training where necessary.

3.5.18 *Businesses* must introduce a system of regular, independent reviews to understand the adequacy and effectiveness of the *MLTF* systems and any weaknesses identified. Independent does not necessarily mean external, as some *businesses* will have internal functions (typically audit, compliance or quality functions) that can carry out the reviews. Any recommendations for improvement should be monitored. Existing monitoring programmes and their frequency can be extending to include AML. The reviews should be proportionate to the size and nature of the *business*. A sole practitioner with no *relevant employees* need not implement regular, independent reviews unless required by their *UK AML supervisory authority*.

3.5.19 As part of their improvement efforts the *senior manager* responsible for compliance and the *MLRO* should monitor publicly-available information on best practice in dealing with *MLTF* risks. For example, thematic reviews by regulators can be useful ways to improve understanding of good and poor practice, while reports on particular enforcement actions can illuminate common areas of weakness in AML policies, controls and procedures.

## 4. RISK BASED APPROACH

- What is the role of the risk based approach?
- What is the role of *senior management*?
- How should the risk analysis be designed?
- What is the risk profile of the *business*?
- How should procedures take account of the?
- What are the different types of risk?
- How important is documentation?

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

### 4.1 What is the role of the risk based approach?

4.1.1 The risk based approach is fundamental to satisfying the *FATF* recommendations, the EU directive and the overall UK *MLTF* regime. It requires governments, supervisors and *Businesses* alike to analyse the *MLTF* risks they face and make proportionate responses to them. It is the foundation of any business' AML policies, controls and procedures, particularly its *CDD* and staff training procedures.

4.1.2 The risk based approach recognises that the risks posed by *MLTF* financing activity will not be the same in every case and so it allows the *business* to tailor its response in proportion to its perceptions of risk. The risk based approach requires evidence-based decision-making to better target risks. No procedure will ever detect and prevent all *MLTF*, but a realistic analysis of actual risks enables a *business* to concentrate the greatest resources on the greatest threats.

4.1.3 The risk based approach does not exempt low risk *clients*, services and situations from *CDD*, however the appropriate level of *CDD* is likely to be less onerous than for those thought to present a higher level of risk.

4.1.4 This section provides guidance on the analyses the *business* will need to perform to properly underpin a risk based approach. Guidance on applying the risk based approach to particular AML procedures and controls can be found in the relevant sections of this *guidance* dedicated to those procedures.

### 4.2 What is the role of senior management?

4.2.1 Senior management is responsible for managing all of the risks faced by the *business*, including *MLTF* risks. Senior managers should ensure that *MLTF* risks are analysed, and their nature and severity identified and assessed, in order so as to produce a risk profile. *Senior management* should then act to mitigate those risks in proportion to the severity of the threats they pose.

4.2.2 Where a risk is identified, the *business* must design and implement appropriate procedures to manage it. The reasons for believing these procedures to be appropriate should be supported by evidence, documented and systems created to monitor effectiveness. A *business*'

risk based approach should evolve in response to the findings of the systems monitoring the effectiveness of the AML policies, controls and procedures.

4.2.3 The risk analysis can be conducted by the *MLRO*, but must be approved by *senior management* including the senior manager responsible for compliance (if a different person to the *MLRO*). This is likely to include formal ratification of the outcomes, including the resulting policies and procedures, but may also include close *senior management* involvement in some or all of the analysis itself.

4.2.4 The risk profile and operating environment of any *business* changes over time. The risk analysis must be refreshed regularly by periodic reviews, the frequency of which should reflect the *MLTF* risks faced and the stability or otherwise of the business environment. In addition, whenever *senior management* sees that events have affected *MLTF* risks, the risk analysis should also be refreshed by an event-driven review. A fresh analysis may require AML policies, controls and procedures to be amended, with consequential impacts upon, for example, the training programs for *relevant employees*.

**4.3 How should a risk analysis be designed?**

4.3.1 One possible first step is to consider the *MLTF* risks faced by each different part of the *business*. The *business* may already have general risk analysis processes, and these could form the basis of its *MLTF* risk analysis.

4.3.2 When designing an analysis process the *business* should look not only at itself but at its clients and markets as well. Consider factors that lower risks as well as those that increase them; a *client* subject to an effective *AML regime* poses a lower risk than one not. *Businesses* should take into account the findings of the most recent UK National Risk Assessment, together with any guidance issued by the relevant *anti-money laundering supervisory authority*.

4.3.3 Total *MLTF* risks include the possibility that the business might:

a) Be used to launder money (e.g. by holding criminal proceeds in a client money account or by becoming involved in an arrangement that disguises the beneficial ownership of criminal proceeds);

b) Be used to facilitate *MLTF* by another person (e.g. by creating a corporate vehicle to be used for money laundering or by introducing a money launderer to another regulated entity);

c) Suffer consequential legal, regulatory or reputational damage because a *client* (or one or more of its associates) is involved in money laundering.

4.3.4 Risks should be grouped into categories, such as '*client*', 'service' and 'geography'. Some risks will not easily fit under any one heading but that should not prevent them from being considered properly. Nor should a *business* judge overall risk simply by looking at individual risks in isolation. When two threats are combined they can produce a total risk greater than the sum of the parts. A particular industry and a particular country may each be thought to pose only a moderate risk. But when they are brought together, perhaps by a particular *client* or transaction, then the combined risk could possibly be high. *Businesses* must not take a 'tick-box' approach to assessing MLTF risk in relation to any individual *client* but must, instead, take reasonable steps to assess all information relevant to its consideration of the risk.

**4.4 What is the risk profile of the business?**

4.4.1 A business with a relatively simple *client* base and a limited portfolio of services may have a simple risk profile. In which case, a single set of AML policies, controls and procedures may suffice right across its operations. On the other hand, many *Businesses* will find that their risk analysis reveals quite different *MLTF* risks in different aspects of the *business*. *Accountancy services*, for example, may face significantly different risks to insolvency, bankruptcy and recovery services. A risk analysis allows resources to be targeted, and procedures tailored, to address those differences properly.

4.4.2 When a *business* decides to have different procedures in different parts of its operations, it should consider how to deal with *clients* whose needs straddle departments or functions, such as:

a) A new *client* who is to be served by two or more parts of the *business* with different AML policies, controls and procedures;

b) An existing *client* who is to receive new services from a part of the *business* with its own distinct AML policies, controls and procedures.

4.4.3 The *risk based approach* can also take into account the *business*' experience and knowledge of different commercial environments. If, for example, it has no experience of a particular country, it could treat it as a normal or high risk even though other *Businesses* might consider it low risk. Similarly, if it expects to deal with only UK individuals and entities, it may treat as high risk any *client* associated with a non-UK country.

**4.5 How should procedures take account of the risk based approach?**

4.5.1 Before establishing a *client* relationship or accepting an engagement a *business* must have controls in place to address the risks arising from it. The risk profile of the *business* should show where particular risks are likely to arise, and so where certain procedures will be needed to tackle them.

4.5.2 Risk based approach procedures should be easy to understand and easy to use for all *relevant employees* who will need them. Sufficient flexibility should be built in to allow the procedures to identify, and adapt to, unusual situations.

4.5.3 The nature and extent of AML policies, controls and procedures depend on:

a) The nature, scale, complexity and diversity of the *business*;

b) The geographical spread of *client* operations, including any local AML regimes that apply; and

c) The extent to which operations are linked to other organisations (such as networking businesses or agencies).

4.5.4 *Businesses* should have different *client* risk categories such as: low, normal, and high. The procedures used for each category should be suitable for the risks typically found in that category. For example, if it is normal for a *business* to deal with *clients* from a high risk country, the *business*' procedures for what they regard as normal *clients* must be designed to be address the risks associated with the high risk country. Some low and high risk indicators can be found in APPENDIX E.

4.5.5 Regardless of the risk categorisation, *businesses* will still be expected to undertake monitoring of the *client* relationship. Such monitoring must be done on a risk based approach, with levels of monitoring varying depending on the *MLTF* risk associated with individual *clients*.

4.5.6 Taking into account key risk categories, a *business* may be able to draw up a simple matrix in order to determine a *client*'s risk profile. Such risk categories may include a *client*'s legal form, the country in which the *client* is established or incorporated, and the industry sector in which the *client* operates. In addition, *businesses* should also consider the nature of the service being offered to a *client* and the channels through which the services/transactions are being delivered.

4.5.7 Elevated risks could be mitigated by:

a) Conducting enhanced levels of due diligence – i.e., increasing the level of *CDD* that is gathered.

b) Carrying out periodic *CDD* reviews on a more frequent basis.

c) Putting additional controls around particular service offerings or *client*.

**4.6 What is client risk?**

4.6.1 A *business* should consider the following question, "Does the *client* or its beneficial owners have attributes known to be frequently used by money launderers or terrorist financiers?"

4.6.2 *Client* risk is the overall *MLTF* risk posed by a *client* based on the key risk categories, as determined by a *business*.

4.6.3 The *client*'s risk profile may also inform the extent of the checks that need to be performed on other associated parties, such as the *client*'s beneficial owners.

4.6.4 Undue *client* secrecy and unnecessarily complex ownership structures can both point to heightened risk because company structures that disguise ownership and control are particularly attractive to people involved in *MLTF*.

4.6.5 In cases where a *client* (an individual) or beneficial owner of a *client* is identified as a *PEP*, an enhanced level of due diligence must be performed on the *PEP*. Further details on the approach to be taken in such circumstances are set out in 5.3.11 - 5.3.22 of this guidance.

**4.7 What is service risk?**

4.7.1 A *business* should consider the following question "Do any of our products or services have attributes known to be used by money launderers or terrorist financiers?"

4.7.2 Service risk is the perceived risk that certain products or services present an increased level of vulnerability in being used for *MLTF* purposes.

4.7.3 *Businesses* should consider carrying out additional checks when providing a product or service that has an increased level of *MLTF* vulnerability.

4.7.4 Services and products in which there is a serious risk that the *business* itself could commit a money laundering offence should also be treated as higher risk. For example, wherever the *business* may commit an offence under Section 327–329 of *POCA*. (See APPENDIX A.)

4.7.5 Before a *business* begins to offer a service significantly different from its existing range of products or services, it should assess the associated *MLTF* risks and respond appropriately to any new or increased risks.

**4.8 What is geographic risk?**

4.8.1 A *business* should consider the following question "Are our *clients* established in countries that are known to be used by money launderers or terrorist financiers?"

4.8.2 Geographic risk is the increased level of risk that a country poses in respect of *MLTF*.

4.8.3 When determining geographic risk, factors to consider may include the perceived level of corruption, criminal activity, and the effectiveness of *MLTF* controls within the country.

4.8.4 *Businesses* should make use of publicly available information when assessing the levels of *MLTF* of a particular country, e.g. information published by civil society organisations such as Transparency International and public assessments of the *MLTF* framework of individual countries (such as *FATF* mutual evaluations).

4.8.5 Although some countries may carry a higher level of *MLTF* risk, those *businesses* that have extensive experience within a given country may reach a geographical risk classification that differs to those that that only have a limited exposure.

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

### 4.9 What is sector risk?

4.9.1 A *business* should consider the following question "Do our *clients* have substantial operations in sectors that are favoured by money launderers or terrorist financiers?"

4.9.2 Sector risks are the risks associated with certain sectors that are more likely to be exposed to increased levels of *MLTF*.

4.9.3 *Businesses* should consider the sectors in which their *client* has significant operations, and take this into account when determining a *client*'s risk profile. When considering what constitutes a high risk sector, *Businesses* should take into account the findings of the most recent UK National Risk Assessment, together with any guidance issued by the relevant *anti-money laundering supervisory authority*.

### 4.10 What is delivery channel risk?

4.10.1 A *business* should consider the following question "Does the fact that I am not dealing with the *client* face to face pose a greater *MLTF* risk?"

4.10.2 Certain delivery channels can increase the *MLTF* risk, because they can make it more difficult to determine the identity and credibility of a *client*, both at the start of a *business relationship* and during its course.

4.10.3 For example, delivery channel risk could be increased where services/products are provided to *clients* who have not been met face-to-face, or where a *business relationship* with a *client* is conducted through an intermediary.

4.10.4 *Businesses* should consider the risks posed by a given delivery channel when determining the risk profile of a *client*, and whether an increased level of *CDD* needs to be performed.

### 4.11 Why is documentation important?

4.11.1 *Businesses* must be able to demonstrate to their *anti-money laundering supervisory authority* how they assess and seek to mitigate *MLTF* risks. This assessment must be documented, and made available to the *anti-money laundering supervisory authority* on request. The documentation should demonstrate how the risk assessment informs their policies and procedures.

## 5. CUSTOMER DUE DILIGENCE (*CDD*)

- What is the purpose of *CDD*?
- When should *CDD* be carried out?
- How should *CDD* be applied?
- What happens if *CDD* cannot be performed?

### 5.1 What is the purpose of *CDD*?

5.1.1 Criminals often seek to mask their true identity by using complex and opaque ownership structures. The purpose of *CDD* is to know and understand a *client*'s identity and business activities so that any *MLTF* risks can be properly managed. Effective *CDD* is, therefore, a key part of AML defences. By knowing the identity of a *client*, including who owns and controls it, a *business* not only fulfils its legal and regulatory requirements it equips itself to make informed decisions about the *client*'s standing and acceptability.

5.1.2 *CDD* also helps a *business* to construct a better understanding of the *client*'s typical business activities. By understanding what is normal practice it is easier to detect abnormal events, which, in turn, may point to *MLTF* activity.

**CDD principles**

5.1.3 The *2017 Regulations* outline the required components of good *CDD*. *Businesses* must apply them, (a) at the start of a new *business relationship* (including a company formation), (b) at appropriate points during the lifetime of the relationship and (c) when an *occasional transaction* is to be undertaken. The required components are:

a) Identifying the ***client*** (i.e., knowing who the *client* is) and then verifying their identity (i.e., demonstrating that they are who they claim to be) by obtaining documents or other information from independent and reliable sources;

b) Identifying ***beneficial owner(s)*** so that the ownership and control structure can be understood and the identities of any individuals who are the owners or controllers can be known and, on a risk sensitive basis, reasonable measures should be taken to verify their identity; and

c) Gathering information on the intended purpose and nature of the ***business relationship***.

5.1.4 When determining the degree of *CDD* to apply, the business must adopt a risk based approach, taking into account the type of *client, business relationship*, product or transaction, and ensuring that the appropriate emphasis is given to those areas that pose a higher level of risk (see Section four of this *guidance*). For this reason it is important that risks are assessed at the outset of a *business relationship* so that a proportionate degree of *CDD* can be brought to bear.

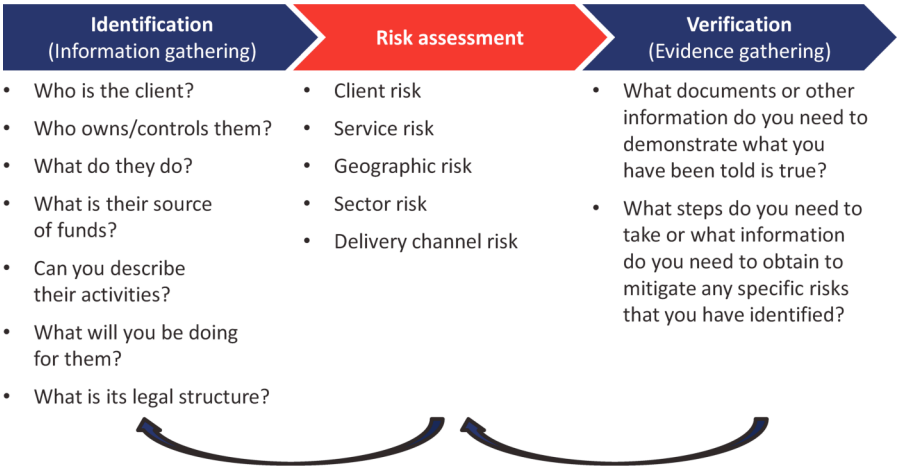
5.1.5 Where the work to be performed falls within the scope of *defined services*, the business must ensure that *CDD* is applied to new and existing *clients* alike. For existing *clients*, *CDD* information gathered previously should be reviewed and updated where it is necessary, timely and risk-appropriate to do so.

5.1.6 The *2017 Regulations* stipulate that *CDD* must also be performed where there is either a suspicion of *MLTF*, or any doubts about the reliability of the identity information, or documents obtained previously for verification purposes.

5.1.7 Where there is such knowledge or suspicion the *business* needs to consider not only whether the existing *CDD* information is sufficient and up-to-date, but also whether an external *SAR* should be made to the *NCA*.

5.1.8 While the *2017 Regulations* prescribe the level of *CDD* that should be applied in certain situations (ie. simplified or enhanced – for more on this see 5.3 of this *guidance*), they do not describe how to do this on a risk-sensitive basis. Nonetheless, a *business* is expected to be able to demonstrate to its *anti-money laundering supervisory authority* that the measures it applied were appropriate in accordance with its own risk assessment. Section four of this *guidance* outlines broadly the key areas to be considered when developing a risk based approach including (amongst other factors) the purpose, regularity and duration of the business relationship.

**Stages of CDD**




5.1.9 The arrows in the diagram above represent feedback loops by which an initial risk assessment or verification may highlight a need for more information to be gathered or a fresh risk assessment performed.

5.1.10 The **identification** phase requires the gathering of information about a *client*'s identity and the purpose of the intended *business relationship*. Appropriate identification information for an individual would include full name, date of birth and residential address. This can be collected from a range of sources, including the *client*. In the case of corporates and other organisations, identification also extends to establishing the identity of anyone who ultimately owns or controls the *client*. These people are the Beneficial Owners (BOs), and further detail on how to deal with them can be found in 5.1.14 of this *guidance*.

5.1.11 The next stage of *CDD* is **risk assessment**. This should be performed in accordance with the risk based approach *guidance* contained in Section four of this guidance, and must reflect the purpose, regularity and duration of the *business relationship*, as well as the size of transactions to be undertaken by the *client* and the *business*' own risk assessment. An initial risk assessment is based on the information gathered during stage one (identification), but this may prompt the gathering of additional information as indicated by the left-hand feedback loop. The right-hand feedback loop shows that additional risk assessment may be required in the light of stage three (**verification**).

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

5.1.12 Once an initial **risk assessment** has been carried out, evidence is required to verify the identity information gathered during the first stage. This is called *client* **verification**. Verification involves validating (with an independent, authoritative source), that the identity is genuine and belongs to the claimed individual or entity. For an individual, verification may require sight of a passport (with a photocopy taken). For corporates and others, in addition to the *client* itself, reasonable verification measures for any individual beneficial owners (BOs) must also be considered on a risk sensitive basis.

5.1.13 Further guidance on the type of information that should be gathered and the documents that can be used to verify it, can be found in 5.3.35 of this *guidance*.

**Beneficial ownership**

**Definition**

5.1.14 A beneficial owner can only be a natural person i.e., an individual (other than in the case of a trust, see below).

5.1.15 Regulations 5 and 6 of the *2017 Regulations* defines the meaning of 'beneficial owner' for a range of different *client* types. The table below gives a summary of how beneficial ownership could be established for a variety of entities:

| Client type | Voting Rights | Shares | Capital or profits | Other means of ownership /control |
|---|---|---|---|---|
| Companies whose securities are listed on a EEA regulated investment market or equivalent | | | | No requirement to establish beneficial ownership |
| Bodies corporate (including LLPs and LPs) | →25% | →25% | | Any individual who exercises ultimate control over the management of the body corporate, or who controls the body corporate |

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

| Client type | Voting Rights | Shares | Capital or profits | Other means of ownership /control |
|---|---|---|---|---|
| Partnerships other than LLPs and LPs | entitled to or controls →25% | entitled to or controls →25% | | Any individual who exercises ultimate control over the partnership management (or in the case of a Scottish partnership, significant influence) |
| Trusts | | | | The beneficiaries (or where some/all have not yet been determined, the class of persons in whose main interest the trust is set up or operates)<br>The settlor and trustee(s)<br>Any other individual who has control over the trust (e.g., a protector or trust controller). |
| Other legal entities | | | | Any individual who benefits from the property of the entity<br>where no individual beneficiaries are identified, the class of persons in whose main interest the entity or arrangement was set up or operates,<br>any individual who exercises control over the entity/ arrangement. |
| Estates of deceased individuals | | | | The executor or administrator of the estate |

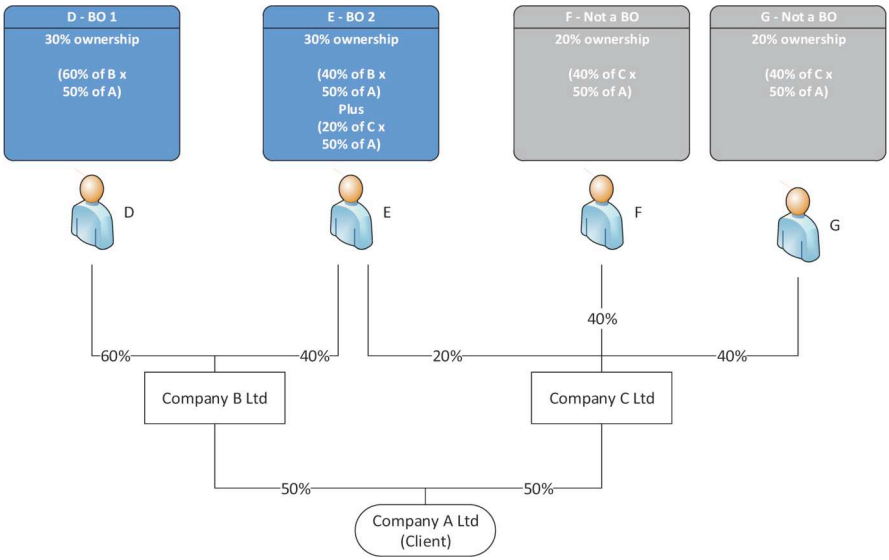
| Client type | Voting Rights | Shares | Capital or profits | Other means of ownership /control |
|---|---|---|---|---|
| All other cases | | | | The individual who ultimately owns or controls the client, or on whose behalf a transaction is being conducted |
| Where all possible means of identifying the beneficial owner of a body corporate have been exhausted and recorded | | | | the senior individual responsible for management (noting the reasons why the business was unable to obtain adequate information on the beneficial owner, and considering whether it may be appropriate to cease acting, or file a SAR). |

5.1.16 *Businesses*, in accordance with their legal obligations, need to be diligent in their enquiries about beneficial ownership, taking into account that the information they need may not always be readily available from public sources. A flexible approach to information gathering will be needed as it will often involve direct enquiries with *clients* and their advisers as well as searches of public records in the UK and overseas. There may be situations in which someone is considered to be the beneficial owner by virtue of control even though their ownership share is less than 25%.

**Determining BOs in respect of complex structures**

5.1.17 In many situations determining beneficial ownership is a straightforward matter. Cases in which the *client* is part of a complex structure will need to be looked at more closely. The diagrams below illustrate types of structures, including indirect ownership and aggregation, which should be taken into account when determining beneficial ownership.

**EXAMPLE 1**




The *client* is Company A Ltd, a private company. Unless persons F or G exercise the relevant control through other means (such as through 25% voting rights or other means of control) and based on a 25% ownership threshold, the BOs are person D and person E.

In determining the beneficial owner position, we would need to understand the ownership of Companies B & C (also private companies), but they themselves do not meet the definition of a BO as they are not natural persons.

Person D: is a beneficial owner due to their indirect shareholding of 30% via Company B.

Person E: is a beneficial owner due to their indirect shareholding of 30% via Company B and C.

Persons F & G are not beneficial owners as they only own 20% each via Company C.

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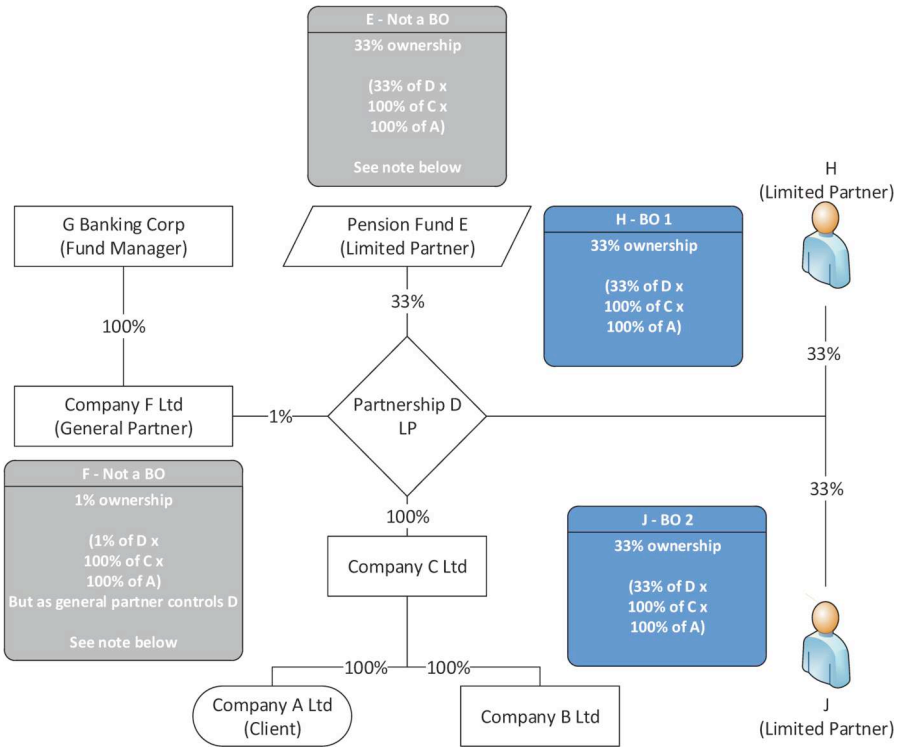
**EXAMPLE 2**




Our *client* is Company A Ltd, a private company. Unless E or F exercise the relevant control through other means (such as through 25% voting rights or other means of control) and based on a 25% threshold, the BOs are person H and person J.

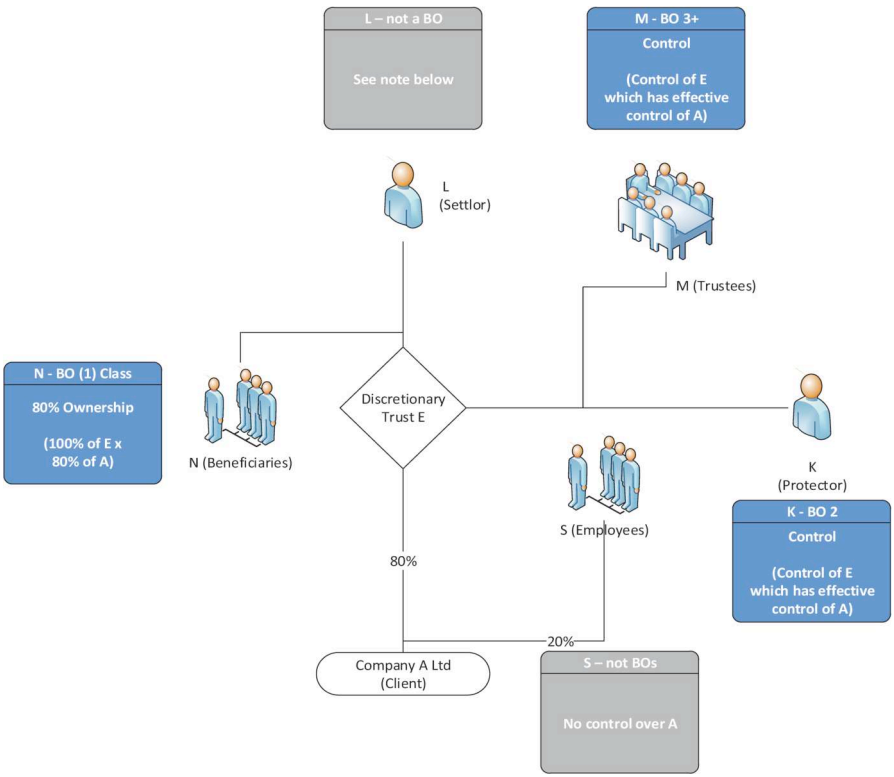
In determining the beneficial owner position, we would need to understand the structure of Company C, Partnership D, Pension Fund E, Company F and G Banking Corp but they themselves do not meet the definition of a BO as they are not natural persons.

Persons H & J: are beneficial owners based on a 25% threshold due to their indirect shareholding of 33% each via Partnership D.

Whilst not beneficial owners in their own right, Pension Fund E and Company F present avenues of ownership and control which should be considered further. Pension Fund E has a 33% ownership interest in Company A. Company F, as General Partner, controls the operations of Partnership D

(which owns 100% of Company A). Company F is ultimately owned by G Banking Corp. In some situations, pension schemes and banks may qualify for Simplified Due Diligence (SDD), in which case consideration will stop at the point that we can confirm they are eligible for such treatment. Depending on the risk assessment we may need to further investigate the ownership and control structure to ensure there are no further BOs.

**EXAMPLE 3**




The *client* (Company A Ltd) is a body corporate, therefore:

a) Its BOs are the natural persons who: (a) exercise ultimate control over its management; (b) own or control more than 25% of its voting rights; (c) own or control more than 25% of its shares; or (d) otherwise controls it (for example through the right to appoint or remove a majority of the directors). There is no need to consider who benefits from dividends or capital distributions.

b) There is no need to use the BO rules related to other types of *client*, such as trusts.

In our case, all of the shares in Company A have equal voting rights. 80% of them are owned by Discretionary Trust E, which allows Discretionary trust E to control the activities of Company A. The remaining shares are owned by employees of Company A, none of whom have any connection to anyone else in the ownership and control structure.

Discretionary trust E is not a natural person, so it cannot be a BO.

The activities of Discretionary trust E are controlled by its trustees (M). Thus, each trustee is a BO of Company A.

In our case the trust's protector (K) acts as a check on the powers of the trustees and is also responsible for appointing new trustees. They are therefore regarded as having significant influence and control over E. Protector K is a BO of Company A.

In our case the settlor (L) has no involvement following settlement of assets into the trust, nor do they exercise significant influence or control over the trustees or the protector. L has no other connection to A. L is not a BO of Company A, since they will not be exercising significant influence or control over E.

The employee-shareholders do not have enough votes, acting either individually or together, to control Company A, none of them is a BO of Company A.

Although the trustees and the protector must act in the interest of the beneficiaries, they (N) have no authority over the trustees or protector. Thus, the beneficiaries will not be BOs of Company A, unless they exercise significant influence or control over E or A.

Notes:

- There may be situations where it is appropriate to know the identity of person L, for example to understand the source of Company A's capital. The MLRO should make the decision to seek such information as a risk-sensitive response to a particular set of circumstances.
- There may be situations where it is appropriate to identify the class of beneficiaries of trust E or even individuals receiving distributions from the trust, for example where distributions from Company A appear

excessive it may be appropriate to establish that the beneficiary or beneficiaries require substantial funds. This may occur where a beneficiary is paying for a wedding or for large medical bills. The MLRO should make the decision to seek such information as a risk-sensitive response to a particular set of circumstances.

- If the trust E becomes a client, the settlor and the class of beneficiaries will need to be identified, in line with the rules for a discretionary trust.

**5.2 When should CDD be carried out?**

**When establishing a business relationship**

5.2.1 *CDD* should normally be completed before entering into a *business relationship* or undertaking an *occasional transaction*. For guidance on the situation when *CDD* cannot be performed before the commencement of a *business relationship*, see 5.4 of this guidance.

5.2.2 A *business relationship* is defined by the *2017 Regulations* (Regulation 4) as:

'A business, professional or commercial relationship between a relevant (ie. regulated) person and a customer, which arises out of the business of the relevant person and is expected by the relevant person, at the time when contact is established, to have an element of duration.'

Thus generic advice, provided with no expectation of any client follow-up or continuing relationship (such as generic reports provided free of charge or available for purchase by anyone), is unlikely to constitute a *business relationship*, although may potentially be an *occasional transaction*.

5.2.3 Under Regulation 27 (2) of the *2017 Regulations*, for a transaction to be 'occasional' it must occur outside of a *business relationship* and have a value more than €15,000. Such a thing is not common in *accountancy services*, but should it occur then the business must, (a) understand why the *client* requires the service, (b) consider any other parties involved, and (c) establish whether or not there is any potential for *MLTF*. If the *client* returns for another transaction the *business* should consider whether this establishes an ongoing relationship.

5.2.4 *CDD* procedures must also be carried out at certain other times, such as when there is a suspicion of *MLTF*, or where there are doubts about the available identity information, perhaps following a change in ownership/control or through the participation of a PEP (see 5.3.11 of this *guidance*).

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

**Ongoing monitoring of the client relationship**

5.2.5 Established *business relationships* should be subject to *CDD* procedures throughout their duration. This ongoing monitoring involves the scrutiny of *client* activities (including enquiries into sources of funds if necessary) to make sure they are consistent with the *business*' knowledge and understanding of the *client* and its operations, and the associated risks.

**Event-driven reviews**

5.2.6 *Businesses* need to make sure that documentation, data and information obtained for *CDD* purposes is kept up-to-date. Events prompting a *CDD* information update must include:

- a change in the *client*'s identity
- a change in beneficial ownership of the *client*
- a change in the service provided to the *client*
- information that is inconsistent with the *business*' knowledge of the *client*

An event driven review may also be triggered by:

- the start of a new engagement;
- planning for recurring engagements;
- a previously stalled engagement restarting;
- a significant change to key office holders;
- the participation of a *PEP* (see 5.3.11 of this *guidance*)
- a significant change in the *client*'s business activity (this would include new operations in new countries); and
- there is knowledge, suspicion or cause for concern (for example where you doubt the veracity of information provided). If a *SAR* has been made, care must also be taken to avoid making any disclosures which could constitute *tipping off*.

**Periodic reviews**

5.2.7 *Businesses* should use routine periodic reviews to update their *CDD*. The frequency of up-dating should be risk based, making use of the *business*' risk assessment covered in Section 4 of this *guidance*, and reflecting the *business*' knowledge of the *client* and any changes in its circumstances or the services it requires.

**Ongoing procedures**

5.2.8 The *CDD* procedures required for either event-driven or periodic reviews may not be the same as when first establishing a new *business relationship*. Given how much existing information could already be held, ongoing *CDD* may require the collection of less new information than was required at the very outset.

**5.3 How should *CDD* be applied?**

**Applying *CDD* by taking a risk based approach**

5.3.1 Regulation 28(12) of the *2017 Regulations* requires adequate *CDD* measures to reflect the *business'* risk assessment (Section four of this *guidance*). This is important not only to ensure that there is good depth of knowledge in higher risk cases but also to avoid disproportionate effort in lower or normal risk cases and to minimise inconvenience for a potential *client*. No system of checks will ever detect and prevent all *MLTF*, but a risk-sensitive approach of this kind will provide a realistic assessment of the risks. A non-exhaustive list of risk factors can be found in APPENDIX E.

5.3.2 Extensive information on how to apply *CDD* in this way is contained in the guidance on risk-sensitive client verification provided by the *JMLSG*, which considers a wide range of entity types. For information on the more frequently encountered entity types see APPENDIX C.

***Simplified due diligence (SDD)***

5.3.3 *SDD* can be applied when a *client* is low risk, in accordance with the *businesses'* risk assessment criteria.

5.3.4 *CDD* measures are still required but the extent and timing may be adjusted to reflect the assessment of low risk, for example in determining what constitutes reasonable verification measures. Ongoing monitoring for unusual or suspicious transactions is still required.

5.3.5 The *business'* internal procedures should set out clearly what constitutes reasonable grounds for a client to qualify for SDD and must take into account at least the risk factors in APPENDIX E and relevant information made available by its *anti-money laundering supervisory authority*.

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

5.3.6 In any case, when a client or potential client has been subjected to SDD, and a suspicion of *MLTF* arises nonetheless, the SDD provisions must be set aside and the appropriate due diligence procedures applied instead (with due regard given to any risk of *tipping off*).

***Enhanced due diligence (EDD)***

5.3.7 A risk based approach to *CDD* will identify situations in which there is a higher risk of *MLTF*. The regulations specify that 'enhanced' due diligence (Regulation 33 of the *2017 Regulations*) must be applied in the following situations:

a) where there is a high risk of *MLTF*;

b) in any *occasional transaction* or *business relationship* with a person established in a high-risk third country;

c) if a business has determined that a client or potential client is a *PEP*, or a *family member* or *known close associate* of a *PEP*;

d) in any case where a *client* has provided false or stolen identification documentation or information on establishing a *business relationship*;

e) in any case where a transaction is complex and unusually large, there is an unusual pattern of transactions which have no apparent economic or legal purpose;

f) in any other case which by its nature can present a higher risk of *MLTF*.

5.3.8 The *business*' internal procedures should set out clearly what constitutes reasonable grounds for a *client* to qualify for EDD and must take into account at least the high risk factors in APPENDIX E.

5.3.9 EDD procedures must include:

a) as far as reasonably possible, examining the background and purpose of the engagement; and

b) Increasing the degree and nature of monitoring of the *business relationship* in which the transaction is made to determine whether that transaction or that relationship appear to be suspicious.

5.3.10 EDD measures (as detailed in Regulation 33 (5) of the *2017 Regulations*) may also include one or more of the following measures:

a) seeking additional independent, reliable sources to verify information, including identity information, provided to the *business*;

b) taking additional measures to understand better the background, ownership and financial situation of the *client*, and other parties relevant to the *engagement*;

c) taking further steps to be satisfied that the transaction is consistent with the purpose and intended nature of the *business relationship*;

d) Increasing the monitoring of the *business relationship*, including greater scrutiny of transactions.

***Politically exposed person (PEP)***

5.3.11 As set out above, the *2017 Regulations* specify that *PEPs* (as well as certain *family members* and *known close associates*) must undergo EDD. The nature, and extent of, such EDD measures must vary depending on the extent of any heightened *MLTF* risk associated with individual *PEPs*. *Businesses* must treat *PEPs* on a case-by-case basis, and apply EDD on the basis of their assessment of the *MLTF* risk associated with any individual *PEPs*.

5.3.12 So as to assess this risk, it is important to identify *PEPs* so that the *business* can properly consider the risks associated with any *engagement* involving them. Appropriate risk management systems and procedures to determine whether potential *clients* (or their beneficial owners) are *PEPs*, or *family members/known close associates* of a *PEP*. These must be based on the risk assessment process detailed in Section four of this *guidance*, and relevant information provided by the *business' anti-money laundering supervisory authority*. Domestic *PEPs* are included within the definition of *PEPs*. *Businesses* should, however, consider factors including the country which has entrusted a *PEP* with a prominent public function when determining the level of *MLTF* risk associated with an individual *PEP*. *PEPs* entrusted with prominent public functions by countries with characteristics such as low levels of corruption; strong state institutions; and credible anti-money laundering defences are likely to pose less of an *MLTF* risk than *PEPs* from higher-risk countries.

5.3.13 An individual identified as a *PEP* solely because of their public function in the UK must still be treated as a *PEP*. However if the *business* is not aware of any factors that would place the individual in a higher risk category, the individual may be categorised as a low risk *PEP*. Regulation 18 of the *2017*

*Regulations* and the risk factors guidance produced by the European Supervisory Authorities set out factors that might point to potential higher risk. Such factors might also include, for example:

a) known involvement in publicised scandals e.g., regarding expenses;

b) undeclared business interests;

c) the acceptance of inducements to influence policy.

5.3.14 In lower-risk situations a *business* should apply less onerous EDD requirements (such as, for example, making fewer enquiries of a *PEP's family members* or *known close associates*; and taking less intrusive and less exhaustive steps to establish the *sources of wealth/funds* of *PEPs*). Conversely, and in higher-risk situations, *Businesses* should apply more stringent EDD measures. This represents part of the risk based approach that *businesses* should take to *MLTF* compliance, as described more fully elsewhere in this *guidance*.

5.3.15 *Businesses* must treat individuals as *PEPs* for at least 12 months after they cease to hold a prominent public function. This requirement does not apply to *family members* or *known close associates*. *Family members* and *known close associates* of *PEPs* should be treated as ordinary clients (and subject only to *CDD* obligations) from the point that the *PEP* ceases to discharge a prominent public function. *Businesses* should only apply EDD measures to *PEPs* for more than 12 months after they have ceased to hold a prominent public function when the *business* has determined that they present a higher risk of *MLTF*.

5.3.16 To establish whether someone is a *family member* or *known close associate* of a *PEP*, businesses are expected to refer only to information that is either in the public domain or already in their possession. The *2017 Regulations* provide that the definition of a family member must include the spouses/civil partners of *PEPs*, the children of *PEPs* (and their spouse or civil partner) and the parents of *PEPs*. This is not an exhaustive list – in determining whether other *family members* should be subject to EDD, *businesses* should consider the levels of *MLTF* risk associated with the relevant *PEP*. In lower-risk situations, a business should not apply EDD to additional *family members* other than those contained within the definition set out in the *2017 Regulations*.

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

5.3.17 The *2017 Regulations* state that only directors, deputy directors and board members (or equivalent) of international organisations should be treated as *PEPs*. Middle-ranking and junior officials do not fall within the definition of a *PEP*.

5.3.18 Since the term 'international organisation' is not defined by the *2017 Regulations*, careful consideration should be given to the type, reputation and constitution of a body before excluding its representatives from EDD. Bodies such as the United Nations and NATO can confidently be considered to fall within the definition. The context of the *engagement* and role of the *PEP* in respect of it should also be considered. The regulations are clear that only directors, deputy directors and board members (or equivalent of international organisations should be treated as PEPs.

5.3.19 *Businesses* are required to use risk-sensitive measures to help them recognise *PEPs*. This can be as simple as asking the client themselves or searching the internet for public information relating to the *PEP*. *Businesses* likely to provide services regularly to *PEPs* should consider subscribing to a specialist database. *Businesses* that use such databases must understand how they are populated and will need to ensure that those flagged by the database fall within the definition of a *PEP*, *family member* or *known close associate* as set out by the *2017 Regulations*. During the life of a relationship, and to the extent that it is practical, attempts should be made to keep abreast of developments that could transform an existing *client* into a *PEP*.

5.3.20 *Businesses* wanting to enter into, or continue, a *business relationship* with a *PEP* must carry out EDD, which includes:

a) *senior management* approval for the relationship;

b) adequate measures to establish sources of wealth and funds; and

c) enhanced monitoring of the ongoing relationship.

As set out above, the nature and extent of EDD measures must vary depending on the levels of *MLTF* risk associated with individual *PEPs*.

5.3.21 The Financial Conduct Authority (FCA) has published detailed guidance on how businesses that it supervises for *MLTF* purposes should identify and treat PEPs. *Businesses* may find this guidance useful in determining the approach that they should take to identifying and applying EDD to *PEPs*.

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

5.3.22 Recital 33 of the *EU Directive* (which the *2017 Regulations* bring into UK law)makes it clear that refusing a *business relationship* with a person solely on the basis that they are a PEP is a contrary to the spirit and letter of the *EU Directive*, and of the FATF standards. *Businesses* must instead mitigate and manage any identified *MLTF* risks, and should refuse *business relationships* only when such risk assessments indicate that they cannot effectively mitigate and manage these risks.

**Financial sanctions and other prohibited relationships**

5.3.23 *Businesses* must comply with any sanctions, embargos or restrictions in respect of any person or state to which the UN, UK or EU has decided to apply such measures (a list is published by HM Treasury). *Businesses* may be directed to not enter into *business relationships*, carry out *occasional transactions* or proceed with any arrangements already in progress, and have an obligation to report sanctions breaches to HM Treasury's Office of Financial Sanctions Implementation (OFSI) (separately to the making of an external *SAR* to the *NCA*, where appropriate). Depending on the circumstances, sanctions imposed by overseas countries may also apply to UK *businesses*.

5.3.24 Financial sanctions can be a complex and changeable area. Detailed discussion of it is beyond the scope of this *guidance*. *Businesses* should make use of the *guidance* published by OFSI. OFSI also offer a free e-alerts service to help businesses stay up-to-date with developments in financial sanctions. *Businesses* should note that *2017 Regulations* set out specific reporting obligations for certain *businesses*, including *external accountants*, *auditors*, and *tax advisers*. A *business* that fails to comply with its reporting obligations will be committing an offence, which may result in a criminal prosecution or a monetary penalty. For further information on the reporting obligations refer to the OFSI guide to financial sanctions. *Businesses* unsure of their legal obligations should seek legal advice.

**Reliance on other parties**

5.3.25 *Businesses* are permitted to rely on certain other parties (subject to their agreement) to complete all or part of *CDD*.

5.3.26 This is permitted only if the other party is a member of the *regulated sector* in the UK, or subject, in an EEA or non-EEA state, to an equivalent regulatory regime which includes compliance supervision requirements equivalent to the *EU Directive*.

5.3.27 *Businesses* should note that where one party places reliance on another they must enter into an agreement (that should be in writing) to ensure that the other party will provide the *CDD* documentation immediately on request. An arrangement of this kind can be useful and efficient when the two parties are able to build a relationship of trust, but it should not be entered into lightly. Liability for inadequate *CDD* remains with the relying party. *Businesses* placing reliance on another should satisfy themselves with the level of *CDD* being undertaken.

**Parties seeking reliance**

5.3.28 A *business* relying on a third party in this way is not required to apply standard *CDD*, but it must still carry out a risk assessment and perform ongoing monitoring. That means it should still obtain a sufficient quantity and quality of *CDD* information to enable it to meet its monitoring obligations.

5.3.29 In addition, the *business* seeking to rely on a third party remains liable for any *CDD* failings irrespective of the terms of the *CDD* agreement.

5.3.30 If relying on a third party, *businesses* must obtain copies of all relevant information to satisfy *CDD* requirements. They should also enter into a written arrangement that confirms that the party being relied on will provide copies of identification and verification documentation immediately on request.

**Parties granting reliance**

5.3.31 A *business* should consider whether it wishes to be relied upon to perform *CDD* for another party. Before granting consent, a *business* that is relied upon must ensure that its *client* (and any other third party whose information would be disclosed) is aware that the disclosure may be made to the other party and has no objection to the disclosure. It should make sure that:

a) it has adequate systems for keeping proper *CDD* records;

b) it can make available immediately on request:

- any information about the *client*/BO gathered during *CDD*; and/or
- copies of any information provided during *client*/BO identity/verification or documentation obtained during *CDD*.

c) It can keep those *CDD* records securely for five years after the end of the *business relationship*.

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

**Group engagements**

5.3.32 When a relevant *business* contracts with a group of companies that are under the control of a parent undertaking, all of which could be considered *clients*, it may wish to consider applying *CDD* in a proportionate, risk-sensitive way by treating the group as a single entity.

**Subcontracting**

5.3.33 Where a relevant *business*, A, is engaged by another business, B, to help with work for one of its *clients* or some other underlying party, C, then A should consider whether its *client* is in fact B, not C. For example, where there is no *business relationship* formed, nor is there an engagement letter between A and C, it may be that *CDD* on C is not required but should instead be completed for B.

5.3.34 On the other hand, where there is significant contact with the underlying party, or where a *business relationship* with it is believed to have been established, then C may also be deemed a *client* and *CDD* may be required for both C and B. In this situation, A may wish to take into account information provided by B and the relationship it has with C when determining what *CDD* is required under its risk based approach. It should be noted that the same considerations are relevant in networked arrangements, where work is referred between member firms.

**Evidence gathering**

5.3.35 The *2017 Regulations* do not prescribe what information sources a business should consult to perform *CDD* effectively. There are many possibilities, including direct discussions with the *client* and collecting information from its websites, brochures and reports, as well as public domain sources. It is particularly important to make sure that the *client* is who they say they are. Since the purpose of *client* verification is to check the *client* identity information already gathered, it is important that the information used at this stage is drawn from independent sources and any identity evidence used should be from an authoritative source.

5.3.36 In higher risk cases *businesses* must consider whether they need to take extra steps to increase the depth of their *CDD* knowledge. These might include more extensive internet and media searches covering the *client*, key counterparties, the business sectors and countries and requests for

additional identity evidence. Subscription databases can be a quick way to access this kind of public domain information, and they will often reveal links to known associates (companies and individuals) as well.

5.3.37 *Client* verification means to verify on the basis of documents or information obtained from a reliable source which is independent of the person whose identity is being verified. Documents issued or made available by an official body can be regarded as being independent.

5.3.38 It is important that verification procedures are undertaken on a risk-sensitive basis. Refer to APPENDIX C for a non-exhaustive list of documents that can be used for verification purposes. Further help can be found in the *JMLSG* guidance.

**Copies of documents**

**Certification**

5.3.39 *Businesses* should consider how they will demonstrate the provenance of document copies. When the original was seen by a *relevant employee* it should be sufficient for that person to endorse the copy to that effect, including the date on which it was seen. When the copy originates from outside the *business*, the standing of the person who certified it should be considered and *relevant employees* should be aware of the risks associated with certified copies (for example, that such documents may be falsified). It may be necessary to stipulate acceptable sources for certified copies; for example, *businesses* may decide to restrict acceptance to those persons in the permitted categories for reliance (see 5.3.26 of this *guidance*).

**Annotation**

5.3.40 Where a document is not an original but could be mistaken for one, it should be annotated to that effect. This is particularly true for documents sourced from the internet, such as downloads from Companies House, from the website of a regulator, stock exchange or government department, or from any other suitable source. Documents of this kind should carry an indication of the source and when the download took place – sometimes in the automatic page footers/headers – and these would satisfy this requirement. Where necessary and taking a risk based approach, such documents (whether downloaded or otherwise) should be validated with an authoritative source such as a government agency.

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

**Use of electronic data**

5.3.41 A number of subscription services give access to identity-related information. Many of them can be accessed on-line and are often used to replace or supplement paper-based verification checks. Companies House registers of persons of significant control may be used but may not be relied upon in the absence of other supporting evidence.

5.3.42 Before using any electronic service, question whether the information is reliable, comprehensive and accurate. Consider the following:

a) **Does the system draw on multiple sources?** A single source (e.g., the electoral register) is not usually sufficient. A system that combines negative and positive data sources is generally the more robust.

b) **Are the sources checked and reviewed regularly?** Systems that do not update their data regularly are generally more prone to inaccuracy.

c) **Are there control mechanisms to ensure data quality and reliability?** Systems should have built-in data integrity checks which, ideally, are sufficiently transparent to prove their effectiveness.

d) **Is the information accessible?** It should be possible to either download and store search results in electronic form, or print a hardcopy that contains all the details required (name of provider, original source, date, etc.).

e) **Does the system provide adequate evidence that the client is who they claim to be?** Consideration should be given as to whether the evidence provided by the system has been obtained from an official source, e.g., certificate of incorporation from the official company registry.

**5.4 What happens if CDD cannot be performed?**

**When delays occur**

5.4.1 The *business* should still gather enough information to form a general understanding of the *client*'s identity so that it remains possible to assess the risk of *MLTF*.

5.4.2 The *2017 Regulations* do recognise that *CDD* will sometimes need to be completed while the *business relationship* is established, rather than before. But delays of this kind are only permissible when there is little risk of *MLTF* and it is necessary to avoid interrupting the normal conduct of business. Such exceptions will be rare (see 5.4.6 of this *guidance*).

5.4.3 When most of the information needed has been collected before the *business relationship* has begun, it may be acceptable to have a short extension (to allow for information collection to be completed) provided the cause of the delay is administrative or logistical, not the *client*'s reluctance to cooperate. To ensure the reasons are valid, and should not give rise to suspicions of *MLTF*, it is recommended that each extension be considered individually and agreed by the *MLRO*.

5.4.4 Extensions to the *CDD* schedule should be specific, well-defined and time-limited. There should be no granting of general extensions (such as for particular *client* types).

5.4.5 No *client engagement* (including transfers of *client* money or assets) should be completed until *CDD* has been completed in accordance with the *business*' own procedures.

5.4.6 Provided that *CDD* is completed as soon as practicable, verification procedures may be completed during the establishment of a *business relationship* if it is necessary not to interrupt the normal course of business and there is little risk of *MLTF*. In some situations it may be necessary to carry out *CDD* while commencing work because it is urgent. Such situations could include:

a) some insolvency appointments;

b) appointments that involve ascertaining the *client*'s legal position or defending them in legal proceedings;

c) response to an urgent cyber incident; or

d) when it is critically important to preserve or extract data or other assets without delay.

5.4.7 It is recommended that these categories are considered carefully and defined by the *MLRO* to ensure that the reasons for any extension are appropriate.

**Cessation of work and suspicious activity reporting**

5.4.8 If a prospective or existing *client* refuses to provide *CDD* information, the work must not proceed and any existing relationship with the *client* must be terminated. However in many cases inability to complete *CDD* is not a circumstance where an insolvency practitioner can resign and so an ap-

propriate risk based approach should be adopted where the *client*'s management are not cooperative. Consideration must also be given to whether or not a *SAR* should be submitted to the *NCA* under *POCA* or *TA 2000* (see Section six of this *guidance*).

## 6. SUSPICIOUS ACTIVITY REPORTING (SAR)

- What must be reported?
- When and how should an external *SAR* be made to the *NCA*?
- What is *consent* and why is it important?
- What should happen after an external *SAR* has been made?

### 6.1 What must be reported?

**The reporting regime**

6.1.1 *Businesses* must have internal reporting procedures that enable *relevant employees* to disclose their knowledge or suspicions of *MLTF*. A *nominated officer* must be appointed to receive these disclosures (this *guidance* assumes that this role will be filled by the *MLRO*). In the regulated sector it is an offence for someone who knows or suspects that *MLTF* has taken place (or has reasonable grounds) not to report their concerns to their *MLRO* (or, in exceptional circumstances, straight to the *NCA*).

6.1.2 The *MRLO* has a duty to consider all such internal *SARs*. If the *MLRO* also suspects *MLTF* when an external *SAR* must be made to the *NCA*. Typically the *MLRO*'s knowledge or suspicions will arise (directly or indirectly) out of the internal *SARs* they receive.

6.1.3 Similar 'failure to disclose' provisions are found in The *TA 2000*.

6.1.4 The key elements required for a *SAR* (suspicion, crime, proceeds) are set out below.

**Suspicion**

6.1.5 There is very little guidance on what constitutes 'suspicion' so the concept remains subjective. Some pointers can be found in case law, where the following observations have been made. Suspicion is:

- a state of mind more definite than speculation but falling short of evidence-based knowledge;

- a positive feeling of actual apprehension or mistrust;
- a slight opinion, without sufficient evidence.

Suspicion is not:

- a mere idle wondering;
- a vague feeling of unease.

6.1.6 A *SAR* must be made where there is knowledge or suspicion of money laundering, but there is no requirement to make speculative *SARs*. If, for example, a suspicion is formed that someone has failed to declare all of their income for the last tax year, to assume that they had done the same thing in previous years would be speculation in the absence of specific supporting information. Similarly, the purchase of a brand new Ferrari by a *client*'s financial controller is not, in itself, suspicious activity. However, inconsistencies in accounts for which the financial controller is responsible could raise speculation to the level of suspicion.

6.1.7 A *SAR* is also required when there are 'reasonable grounds' to know or suspect. This is an objective test; i.e., the standard of behaviour expected of a reasonable person in the same position. Claims of ignorance or naivety are no defence.

6.1.8 It is important for individuals to make enquiries that would reasonably be expected of someone with their qualifications, experience and expertise, and as long as the enquiries fall within the normal scope of the *engagement* or *business relationship*. In other words, they should exercise a healthy level of professional scepticism and judgement and, if unsure about what to do, consult their *MLRO* (or similar) in accordance with the *business*' own procedures. If in doubt, err on the side of caution and report to the *MLRO*.

6.1.9 The information or knowledge that gave rise to the suspicions must have come to the individual in the course of business in the *regulated sector*.

**Crime**

6.1.10 Criminal conduct is behaviour which constitutes a criminal offence in the UK or, if it happened overseas, would have been an offence had it taken place in any part of the UK.

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

6.1.11 There is an overseas conduct exception, set out in Section 330 (7A) of *POCA*, which describes the circumstances in which there is no requirement to report overseas matters of this kind:

a) the conduct is reasonably believed to have taken place overseas; and

b) it was lawful where it took place; and

c) the maximum sentence had it happened in the UK would be less than 12 months.

(For offences under the Gaming Act 1968, the Lotteries and Amusements Act 1976 and Section 23 or 25 of the *FSMA 2000* the exemption still applies even if the UK sentence is more than 12 months.)

Because these tests are complex and burdensome, *MLROs* may seek legal advice to resolve any doubts.

6.1.12 There is no similar overseas conduct exemption for reporting suspicions of terrorist financing.

6.1.13 In most cases of suspicious activity the reporter will have a particular type of criminal conduct in mind, but this is not always the case. Some transactions or activities so lack a commercial rationale or business purpose that they give rise to a general suspicion of *MLTF*. UK law defines money laundering widely; any criminal conduct that results in criminal property is classified as money laundering. Individuals are not required to become experts in the wide range of criminal offences that lead to money laundering, but they are expected to recognise any that fall within the scope of their work. Exercise professional scepticism and judgement at all times.

6.1.14 An innocent error or mistake would not normally give rise to criminal proceeds (unless a strict liability offence). If a *client* is known or believed to have acted in error, they should have the situation explained to them. They must then promptly bring their conduct within the law to avoid committing a money laundering offence. Where there is uncertainty because certain legal issues lie outside the competence of the practitioner, the *client* should be referred to an appropriate specialist or legal professional.

**Proceeds**

6.1.15 Criminal proceeds can take many forms. Cost savings (as a result of tax evasion or ignoring legal requirements) and other less obvious benefits can be proceeds of crime. Where criminal property is used to acquire more assets, these too become criminal property. It is important to note that there is no question of a de minimis value.

6.1.16 If someone knowingly engages in criminal activity with no benefit, then they may have committed some offence other than money laundering (it will often be fraud) and there is no obligation to make a *SAR*. *Businesses* should nonetheless consider whether they are under some other professional reporting obligations, such as those referred to in 6.4.20 of this *guidance*.

A checklist for the *SAR* reporting process can be found in APPENDIX D.

***OFFENCE: failure to disclose***

6.1.17 Individuals should make sure that any information in their possession which is part of the required disclosure is passed to the *MLRO* as soon as practicably possible.

6.1.18 Where, as a result of an internal *SAR*, the *MLRO* obtains knowledge or forms a suspicion of *MLTF*, they must as soon as practicable make an external *SAR* to the *NCA*. The *MLRO* may commit a *POCA* Section 331 offence if they fail to do so.

**Some examples**

| **Example 1 – Shoplifting** | |
|---|---|
| The *business* acts for a retail *client* and you are aware of some instances of shoplifting. | |
| Report | If you<br>• know or suspect the identity of the shoplifter;<br>• know or suspect the location of the shoplifted goods;<br>• have information that may assist in the identification of the identity of the shoplifter; or<br>• have information that may assist in locating the shoplifted goods. |
| Do not report | If you have none of the information listed above. |
| No further work is required to find out any of the listed details. | |

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

| **Example 1 – Overpaid invoices** | |
|---|---|
| Some customers of your *client* have overpaid their invoices. The *client* retains overpayments and credits them to the profit and loss account. | |
| Report | If you<br>• know or suspect that the *client* intends to dishonestly retain the overpayments. Reasons for such a belief may include:<br>• – The *client* omits overpayments from statements of account.<br>• – The *client* credits the profit and loss account without making any attempt to contact the overpaying party.<br>• have information that may assist in locating the shoplifted goods. |
| Do not report | If you:<br>• believe that the *client* has no dishonest intent to permanently deprive the overpaying party. Reasons for such a belief may include:<br>– Systems operated by the *client* to notify the customer of overpayments.<br>– Evidence that requested repayments are processed promptly.<br>– Evidence that the *client* has attempted to contact the overpaying party.<br>– The *client* has sought and is following legal advice in respect of the overpayments. |

| **Example 3 – Illegal dividends** | |
|---|---|
| Your *client* has paid a dividend based on draft accounts. Subsequent adjustments reduce distributable reserves to the extent that the dividend is now illegal. | |
| Report | If there is suspicion of fraud. |
| Do not report | If there is no such suspicion. The payment of an illegal dividend is not a criminal offence under the Companies Act. |

| **Example 4 – Invoices lacking commercial rationale** | |
|---|---|
| Your *client* plans to expand its operations into a new country of operation. They have engaged a consultancy firm to oversee the implementation although it is not clear what the firm's role is. Payments made to the consultancy firm are large in comparison to the services provided and some of the expenses claimed are for significant sums to meet government officials' expenses. The country is one where corruption and facilitation payments are known to be widespread. You ask the Finance Director about the matter and he thought that such payments were acceptable in the country in question. | |
| Report | If you suspect that bribes have been paid. |
| Do not report | If you do not suspect illegal payments. |
| Money laundering offences include conduct occurring overseas which would constitute an offence if it had occurred in the UK. | |

| **Example 5 – Concerted price rises** | |
|---|---|
| Your *client's* overseas subsidiary is one of three key suppliers of goods to a particular market in Europe. The subsidiary has recently significantly increased its prices and margins and its principal competitors have done the same. There has been press speculation that the suppliers acted in concert, but publicly they have cited increased costs of production as driving the increase. Whilst this explains part of the reason for the increase, it is not the only reason because of the increase in margins. On reviewing the accounting records, you see significant payments for consultancy services and seek an explanation. Apparently, they relate to an assessment of the impact of the price increase on the market as well as some compensation for any losses the competitors suffered on their business outside of Europe. Some of the increased profits have flowed back to the UK parent company. There is not a criminal cartel offence under local law but there is under UK law. | |
| Report | If you suspect a price fixing cartel. |
| Do not report | If you do not suspect criminal activity. |

| **Example 6 – Breaches of overseas laws** | |
|---|---|
| You suspect that one of your *client's* overseas subsidiaries has been in breach of a number of local laws. In particular, dividends have been paid to the parent company in breach of local exchange control requirements. | |
| Report | If you suspect that in order for the payment to have been made an act (such as fraud) that would have been a criminal offence had it occurred in the UK, has taken place. |
| Do not report | If you decide that no act that would have been a criminal offence had it taken place in any part of the UK, has occurred. |

| **Example 6 – Breaches of overseas laws** |
| --- |
| Money laundering offences include conduct occurring overseas which would constitute an offence if it had occurred in the UK (carrying a custodial sentence of 12 months or more). The UK has no exchange control legislation. |

**Failure to disclose: defences and exemptions**

6.1.19 There are the following defences against failure to disclose:

a) There is a reasonable excuse for not making the disclosure. However, it is anticipated that only relatively extreme circumstances – such as duress or threats to safety – would be accepted;

b) The privileged circumstances exemption applies (see 6.2.22 of this *guidance*);

c) The *relevant employee* concerned did not know about or suspect *MLTF* and had not received the training required by Regulation 21 of the *2017 Regulations*. As no training was provided, the *relevant employee* is not bound by the objective test – i.e., to always report when there are 'reasonable grounds' for knowledge or suspicion – but the *business* has committed an offence by failing to provide training.

**OFFENCE: Tipping off**

6.1.20 This offence is committed when a *relevant employee* in the *regulated sector* discloses that:

a) a *SAR* has been made and this disclosure is likely to prejudice any subsequent investigation; or

b) an investigation into allegations of *MLTF* is underway (or being contemplated) and this disclosure is likely to prejudice that investigation.

6.1.21 Considerable care must be taken when communicating with *clients* or third parties after any form of SAR has been made. Before disclosing any of the matters reported it is important to consider carefully whether to do so is likely to constitute an offence of *tipping off* or *prejudicing an investigation* (see 6.1.20 and 6.1.30 of this *guidance*). It is suggested that *businesses* keep records of these deliberations and the conclusions reached (see Section seven of this *guidance*).

6.1.22 No *tipping off* offence is committed under Section 333A of *POCA*, if the relevant person did not know or suspect that their disclosure was likely to prejudice any subsequent investigation.

6.1.23 There are a number of exceptions to this prohibition on disclosing the existence of a *SAR* or an actual or contemplated investigation. A person does not commit an offence if they make a disclosure:

a) to a fellow *relevant employee* of the same undertaking; or

b) to a *relevant professional adviser* in a different undertaking if both people are located in either an EEA state or a state with equivalent anti-money laundering requirements, and both undertakings share common ownership, management or control; or

c) to an *anti-money laundering supervisory authority* as defined by the *2017 Regulations*; or

d) for the purposes of the prevention, investigation or prosecution of a criminal offence in the UK or elsewhere, or an investigation under *POCA*, or the enforcement of any court order under *POCA*; or

e) following notification that the moratorium period for a *consent SAR* has been extended beyond 31 days, to the subject of the report (provided the content of the *SAR* is not disclosed). *Businesses* may wish to seek legal advice.

6.1.24 An offence is not committed if a *relevant professional adviser* makes a disclosure to another within the same profession (e.g. accountancy) but from a different business, who is of the same professional standing (including with respect to their duties of professional confidentiality and protection of personal data), when that disclosure:

a) relates to a single *client* or former *client* of both advisers; and

b) involves a transaction or the provision of a service that involves both of them; and

c) is made only for the purpose of preventing a money laundering offence; and

d) is made to a person in an EU member state or a state imposing equivalent *MLTF* requirements.

6.1.25 No disclosure offence is committed if a *relevant employee* attempts to dissuade their *client* from conduct amounting to an offence. No *tipping off* offence is committed when enquiries are made of a client regarding some-

thing that properly falls within the normal scope of the *engagement* or *business relationship*. For example, if a *business* discovers an invoice that has not been included on a *client*'s tax return, then the *client* should be asked about it.

6.1.26 Although normal commercial enquiries (perhaps to understand a particular transaction) would not generally lead to *tipping off*, care is required nonetheless. Enquiries should be confined to what is required by the ordinary course of business. No attempt should be made to investigate matters unless to do so is within the scope of the professional work commissioned. It is important to avoid making accusations or suggesting that anyone is guilty of an offence.

6.1.27 Continuing work may require that matters relating to the suspicions be discussed with the *client's senior management*. This may be of particular importance in audit relationships.

6.1.28 *Relevant employees* concerned about *tipping off* may wish to consult their *MLRO*. In particular, it is important that documents containing references to the subject matter of any *SAR* is not released to third parties without first consulting the *MLRO* and, in extreme cases, law enforcement. Examples of such documents include:

a) public audit or other attestation reports;

b) public reports to regulators;

c) confidential reports to regulators (e.g., to the FCA under certain auditing standards);

d) provision of information to sponsors or other statements in connection with rule 2.12 of the UK's stock exchange listing rules;

e) reports under the Company Directors Disqualification Act 1986;

f) reports under s218 of the Insolvency Act 1986;

g) Companies Act statements on *auditor* resignations;

h) professional clearance/etiquette letters;

i) communications to *clients* of an intention to resign.

6.1.29 *MLROs* sometimes need advice when formulating instructions to the wider business. Legal advice can be sought from a suitably skilled and knowledgeable professional legal adviser. Recourse can be made to the

helplines and support services provided by the professional bodies. Discussion with the *NCA* and law enforcement may also be valuable, but bear in mind that they cannot provide advice and they are not entitled to dictate the conduct of a professional relationship.

**OFFENCE: Prejudicing an investigation**

6.1.30 Revealing the existence of a law enforcement investigation can lead to an offence of *prejudicing an investigation*. There is a defence if the person who made the disclosure did not know or suspect that it would be prejudicial, or did not know or suspect the documents to be relevant, or did not intend to conceal any facts from the person carrying out the investigation.

6.1.31 Falsification, concealment or destruction of documents relevant to an investigation (or causing the same) can also fall within this offence. Again, there is a defence if it was not known or suspected that the documents were relevant, or there was no intention to conceal facts.

**6.2 When and how should an external SAR be made to the NCA?**

**Is a report required?**

6.2.1 There are no hard and fast rules for recognising *MLTF*. It is important for everyone to remain alert to the risks and to apply their professional judgement, experience and scepticism.

6.2.2 *Relevant employees* must ask themselves whether something they have observed in the course of business has the characteristics of *MLTF* and, therefore, warrants a *SAR*. Most *businesses* include in their standard anti-money laundering systems and controls to enable *relevant employees* to discuss, with suitable people, whether their concerns amount to reportable knowledge or suspicion. *Relevant employees* should take advantage of these arrangements.

6.2.3 Once there is the requisite knowledge or suspicion, or reasonable grounds for either, then the *relevant employee* must submit an internal *SAR* to their *MLRO* promptly (or, in exceptional circumstances, straight to the *NCA*).

6.2.4 Deciding whether or not something is suspicious may require further enquiries to be made with the *client* or their records (all within the normal scope of the assignment or *business relationship*). The UK anti-money laundering regime does not prohibit normal commercial enquiries to fulfil *client* duties, and these may help establish whether or not something is properly a cause for suspicion.

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

6.2.5 Investigations into suspected *MLTF* should not be conducted unless to do so would be within the scope of the *engagement*. Any information sought should be in keeping with the normal conduct of business. Normal business activities should continue (subject to the *business's* consideration of the risks involved), with any information or other matters that flow from included in a *SAR*. To perform additional investigations is not only unnecessary, it is undesirable since it would risk *tipping off* a money launderer.

6.2.6 *Relevant employees* may wish to consider the following questions to assist their decision.

**Should I submit a report to the MLRO?**

| Step | Question |
|---|---|
| 1 | • Do I have knowledge or suspicion of criminal activity? or<br>• Am I aware of an activity so unusual or lacking in normal commercial rationale that it causes a suspicion of MLTF? |
| 2 | • Do I know or suspect that a benefit arose from the activity in 1? |
| 3 | • Do I think that someone involved in the activity, or in possession of the proceeds of that activity, knew or suspected that it was criminal? |
| 4 | • Can I identify the person (or persons) in possession of the benefit? or<br>• Do I know the location of the benefit? or<br>• Do I have information that will help identify the person (or persons)? or<br>• Do I have information that will help locate the benefits? |

6.2.7 If in doubt, always report concerns to the *MLRO*.

**Internal reports to the MLRO**

6.2.8 Only sole practitioners, who employ no *relevant employees*, have a duty to submit *SARs* straight to the *NCA*.

6.2.9 Section 330 of *POCA* requires all *relevant employees* to make an internal *SAR* to their *MLRO* – reporting to a line manager or colleague is not enough to comply with the legislation. Someone seeking reassurance that their conclusions are reasonable can discuss their suspicions with managers or other colleagues, in line with the *business'* procedures.

6.2.10 When more than one *relevant employee* is aware of the same reportable matter a single *SAR* can be submitted to the *MLRO*, but it should contain the names of all those making the *SAR*. No internal *SAR* should be made in the name of a *relevant employee* who is unaware of the existence of the internal *SAR*. There is no prescribed format for internal *SARs* to be made to an *MLRO*.

**Onward reports by the MLRO to the NCA**

6.2.11 It is the *MLRO*'s responsibility to decide whether the information reported internally needs to be reported to the *NCA*. The *MLRO* is also responsible for deciding whether, (a) *consent* is required from law enforcement for the *engagement* or any aspect of it to continue, and (b) how *client* business should be conducted while a consent decision is awaited. Registering with the NCA SAR Online System is recommended to facilitate timely reporting when an external SAR to be made to the *NCA* is necessary.

6.2.12 *MLROs* should approach external reporting with caution. When deciding what to do they should consider the following questions:

a) Do I know or suspect (or have reasonable grounds for either) that someone is engaged in *MLTF*?

b) Do I think that someone involved in the activity, or in possession of the proceeds of that activity, knew or suspected that it was criminal?

c) From the contents of the internal *SAR*, can I identify the suspect or the whereabouts of any laundered property?

d) Is an application for *consent* required (see 6.3 of this *guidance*)?

e) Do I believe, or is it reasonable for me to believe, that the contents of the internal *SAR* will, or may, help identify the suspect or the whereabouts of any laundered property?

f) Can I provide the information essential to an external *SAR* (see 6.2.15 of this *guidance*) without disclosing information acquired in privileged circumstances? The privilege reporting exemption is limited to relevant professional advisers and is available only to members of professional bodies, such as those listed in schedule 1 of the *2017 Regulations*, who also meet the requirements set out in Section 330 (14) of *POCA*. Further guidance on the privilege reporting exemption can be found in 6.2.22 of this *guidance*.

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

6.2.13 The *MLRO* may want to make reasonable enquiries of other relevant employees and systems within the *business*. These may confirm the suspicion, but they may also eliminate it, enabling the matter to be closed without the need for a *SAR*.

6.2.14 There is no prescribed format for an external *SAR* to the *NCA*. Various submission methods are available. The NCA SAR Online System is the *NCA's* preferred submission mechanism. It is available through the *NCA* website and allows *businesses* to make *SARs* in a secure online environment. The *NCA* accepts hard copy *SARs* but will not provide a reference number in response to these.

**What information should be included in an external SAR?**

6.2.15 Guidance can be found on the NCA website. The following should be regarded as essential information:

a) Name of reporter;

b) Date of report;

c) The name of the suspect or information that may help identify them. This may simply be details of the victim if their identity is known. As many details as possible should be provided to the *NCA* to assist with the identification of the suspect;

d) Details of who else is involved, associated, and how;

e) The facts regarding what is suspected and why. The 'why' should be explained clearly so that it can be understood without professional or specialist knowledge;

f) The relevant NCA glossary code (if applicable);

g) The whereabouts of any criminal property, or information that may help locate it, such as details of the victim;

h) The actions that the *business* is taking which require consent (see 6.3 of this *guidance*)?

6.2.16 All external *SARs* should be free of jargon and written in plain English.

6.2.17 It is also recommended that reporters:

a) do not include confidential information not required by *POCA*;

b) show the name of the *business*, individual or *MLRO* submitting the report only once, in the source ID field and nowhere else;

c) do not include the names of the *relevant employees* who made the internal *SARs* to the *MLRO*;

d) include other parties as 'subjects' only when the information is necessary for an understanding of the external *SAR* or to meet required disclosure standards; and

e) highlight clearly any particular concerns the reporter might have about safety (whether physical, reputational or other). This information should be included in the 'reasons for suspicion/disclosure' field.

**Confidentiality**

6.2.18 A correctly made external *SAR* provides full immunity from action for any form of breach of confidentiality, whether it arises out of professional ethical requirements or a legal duty created by contract (e.g., a non-disclosure agreement).

6.2.19 There will be no such immunity if the external *SAR* is not based on knowledge or suspicion, or if it is intended to be 'defensive' i.e., for the purposes of regulatory compliance rather than because of a genuine suspicion.

**Documenting reporting decisions**

6.2.20 In order to control legal risks it is important that adequate records of internal *SARs* are kept. This is usually done by the *MLRO* and would normally include details of:

a) all internal *SARs* made;

b) how the *MLRO* handled matters, including any requests for further information;

c) assessments of the information provided, along with any subsequent decisions about whether or not to await developments or seek extra information;

d) the rationale for deciding whether or not to make an external *SAR*;

e) any advice given to engagement teams about continued working and any *consent* requests made.

These records can be simple or sophisticated, depending on the size of the *business* and the volume of reporting, but they always need to contain broadly the same information and be supported by the relevant working papers. They are important because they may be needed later if the *MLRO* or some other person is required to justify and defend their actions.

6.2.21 For the *MLRO's* efficiency and ease of reference, a reporting index may be kept and each internal *SAR* given a unique reference number.

**Reporting and the privileged circumstances exemption**

6.2.22 Section 330 (10) of *POCA* contains a privileged circumstances reporting exemption. Members of relevant professional bodies (which are referred to as 'relevant professional advisers') who know about or suspect *MLTF* (or have reasonable grounds for either) are not required to submit a SAR if the information came to them in privileged circumstances (i.e. during the provision of legal advice and acting in respect of litigation). In these circumstances, and as long as the information was not provided with the intention of advancing a crime, then the information must not be reported. The privileged reporting exemption only covers *SARs* and should not be confused with legal professional privilege, which also extends to other documentation and advice.

6.2.23 In Section 330 (14) of *POCA*, *relevant professional adviser* is defined as an accountant, auditor or tax adviser:

a) who is a member of a relevant professional body; and

b) that body makes provision for:

- testing professional competence as a condition of admission; and
- imposing and maintaining professional and ethical standards for members along with sanctions for failures to comply.

However, there is no list of the professional bodies that meet these criteria. If *businesses* are in any doubt about whether these provisions apply to them, they should consult their own professional body or seek legal advice.

6.2.24 Whether or not the privilege reporting exemption applies to a given situation is a matter for careful consideration. The *business* may have been providing the *client* with a variety of services, not all of which would create

the circumstances required for the exemption. Consequently, it is strongly recommended that careful records are kept about the provenance of the information under consideration when decisions of this kind are being made. Legal advice may be needed.

6.2.25 Set out below are some examples of work which may fall within privileged circumstances.

| | |
|---|---|
| Advice on tax law to assist a *client* in understanding their tax position;<br><br>Advice on the legal aspects of a take-over bid;<br><br>Advice on duties of directors under the Companies Act;<br><br>Advice to directors on legal issues relating to the Insolvency Act 1986; and<br><br>Advice on employment law. | Assisting a *client* by taking witness statements from him or from third parties in respect of litigation;<br><br>Representing a *client*, as permitted, at a tax tribunal; and<br><br>When instructed as an expert witness by a solicitor on behalf of a *client* in respect of litigation. |

6.2.26 Audit work, book-keeping, preparation of accounts or tax compliance assignments are unlikely to take place in privileged circumstances.

**Discussion with the MLRO**

6.2.27 Given the complexity of these matters – as well as the need for a considered and consistent approach to all decisions, supported by adequate documentation – it is recommended that they are always discussed with the *MLRO*.

6.2.28 Where the purpose of these discussions is to obtain advice on making a disclosure under Section 330 of *POCA* they do not affect the applicability of the privilege reporting exemption.

6.2.29 Anyone making an internal *SAR* is entitled to seek advice from an appropriate specialist (either a person within the *business* who falls within requirements of Section 330 (7B) of *POCA* or an external adviser who is similarly entitled to apply the privilege reporting exemption) without affecting the applicability of the privilege reporting exemption.

**The crime/fraud exception**

6.2.30 Communications that would otherwise qualify for the privilege reporting exemption are excluded from it when they are intended to facilitate or guide someone in committing or advancing some crime or fraud. This is usually

the *client* but could be a third party. An example of such a situation could be where a person seeks tax advice ostensibly to regularise their tax affairs but in reality to help them evade tax by improving their understanding of the issues.

6.2.31 Someone worried that they may be guilty of tax evasion can still seek legal advice from a *tax adviser* without fear of the exception being invoked. This remains true even when, having received the advice, the person declines a *business relationship* and the *business* never knows if the irregularities were rectified. However, if that person's behaviour leads the *business* to suspect the advice has been used to further evasion, then a *SAR* could be required.

6.2.32 Whether privileged circumstances apply in a given situation is a difficult question with a fundamentally legal answer. *Businesses* are strongly recommended to seek the advice of a professional legal adviser experienced in these matters.

**6.3 What is consent and why is it important?**

6.3.1 When preparing to make a *SAR* the *MLRO* must consider carefully whether the business would commit a money laundering offence if it continued to act as it intends (usually as instructed by the client). In such cases the *NCA* may, in certain circumstances, provide a defence against money laundering in the form of a *consent* for the activity in question to go ahead.

**Matters requiring consent**

6.3.2 Before applying for a *consent* it is important to consider whether the *NCA* is in fact able to grant one for the activity in question. The *NCA's* powers in this regard are strictly limited to activities that would otherwise be offences under Sections 327, 328 or 329 of *POCA* (see APPENDIX A). Consent cannot be given for other *POCA* offences, such as tipping off (Section 333A of *POCA*) or *prejudicing an investigation* (Section 342 of *POCA*), or for any offence under any other law.

6.3.3 When in doubt *MLROs* should seek advice from the helpline provided by their supervisory body, or else seek legal advice. The *NCA* will say if something falls outside its powers, but it is not in a position to provide advice about whether or not consent is required in any given situation.

6.3.4 Common situations in which *consent* may be required include:

a) acting as an insolvency officeholder when there is knowledge or a suspicion that either:
   - all or some assets in the insolvency are criminal property; or
   - the insolvent entity may enter into, or become concerned in, an arrangement under Section 328 of *POCA*;

b) designing and implementing trust or company structures (including acting as trustee or company officer) when a suspicion arises that the *client* is, or will be, using them to launder money;

c) acting on behalf of a *client* in the negotiation or implementation of a transaction (such as a corporate acquisition) in which there is an element of criminal property being bought or sold by the *client*;

d) handling through *client* accounts money that is suspected of being criminal in origin;

e) providing outsourced business processing services to *clients* when the money is suspected of having criminal origins.

**Applying for and receiving consent**

6.3.5 *Consent* may only be sought on the basis of a *SAR* made under the provisions of Section 338 of *POCA* (authorised disclosures). The 'consent required' option should be selected to alert the *NCA* and enable it to prioritise the request.

6.3.6 The request should clearly state the reasons underlying the knowledge or suspicion that has given rise to the *SAR*, as well as the activity in question and the nature of the *consent* required. Great care is needed to make sure the *consent* will cover the nature and extent of the intended activity. It should make clear to the *NCA* exactly what is being requested. Too narrow a *consent* request could mean repeated subsequent requests are needed, adding cost, creating inefficiency and possibly harming service quality. Too broad or poorly-defined a *consent* request, on the other hand, could result in the request being refused by the *NCA* or deemed invalid for not showing clearly which activities would otherwise be offences under Section 327-329 of *POCA*.

6.3.7 If no refusal has been received within the seven working days following the day of submission (this is the notice period) *consent* is deemed to have been given and the activity in question can proceed.

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

6.3.8 For the best chance of a quick response, any critical timings should be explained clearly, and a complex report should always begin with a summary covering the key facts and the nature of the request.

**When consent is refused**

6.3.9 If *consent* is refused during the notice period, a further 31 days must pass (starting with the day of refusal) before the activity can continue. This is called the moratorium period. This period can be extended by court order in 31 day increments up to a maximum of 186 days.

6.3.10 It is possible that during either the notice or moratorium periods some law enforcement action (e.g. confiscation) will be taken.

6.3.11 If law enforcement takes no restraining action during the moratorium period, the activity can proceed as originally planned at the end of the moratorium period, however *businesses* may wish to seek legal advice.

**Continuation of work while awaiting a consent decision**

6.3.12 Once a *consent* request has been made, the activity in question must cease unless and until:

a) *consent* has been received; or

b) the notice period has expired; or

c) *consent* having been refused during the notice period, the moratorium period has now expired.

To do otherwise is to risk prosecution for a money laundering offence.

6.3.13 If no deliverables are provided until after *consent* has been obtained it may be acceptable to continue working. Care is needed to make sure the work does not constitute a money laundering offence, particularly involvement in an arrangement under Section 328 of *POCA* or some other breach of legal or ethical requirements.

6.3.14 In some situations it can be extremely difficult to explain why activity has had to be halted unexpectedly. There is nothing in the *UK AML regime* that requires a *business* to lie to its *clients*, but conversations with the *client* should be kept to a minimum. When informing *clients* or anyone else about such delays the business must consider the risk of *tipping off* or *prejudicing an investigation* and may wish to seek legal advice.

**6.4 What should happen after an external SAR has been made?**

**Client relationships**

6.4.1 After a *SAR* has been submitted the business need not stop working unless *consent* has been requested (see 1.3.12 of this *guidance*). The activity in question must not go ahead when *consent* has been sought but refused.

6.4.2 Even when *consent* is not required, if a *SAR* involves a *client* or their close associate the *business* may wish to consider whether the suspicion is such that for professional or commercial reasons it no longer wishes to act for them.

6.4.3 Particular challenges may arise out of the requirement for *auditors* to file resignation statements at Companies House. Consider these carefully to make sure that statutory and professional duties are met without including information that could constitute *tipping off*. There is no legal mechanism for obtaining *NCA* clearance for these statements or any other documents that might relate to a resignation. In complex cases a *business* may want to discuss the matter with the *NCA* or other law enforcement agency (to understand the law enforcement perspective). Document the discussions carefully. At times, *MLROs* may also need this kind of advice to help them formulate instructions for the wider *business*.

**Data protection - including subject access requests**

6.4.4 Under the Data Protection Act 1998 *businesses* need not comply with data subject access requests that are likely to prejudice the prevention or detection of crime, or the capture or conviction of offenders. Similarly, personal data that relates to knowledge or suspicion of *MLTF* (i.e., data that has been processed to help prevent or detect crime) need not be disclosed under a subject access request if to do so could constitute *tipping off*. Both of these exceptions apply to the personal data likely to be contained in records relating to internal *MLTF* reports and *SARs*.

6.4.5 Data exempt from one subject access request may no longer be exempt at the time of a subsequent request (perhaps because the original suspicion has by then been proved false). When a *business* receives a data subject access request covering personal data in its possession, it should always consider whether the exception applies to that specific request regardless

of any history of previous requests relating to the same data. These deliberations will usually involve the *MLRO* and the data protection officer. It is recommended that the thinking behind any decision to grant or refuse access is documented.

**Production orders, further information orders and other requests for information**

6.4.6 The *NCA* or other law enforcement authority may seek further information about a *SAR* (usually via the *MLRO*). *Businesses* should have in place systems to enable a full and rapid response to such enquiries, and any enquiries from law enforcement regarding a *business relationship*. It is recommended that the enquirer's identity is formally verified before a response is provided. This can most easily be done by noting the caller's name and agency/force and then calling them back through their main switchboard. The *NCA* have a contact centre for such purposes.

6.4.7 To the extent that the request is simply to clarify the contents of a *SAR*, a response can be given without further formalities.

6.4.8 If a request is received from NCA other than in relation to a SAR, or from a source other than the NCA, then it is recommended that, any further disclosure should normally be made only in response to the exercise of a statutory power to obtain information (as contained in the relevant legislation) or in line with professional guidance on confidentiality and disclosures in the public interest. This approach is not intended to be uncooperative or obstructive. However, insisting on compulsion will protect the business against accusations of breach of confidentiality. When the *business* is compelled in this way, *client* or other third-party consent is not required, but nor should it be sought because of the risk of *tipping off*.

6.4.9 Before responding to an order to produce information, *businesses* should make sure that they understand:

a) the authority under which the request is being made;

b) the extent of the information requested;

c) the timetable and mechanism for providing the information; and

d) what parts of the information should be excluded (i.e., because they are subject to legal privilege).

6.4.10 If in any doubt seek legal advice and keep records of how the issues were judged.

**Requests arising from a change of professional advisor (professional enquiries)**

**Requests regarding CDD information**

6.4.11 In this situation the disclosure request can be made under regulation 39 of the *2017 Regulations* (which covers reliance), or else the new adviser may simply want copies of identification evidence to help in its own identification procedures.

6.4.12 *Businesses* should not release confidential information without the *client's* consent. If reliance is being placed on another *business* (see 5.3.25 of this *guidance*) then Section seven of this *guidance* (on record keeping) should be consulted.

**Requests for information regarding suspicious activity**

6.4.13 It is recommended that these requests are declined. The risk of *tipping off* greatly restricts the ability to make disclosures of this type.

6.4.14 Accountants who are *relevant professional advisers* are reminded that they do not commit a *tipping off* offence if they share information with another accountant of similar standing provided the information satisfies all of the following:

a) it relates to the same *client* or former *client* of both advisers;

b) it covers a transaction or provision of services that involved both of them;

c) it was disclosed only for the purpose of preventing a money laundering offence;

d) it was disclosed to a person in an EU member state or another state which imposes equivalent anti-money laundering requirements.

**Reporting to other bodies**

6.4.15 *Businesses* should have regard to their other obligations, such as their reporting responsibilities under the International Auditing Standards, statutory regulatory returns, or the reporting of misconduct by fellow

members of a professional body. In all these cases the risk of tipping off must be considered and the offence avoided. Accountants may wish to contact their professional body for advice, or else seek legal advice.

6.4.16 A *tipping off* offence is not committed under Section 333A of *POCA*, if the *relevant employee* did not know or suspect that they were likely to prejudice any subsequent investigation. Situations in which this defence can apply include:

a) reporting to your own professional body if it is an *anti-money laundering supervisory authority* (Section 333D of *POCA*);

b) reporting a matter of material significance to the UK charity regulators: Charities Commission for England and Wales, Office of the Scottish Charity Regulator and Charity Commission for Northern Ireland.

## 7. RECORD KEEPING

- Why may existing document retention policies need to be changed?
- What should be considered regarding retention policies?
- What considerations apply to *SARs* and consent requests?
- What considerations apply to training records?
- Where should reporting records be located?
- What do businesses need to do regarding third-party arrangements?
- What are the requirements regarding the deletion of personal data?

### 7.1 Why may existing document retention policies need to be changed?

7.1.1 Records relating to *CDD*, the *business relationship* and *occasional transactions* must be kept for five years from the end of the *client* relationship.

7.1.2 All records related to an *occasional transaction* must be retained for five years after the date of the transaction.

7.1.3 The *2017 Regulations* do not specify the medium in which records should be kept, but they must be readily retrievable.

**7.2 What should be considered regarding retention policies?**

7.2.1 *Businesses* must be aware of the interaction between of *MLTF* laws and regulations with the requirements of the Data Protection Regime. The Data Protection Regime requires that personal information be subject to appropriate security measures and retained for no longer than necessary for the purpose for which it was originally acquired.

**7.3 What considerations apply to SARs and consent requests?**

7.3.1 No retention period is officially specified for records relating to:

a) internal reports;

b) the *MLRO*'s consideration of internal reports;

c) any subsequent reporting decisions;

d) issues connected to *consent*, production of documents and similar matters;

e) suspicious activity reports and consent requests sent to the *NCA*, or its responses.

7.3.2 Since these records can form the basis of a defence against accusations of *MLTF* and related offences, *businesses* may decide that five years is a suitable retention period for them.

**7.4 What considerations apply to training records?**

7.4.1 *Businesses* must demonstrate their compliance with regulations that place a legal obligation on them to make sure that certain of their *relevant employees* are, (a) aware of the law relating to *MLTF*, and (b) trained regularly in how to recognise and deal with transactions and other events which may be related to *MLTF*.

7.4.2 These records should show the training that was given, the dates on which it was given, which individuals received the training and the results from any assessments.

**7.5 Where should reporting records be located?**

7.5.1 Records related to internal and external *SARs* of suspicious activity are not part of the working papers relating to *client* assignments. They should be stored separately and securely as a safeguard against *tipping off* and inadvertent disclosure to someone making routine use of *client* working papers.

**7.6 What do businesses need to do regarding third-party arrangements?**

7.6.1 A *business* may arrange for another organisation to perform some of its AML related activities – *CDD* or training, for example. In which case, it must also ensure that the other party's record keeping procedures are good enough to demonstrate compliance with the *MLTF* obligations, or else it must obtain and store copies of the records for itself. It must also consider how it would obtain its records from the other party should they be needed, as well as what would happen to them if the other party ceased trading.

**7.7 What are the requirements regarding the deletion of personal data?**

7.7.1 Regulation 39(4) of the *2017 Regulations* require that once the periods specified in 7.1 of this *guidance* have expired, the *business* deletes any personal data unless:

a) The *business* is required to retain it under statutory obligation, or

b) the *business* is required to retain it for legal proceedings, or

c) the data subject has consented to the retention.

7.7.2 The *business* is not required to keep any records for more than 10 years after the end of the *business relationship*.

## 8. TRAINING AND AWARENESS

- Who should be trained and who is responsible for it?
- What should be included in the training?
- When should training be completed?

**8.1 Who should be trained and who is responsible for it?**

8.1.1 The regulations require that all '*relevant employees*' (including partners) are made aware of *MLTF* law and are trained regularly to recognise and deal with transactions which may be related to *MLTF*, as well as to identify and report anything that gives grounds for suspicion (see Section six of this *guidance*).

8.1.2 Thought should also be given to who else might need AML training.

8.1.3 A designated person should be made responsible for the detail of AML training. This could be the *MLRO* or a member of *senior management*. There should be a mechanism to ensure that *relevant employees* complete their AML training promptly.

8.1.4 Someone accused of a failure-to-disclose offence has a defence if:

a) they did not know or suspect that someone was engaged in money laundering even though they should have; but

b) their employer had failed to provide them with the appropriate training.

8.1.5 This defence – that the *relevant employee* did not receive the required AML training – is likely to put the *business* at risk of prosecution for a regulatory breach.

**8.2 What should be included in the training?**

8.2.1 Training can be delivered in several different ways: face-to-face, self-study, e-learning, video presentations, or a combination of all of them.

8.2.2 The programme itself should include:

a) an explanation of the law within the context of the *business's* own commercial activities;

b) so-called 'red flags' of which *relevant employees* should be aware when conducting business, which would cover all aspects of the MLTF procedures, including CDD (for example those that might prompt doubts over the veracity of evidence provided) and SARs (for example what might prompt suspicion); and

c) how to deal with transactions that might be related to *MLTF* (including how to use internal reporting systems), the *business's* expectations of confidentiality, and how to avoid *tipping off* (see Section six of this *guidance*);

d) The relevant data protection requirements

8.2.3 Training programmes should be tailored to each business area and cover the business' procedures so that *relevant employees* understand the *MLTF* risks posed by the specific services they provide and types of *client* they

deal with, and so are able to appreciate, on a case-by-case basis, the approach they should be taking. Furthermore, *businesses* should aim to create an AML culture in which relevant employees are always alert to the risks of *MLTF* and habitually adopt a risk based approach to *CDD*.

8.2.4 Records should be kept showing who has received training, the training received and when training took place (see 7.4 of this *guidance*). These records should be used so as to inform when additional training is needed – e.g. when the *MLTF* risk of a specific business area changes, or when the role of a *relevant employee* changes.

8.2.5 A system of tests, or some other way of confirming the effectiveness of the training, should be considered.

8.2.6 The overall objective of training is not for *relevant employees* to develop a specialist knowledge of criminal law. However, they should be able to apply a level of legal and business knowledge that would reasonably be expected of someone in their role and with their experience, particularly when deciding whether to make an internal *SAR* to the *MLRO*.

**8.3 When should training be completed?**

8.3.1 *Businesses* need to make sure that new *relevant employees* are trained promptly.

8.3.2 The frequency of training events can be influenced by changes in legislation, regulation, professional guidance, case law and judicial findings (both domestic and international), the *business*' risk profile, procedures, and service lines.

8.3.3 It may not be necessary to repeat a complete training programme regularly, but it may be appropriate to provide *relevant employees* with concise updates to help refresh and expand their knowledge and to remind them how important effective anti-money laundering work is.

8.3.4 In addition to training, *businesses* are encouraged to mount periodic *MLTF* awareness campaigns to keep *relevant employees* alert to individual and firm-wide responsibilities.

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

### GLOSSARY

***2017 Regulations*** The Money Laundering Regulations, Terrorist Financing and Transfer of Funds Regulations 2017, SI 2017/692

***Accountancy services*** For the purpose of this guidance this includes any service provided under a contract for services (i.e., not under a contract of employment) which requires the recording, review, analysis, calculation or reporting of financial information.

***Anti-money laundering supervisory authority*** A body identified by Regulation 7 of the *2017 Regulations* as being empowered to supervise the compliance of businesses with the *2017 Regulations*. The professional bodies designated as anti-money laundering supervisory authorities are listed in Schedule 1 of the *2017 Regulations*.

***Arrangement*** Any activity that facilitates money laundering, including planning and preparation.

***Auditor*** Any business or individual who is — a statutory auditor within the meaning of Part 42 of the Companies Act 2006(a) (statutory auditors), when carrying out statutory audit work within the meaning of Section 1210 of that Act (meaning of statutory auditor), or (ii) a local auditor within the meaning of Section 4(1) of the Local Audit and Accountability Act 2014 (general requirements for audit) (b), when carrying out an audit required by that Act.

***Business / Businesses*** A company, partnership, individual or other organisation which undertakes defined services. This includes accountancy practices, whether structured as partnerships, sole practitioners or corporates.

***Business relationship*** a business, professional or commercial relationship between a relevant person and a customer, which—

a) arises out of the business of the relevant person, and

b) is expected by the relevant person, at the time when contact is established, to have an element of duration.

***CCAB*** The Consultative Committee of Accountancy Bodies represents the Institute of Chartered Accountants in England and Wales, the Institute of Chartered Accountants of Scotland, the Institute of Chartered Accountants in Ireland, the Association of Chartered Certified Accountants and the Chartered Institute of Public and Finance and Accountancy.

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

***Client*** Someone in a business relationship, or carrying out an occasional transaction, with a business.

***Consent*** Permission to carry out any activity which would constitute a money laundering offence without that permission. Generally granted by the NCA. The definition of, and governing legislation for, consents can be found in s335 of POCA, which also deals with the passing of consent from the MLRO to the individual concerned s336 of POCA.

***Criminal property*** The benefit of criminal conduct where the alleged offender knows or suspects that the property in question represents such a benefit (s340 of POCA).

***Customer Due Diligence (CDD)*** The process by which the identity of a client is established and verified, for both new and existing clients.

***Defined services*** Activities performed in the course of business by organisations or individuals as auditors, external accountants, insolvency practitioners or tax advisers (Regulation 8(c), *2017 Regulations*), or as trust and company services providers (Regulation 8(e), *2017 Regulations*). It also includes services under the designated professional body provisions of part XX, Section 326 of *FSMA 2000* or otherwise providing financial services under the oversight of the appropriate professional body.

***De minimis***. Abbreviation of the Latin "de minimis non curat lex", "the law cares not for small things", something which is too trivial or minor to merit consideration, especially in law.

***EEA*** European Economic Area. Countries which form the combined membership of the European Union (EU) and the European Free Trade Association (EFTA).

***Engagement*** agreement concerning the delivery of a specific service within a business relationship.

***EU directive*** Refers in this document to the Fourth Money Laundering Directive.

***External accountant*** A firm or sole practitioner who by way of business provides accountancy services to other persons when providing such services (Regulation 11(C), *2017 Regulations*).

***Family member*** of a politically exposed person includes spouse or civil partner; children of that person and their spouses and partners; and parents of that person.

***FATF*** Financial Action Task Force. Created by G7 nations to fight money laundering.

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

***FSMA 2000*** Financial Services and Markets Act 2000.

***Guidance*** Advice which is: (a) issued by a supervisory authority or any other appropriate body; (b) approved by HM Treasury; and (c) published in a manner approved by HM Treasury as suitable for bringing it to the attention of persons likely to be affected by it. In this document the term also includes guidance for which Treasury approval has been sought and is expected to be granted. Any use of the term 'guidance' which falls outside of this definition will not have been italicised in this document. *POCA* and the *2017 Regulations* both set out the circumstances in which the courts (and others) are required to take account of *guidance* when determining whether an offence has been committed.

***Independent legal professional*** Provider of legal or notarial services as defined in Regulation 12(1), *2017 Regulations*.

***Internal report*** A report made to the *MLRO* of a *business*.

***Insolvency practitioner*** Any business who acts as an insolvency practitioner within the meaning of s388, Insolvency Act 1986, or art 3, Insolvency (Northern Ireland) Order 1989 (Regulation 11(2), *2017 Regulations*).

***JMLSG*** The Joint Money Laundering Steering Group is the body representing UK trade associations in the financial services industry which aims to promote good practice in anti-money laundering and to provide relevant practical guidance.

***Known close associate*** of a politically exposed person means an individual known to have joint beneficial ownership of a legal entity/arrangement or any other close business relations with a politically exposed person; or an individual who has sole beneficial ownership of a legal entity or a legal arrangement which is known to have been set up for the benefit of a politically exposed person (Regulation 35(12) the *2017 Regulations*).

***MLTF (money laundering and terrorist financing)*** Defined for the purposes of this document to include those offences relating to terrorist finance which are required to be reported under *TA 2000* as well as the money laundering offences defined by *POCA*.

***Moratorium period*** The 31 days following refusal of a consent request during which time the activity for which consent was sought must cease. Law enforcement may take action during this period.

***MLRO*** Money laundering reporting officer.

***Money laundering reporting officer*** See *MLRO*, above.

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

***Nominated officer*** the person who is nominated to receive disclosures under Part 7 POCA or Part 3 TA 2000.

***NCA*** National Crime Agency or equivalent successor body (UKFIU).

***Notice period*** The seven working days following a consent request within which the NCA must respond and during which the activity for which *consent* is sought must cease until granted.

***Occasional transaction*** A transaction which occurs outside of a business relationship and has a value of more than €15,000.

***PEPs*** Politically exposed persons. As defined in Regulation 35(12), *2017 Regulations*. An individual who is entrusted with prominent public functions, other than as a middle-ranking or more junior official. Prominent public functions include head of state, head of government, minister and deputy or assistant ministers; members of parliament or of similar legislative bodies; members of the governing bodies of political parties; members of supreme courts, members of constitutional courts or of any judicial body the decisions of which are not subject to further appeal except in exceptional circumstances; members of courts of auditors or of boards of central banks; ambassadors, charges d'affaires and high ranking officers in the armed forces; members of the administrative, management or supervisory bodies of state-owned enterprises; directors, deputy directors and members of the board or equivalent function of an international organisation.

***POCA*** Proceeds of Crime Act 2002

***Prejudicing an investigation*** An offence related to money laundering, defined under s342, *POCA*. In summary, it captures the following: disclosure of information likely to prejudice an investigation; falsifying, concealing or destroying documents relevant to a money laundering investigation; or being complicit in behaviour of that sort.

***Regulated investment market*** Within the EEA this has the meaning given by point 14, art 4(1), Markets in Financial Instruments Directive 2004/39/EC (or MiFID). Outside the EEA it means a regulated financial market in which the listed companies are subject to the disclosure obligations contained in international standards equivalent to the specified disclosure obligations.

***Regulated sector*** As defined in Schedule 9, part 1, *POCA* (includes those who provide *defined services*).

***Relevant employee*** An employee (including partner) whose work is relevant to compliance with the Regulations, or is otherwise capable of contributing to the

identification and mitigation of the risks of money laundering and terrorist financing to which the business is subject, or to the prevention or detection of money laundering and terrorist financing in relation to the business.

***Relevant professional adviser*** An accountant, *auditor* or tax adviser who is a member of a professional body which: (a) tests competence as a condition of admission to membership; and (b) imposes and maintains professional and ethical standards for its members, with sanctions for non-compliance.

***Required disclosures*** The identity of a suspect (if known); the information or other material on which the knowledge or suspicion of money laundering (or reasonable grounds for it) is based; and the whereabouts of the laundered property (if known).

SAR Suspicious activity report.

***SAR glossary of terms*** Glossary of key terms used by the NCA to give theme to individual SARs and so increase the effectiveness of data mining by the NCA and law enforcement. The general use of these terms is not mandatory.

***Senior management*** means an officer or employee with sufficient knowledge of the firm's *MLTF* risk exposure, and of sufficient authority to take decisions regarding its risk exposure (for example, having a role in determining whether high risk clients are taken on).

***SOCPA*** Serious Organised Crime and Police Act 2005

***Source of funds*** The origin of the funds that are the subject of the business relationship.

***Source of wealth*** The origin of the subject's total assets.

***Suspicious activity report*** Otherwise known as a *SAR* (see above).

***TA 2000*** The Terrorism Act 2000 (as amended by the Anti-Terrorism, Crime and Security Act 2001 and the *Terrorism Act 2006*).

***Tax adviser*** A firm or sole practitioner who by way of business provides advice about the tax affairs of others, when providing such services (Regulation 11(4) of the *2017 Regulations*). Tax compliance services – e.g., assisting in the completion and submission of tax returns – is for the purpose of this document included within the term 'advice about the tax affairs of others'.

***Terrorist financing offences*** These offences relate to:

a) fundraising (s15 TA 2000 (inviting others to provide money or other property with the intention that it will be used for the purposes of terrorism, or with the reasonable suspicion that it will));

b) using or possessing terrorist funds (s16 TA 2000 (receiving or possessing money or other property with the intention, or the reasonable suspicion, that it will be used for the purposes of terrorism));

c) entering into funding arrangements (s17 TA 2000 (making arrangements as a result of which money or other property is, or may be, made available for the purposes of terrorism – this includes where there is reasonable cause for suspicion));

d) money laundering (s18 TA 2000);

e) disclosing information related to the commission of an offence (s19 TA 2000); and

f) failing to make a disclosure in the regulated sector (ss19 and 21A TA 2000 (as amended)).

***Tipping off*** A money laundering-related offence for the regulated sector, defined under s333A-D, POCA.

***UK AML Regime*** UK anti-money laundering and terrorist financing regime

## APPENDIX A: LEGISLATIVE SUMMARIES – PROCEEDS OF CRIME ACT 2002

### s327

A person commits an offence if he **conceals, disguises, converts, transfers or removes criminal property** from England and Wales or from Scotland or from Northern Ireland.

### s328

A person commits an offence if he **enters into or becomes concerned in an arrangement which he knows or suspects facilitates** (by whatever means) the **acquisition, retention, use or control of criminal property** by or on behalf of another person. A person **does not commit** the offences above if:

a) He makes an authorised disclosure under Section 338 and (if the disclosure is made before he does the act mentioned in sub Section (1)) he has the appropriate consent;

b) He intended to make such a disclosure but had a reasonable excuse for not doing so;

c) The act he does is done in carrying out a function he has relating to law enforcement.

**s329**

A person commits an offence if he **acquires, uses, or has possession of criminal property**. In addition to the s327/328 defences there is also available the defence of having acquired possession of the property for adequate consideration.

**s330 Failure to disclose: Regulated sector**

A person commits an offence if, during the course of business he develops knowledge or suspicion (or has reasonable grounds for doing so) that another person is engaged in money laundering, and he does not make the required disclosure as soon as is practicable.

The required disclosure is a disclosure of the information or other matter to the MLRO or the NCA.

A person does not commit an offence under this Section if:

a) He has a reasonable excuse for not disclosing the information or other matter;

b) He is a professional legal adviser and the information or other matter came to him in privileged circumstances;

c) He has no actual knowledge or suspicion and has not received AML training.

**s333 Tipping off: Regulated sector**

A person commits an offence if he acquires, uses, or has possession of criminal property. In addition to the s327/328 defences there is also available the defence of having acquired possession of the property for adequate consideration.

**s342 Prejudicing an investigation**

A person commits an offence if he knows or suspects that an appropriate officer is conducting or about to conduct a confiscation investigation, a civil recovery investigation, a detained cash investigation or a money laundering investigation and either makes a disclosure which is likely to prejudice it or falsifies, conceals, destroys or otherwise disposes of relevant document or causes another to do so.

# 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

## APPENDIX B: OUTSOURCING, SUBCONTRACTING AND SECONDMENTS

### B.1 Outsourcing and subcontracting arrangements

B.1.1 Where a *business* chooses to outsource or subcontract work to a third party it is still obliged to maintain appropriate risk management procedures to prevent *MLTF*. This also requires the *business* to consider whether the outsourcing or subcontracting increases the risk that it will be involved in, or used for, *MLTF*, in which case appropriate controls to address that risk should be put in place.

B.1.2. Where a *business* contracts with a *client*, it remains responsible for ensuring that it undertakes *CDD* to UK standards, including maintaining the appropriate records even if execution of all or part of the *client* work is outsourced or sub-contracted out. Some aspects of *CDD* such as collecting documentary evidence can also be delegated to an outsourcer or sub-contractor, but the business remains responsible for compliance with UK legislation.

B.1.3 Regardless of any outsourcing or subcontracting arrangement, a *business* remains responsible for reporting any knowledge or suspicion of *MLTF* that comes to it in the course of its own *business*. However a *business* is not responsible for reporting knowledge or suspicion that comes to the attention of the outsourcer or sub-contractor, where such knowledge or suspicion has not been passed on to the business. Although there is no legal obligation for an outsourcer or subcontractor to report knowledge or suspicion of *MLTF* to a *business*, if such a *SAR* is made, then the *business* should consider their own reporting obligations. When a sub-contractor is integrated into a UK business it may be appropriate for its *relevant employee*s to be trained in the *MLTF* procedures adopted by that *business* so that common standards can be observed.

### B.2 Secondees and those temporarily working outside the UK

B.2.1 A secondee is an individual employed by one organisation (the seconder) but acting as an employee of another (the receiver). The formal terms of all secondments should make clear to all concerned how the obligations imposed by the *UK AML regime* will be applied.

B.2.2 The position of a secondee working temporarily outside the UK or on foreign secondments, or working permanently outside the UK but still within a UK *business* is difficult. For example the duty to report may be influenced by the terms of the secondment. Issues to consider include:

a) If the work outside the UK is part of a UK defined service then in some circumstances it will be reportable.

b) If an individual works permanently outside the UK for a UK *business*, it may be appropriate to consider whether they are working at a separate *business* or at a branch office of a UK *business*.

c) An individual should be particularly cautious about any decision not to make a SAR on their return to the UK if the information relates to work that they are undertaking in the UK.

B.2.3 Arrangements must be considered on their own facts to determine which policies and procedures the secondee should follow. *Businesses* may wish to take legal advice in relation to the need for their relevant employees to comply with the UK's money laundering reporting regime as well as any local legal requirements, and in relation to the drafting of appropriate secondment agreements.

### B.3 Reporting requirements for subcontractors and secondees

B.3.1 Where all or part of a piece of work is contracted-out there is no legal requirement for the subcontractor to report suspicious activity to the referring business' *MLRO*. However, where the subcontractor notifies the referring *business* of information which gives rise to a MLTF suspicion, the referring *business* must consider its own reporting obligations.

## APPENDIX C: CLIENT VERIFICATION

Documentation purporting to offer evidence of identity may emanate from a number of sources. These documents differ in their integrity, reliability and independence. Some are issued after due diligence on an individual's identity has been undertaken; others are issued on request, without any such checks being carried out. There is a broad hierarchy of documents:

a) certain documents issued by government departments and agencies, or by a court; then

b) certain documents issued by other public sector bodies or local authorities; then

c) certain documents issued by regulated firms in the financial services sector; then

d) those issued by other firms subject to the Regulations, or to equivalent legislation; then

e) those issued by other organisations.

**C.1 Outsourcing and subcontracting arrangements**

**Client identification:**

The full name, date of birth and residential address should be obtained.

**Client Verification:**

A document issued by an official (e.g., government) body is deemed to be independent and reliable source even if provided by the *client*. Documents should be valid and recent. Documents sourced online should not be accepted if there is any suspicion regarding the provenance of the documents. The following is a suggested non-exhaustive list of sources of evidence.

| Risk Profile | Verification |
|---|---|
| Individual deemed normal risk | The original, or an acceptably certified copy, of one of the following documents or similar should be seen and a copy retained:<br>• valid passport<br>• valid photo card driving licence<br>• national Identity card (non UK nationals)<br>• identity card issued by the Electoral Office for Northern Ireland |
| Individual deemed high risk | The original of one of the following documents or similar should be seen and a copy retained:<br>• valid passport<br>• valid photo card driving licence<br>• national identity card (non UK nationals)<br>• identity card issued by the Electoral Office for Northern Ireland |

*continued overleaf*

| Risk Profile | Verification |
|---|---|
| | *continued* |
| | **In addition**<br>The original of a second document should be seen and a copy retained. This should be one of the following:<br>• A valid UK driving licence.<br>• Recent evidence of entitlement to a state- or local authority-funded benefit (including housing benefit, council tax benefit, tax credits, state pension, educational or other grant).<br>• Instrument of a court appointment (such as a grant of probate).<br>• Current council tax demand letter or statement.<br>• HMRC-issued tax notification (NB: employer-issued documents such as P60s are not acceptable).<br>• End of year tax deduction certificates.<br>• Current bank statements or credit/debit card statements.<br>• Current utility bills. |

**Source of wealth and source of funds**

C.1.2 Where appropriate, evidence can be obtained from searching public information sources like the internet, company registers and land registers.

C.1.3 If the *client's* funds/wealth have been derived from, say, employment, property sales, investment sales, inheritance or divorce settlements, then it may be appropriate to obtain documentary proof.

**C.2 Private companies/LLPs**

C.2.1 The following information must be obtained and verified:

a) full name of company

b) registered number

c) registered office address and, if different, principal place of business

d) any shareholders/members who ultimately own or control more than 25% of the shares or voting rights (directly or indirectly including

bearer shares), or any individual who otherwise exercises control over management must be identified (and verified on a risk sensitive basis).

e) The identity of any agent or intermediary purporting to act on behalf of the entity and their authorisation to act e.g., where a lawyer engages on behalf of an underlying *client*.

Unless the entity is listed on a regulated market, reasonable steps should be taken to determine and verify:

a) the law to which it is subject

b) its constitution (for example via governing documents)

c) the full names of all directors (or equivalent) and senior persons responsible for the operations of the company.

Company registers of beneficial ownership may be used but not solely relied upon.

### C.3 Listed or regulated entity

**Client identification**

C.3.1 The following information should be gathered:

a) full name

b) membership or registration number

c) address

**Client verification**

| Risk Profile | Recommended verification |
|---|---|
| Normal/ high risk | One of the following documents should be seen and a copy retained:<br>• a printout from the web-site of the relevant regulator or exchange (which should be annotated);<br>• written confirmation of the entity's regulatory or listing status from the regulator or exchange. |

### C.4 Government or similar bodies

**Client identification**

C.4.1 The following information should be gathered:

a) full name of the body

b) main place of operation

c) government or supra-national agency which controls it

**Client verification**

| Risk Profile | Recommended verification |
|---|---|
| Normal/ high risk | One of the following documents should be seen and a copy retained:<br>• a printout from the web-site of the relevant body (which should be annotated).<br>Additionally for housing associations:<br>• the printout must contain its registered number, registered company number (where appropriate) and registered address. |

## APPENDIX D

| **Should I report to the MLRO?** | | **As the MLRO, should I report externally?** |
|---|---|---|
| • Do I have knowledge or suspicion of criminal activity resulting in someone benefitting? | | • Do I know, suspect or have reasonable grounds to know or suspect that another person is engaged in money laundering; **and** |
| • Am I aware of an activity so unusual or lacking in normal commercial rationale that it causes a suspicion of money laundering? | | • did the information or other matter giving rise to the knowledge or suspicion come to me in a disclosure made under s 330, POCA; **and** |
| • Do I know or suspect a person or persons of being involved in crime, or does another person who I can name have information that might assist in identifying them? | | • do I know the name of the other person or the whereabouts of any laundered property from the s 330 disclosure; or |
| • Do I know who might have received the benefit of the criminal activity, or where the criminal property might be located, or have I got any information which might allow the property to be located? | | • can I identify the other person or the whereabouts of any laundered property from information or other matter contained in the s 330 disclosure; or |

## 6.3 ANTI-MONEY LAUNDERING GUIDANCE FOR THE ACCOUNTANCY SECTOR

| **Should I report to the MLRO?** | | **As the MLRO, should I report externally?** |
|---|---|---|
| • Do I think that the person(s) involved in the activity knew or suspected that the activity was criminal? | | • do I believe, or is it reasonable for me to believe, that the information or other matter contained in the s 330 disclosure will or may assist in identifying the other person or the whereabouts of any laundered property. |
| • Can I explain my suspicions coherently? | | • Does the privileged circumstances exemption apply?<br>• Is consent required? |

**CHECKLIST: Essential elements of a SAR**

- Name of reporter.
- Date of report.
- Who is suspected or information that may assist in ascertaining the identity of the suspect (which may simply be details of the victim and the fact that the victim knows the identity but this is not information to which the business is privy in the ordinary course of its work). The reporter should provide as many details as possible to allow NCA to identify the main subject.
- Who is otherwise involved in or associated with the matter and in what way.
- The facts.
- What is suspected and why
- Information regarding the whereabouts of any criminal property or information that may assist in ascertaining it (which may simply be the details of the victim who has further information but this is not information to which the business is privy in the ordinary course of its work).
- What involvement does the business have with the issue in order that requirements for consent.
- Reports should generally be jargon free and written in plain English.

## APPENDIX E: RISK FACTORS

**High risk factors**

**Customer risk factors,** including whether—

i. the business relationship is conducted in unusual circumstances;

ii. the customer is resident in a geographical area of high risk (see below);

iii. the customer is a legal person or legal arrangement that is a vehicle for holding personal assets;

iv. the customer is a company that has nominee shareholders or shares in bearer form;

v. the customer is a business that is cash intensive;

vi. the corporate structure of the customer is unusual or excessively complex given the nature of the company's business;

**Product, service, transaction or delivery channel risk factors,** including whether—

i. the product involves private banking;

ii. the product or transaction is one which might favour anonymity;

iii. the situation involves non-face-to-face business relationships or transactions, without certain safeguards, such as electronic signatures;

iv. payments will be received from unknown or unassociated third parties;

v. new products and new business practices are involved, including new delivery mechanisms, and the use of new or developing technologies for both new and pre-existing products;

vi. the service involves the provision of nominee directors, nominee shareholders or shadow directors, or the formation of companies in a third country;

**Geographical risk factors,** including—

i. countries identified by credible sources, such as mutual evaluations, detailed assessment reports or published follow-up reports, as not having effective systems to counter money laundering or terrorist financing;

ii. countries identified by credible sources as having significant levels of corruption or other criminal activity, such as terrorism (within the meaning of Section 1 of the Terrorism Act 2000(a)), money laundering, and the production and supply of illicit drugs;

iii. countries subject to sanctions, embargos or similar measures issued by, for example, the European Union or the United Nations;

iv. countries providing funding or support for terrorism;

v. countries that have organisations operating within their territory which have been designated—

aa) by the government of the United Kingdom as proscribed organisations under Schedule 2 to the Terrorism Act 2000(a), or

bb) by other countries, international organisations or the European Union as terrorist organisations;

vi. countries identified by credible sources, such as evaluations, detailed assessment reports or published follow-up reports published by the Financial Action Task Force, the International Monetary Fund, the World Bank, the Organisation for Economic Co-operation and Development or other international bodies or non-governmental organisations as not implementing requirements to counter money laundering and terrorist financing that are consistent with the recommendations published by the Financial Action Task Force in February 2012 and updated in October 2016.

**Low risk factors**

**Customer risk factors,** including whether the customer—

i. is a public administration, or a publicly owned enterprise;

ii. is an individual resident in a geographical area of lower risk (see sub-paragraph (c));

iii. is a credit institution or a financial institution which is—

aa) subject to the requirements in national legislation implementing the fourth money laundering directive as an obliged entity (within the meaning of that directive), and

bb) supervised for compliance with those requirements in accordance with Section 2 of Chapter VI of the fourth money laundering directive;

iv. is a company whose securities are listed on a regulated market, and the location of the regulated market;

**Product, service, transaction or delivery channel risk factors,** including whether the product or service is—

i. a life insurance policy for which the premium is low;

ii. an insurance policy for a pension scheme which does not provide for an early surrender option, and cannot be used as collateral;

iii. a pension, superannuation or similar scheme which satisfies the following conditions—

aa) the scheme provides retirement benefits to employees;

bb) contributions to the scheme are made by way of deductions from wages; and

cc) the scheme rules do not permit the assignment of a member's interest under the scheme;

iv. a financial product or service that provides appropriately defined and limited services to certain types of customers to increase access for financial inclusion purposes in an EEA state;

v. a product where the risks of money laundering and terrorist financing are managed by other factors such as purse limits or transparency of ownership;

vi. a child trust fund within the meaning given by Section 1(2) of the Child Trust Funds Act 2004(a);

vii. a junior ISA within the meaning given by regulation 2B of the Individual Savings Account Regulations 1998(b);

**Geographical risk factors,** including whether the country where the customer is resident, established or registered or in which it operates is—

i. an EEA state;

ii. a third country which has effective systems to counter money laundering and terrorist financing;

iii. a third country identified by credible sources as having a low level of corruption or other criminal activity, such as terrorism (within the meaning of Section 1 of the Terrorism Act 2000(c)), money laundering, and the production and supply of illicit drugs;

iv. a third country which, on the basis of credible sources, such as evaluations, detailed assessment reports or published follow-up reports published by the Financial Action Task Force, the International Monetary Fund, the World Bank, the Organisation for Economic Co-operation and Development or other international bodies or nongovernmental organisations—

aa) has requirements to counter money laundering and terrorist financing that are consistent with the revised Recommendations published by the Financial Action Task Force in February 2012 and updated in October 2016; and

bb) effectively implements those Recommendations.

CCAB will not be liable for any reliance you place on the information in this material. You should seek independent advice.

Laws and regulations referred to in this guidance are stated as at 7 March 2018. Every effort has been made to make sure the information it contains is accurate at the time of creation. CCAB cannot guarantee the completeness or accuracy of the information in this guidance and shall not be responsible for errors or inaccuracies. Under no circumstances shall CCAB be liable for any reliance by you on any information in this guidance.

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