STATEMENT OF INSOLVENCY PRACTICE 3 (E&W)

VOLUNTARY ARRANGEMENTS

ENGLAND AND WALES

1. Introduction

1.1 This Statement of Insolvency Practice (SIP) is one of a series of guidance notes issued to licensed insolvency practitioners with a view to maintaining standards by setting out required practice and harmonising practitioners' approach to particular aspects of insolvency.

SIP 3 is issued under procedures agreed between the insolvency regulatory authorities acting through the Joint Insolvency Committee (JIC). It was commissioned by the JIC, produced by the Association of Business Recovery Professionals, and has been approved by the JIC and adopted by each of the regulatory authorities listed below:

Recognised Professional Bodies:

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

Competent Authority:

- The Insolvency Service (for the Secretary of State for Trade and Industry)

The purpose of SIPs is to set out basic principles and essential procedures with which insolvency practitioners are required to comply. Departure from the standard(s) set out in the SIP(s) is a matter that may be considered by a practitioner's regulatory authority for the purposes of possible disciplinary or regulatory action.

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1.2 The Insolvency Act 1986 (IA 1986) and associated Rules (as amended) set out a procedure which enables the directors of a company to make a proposal for a voluntary arrangement (CVA) with its creditors. A similar procedure is set out which enables a debtor to make a proposal for a voluntary arrangement (IVA) with his creditors. In the latter case the debtor has the option of applying for an Interim Order (IO) to provide a stay on actions by creditors. However, this is not a mandatory requirement, and a proposal may be put forward without the prior need to obtain an IO. In either case the debtor may or may not be an undischarged bankrupt. Where the debtor is an undischarged bankrupt the IO may contain provision as to the conduct of the bankruptcy and the administration of the estate.

The CVA procedure is also available to insolvent partnerships.

In the case of both CVAs and IVAs the arrangement must take the form of a composition in satisfaction of the company's or individual's debts or a scheme of arrangement of their affairs.

1.3 Members should refer to the relevant legislation which, for a CVA, is contained in sections 1-7B (inclusive) of the IA 1986, Schedule A1 to the IA 1986 and rules 1.1-1.54 (inclusive) of the Rules, as amended. IVAs are dealt with at sections 252-263 (inclusive) of the IA 1986 and rules 5.1-5.38 (inclusive) of the Rules, as amended.

In relation to CVAs for insolvent partnerships members should refer specifically to Part II of The Insolvent Partnerships Order 1994, as amended, which applies Part I of the Act (Company Voluntary Arrangements) with appropriate modifications.

1.4 The objective of this statement is to set out best practice in relation to the work carried out by members in connection with voluntary arrangements (VAs). Due to the similarities in the law and practice of CVAs and IVAs, this statement is intended to apply to both types of VA, except where otherwise specifically indicated. The statement does not apply to 'fast-track' IVAs under sections 263A-263G IA 1986, which is expected to come into force in 2004.

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

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

2. Basis of the Arrangement

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

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

3. Initial Contact with the Directors/Debtor

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

3.2 **[IVA]** The member should consider the need for separate representation of any third parties who intend to inject funds or who are otherwise affected by the VA. Where there is a possibility that a VA may adversely affect a spouse, or a co-owner or other occupier of a dwelling house or other property, the potentially affected party should be advised to take independent advice.

3.3 **[IVA]** The member should take all necessary steps to familiarise himself with the debtor's financial circumstances. He should satisfy himself that the debtor has received appropriate advice on his position and that all the options available to him and the consequences of his decision to propose a VA have been fully explained to him. Unless there are exceptional circumstances, the member, or a suitably experienced member of his staff, should meet the debtor personally and should keep a written record of the meeting. The Association of Business Recovery Professionals has produced a booklet entitled 'Is a Voluntary Arrangement Right for Me?' explaining the IVA procedure and setting out the alternatives available to insolvent debtors. Before deciding on a course of action the debtor should be provided with a copy of the booklet and confirm in writing that he has read and understood it.

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

3.5 Where consideration is being given to obtaining a moratorium under Schedule A1 IA 1986 the member should explain to the directors the additional duties which fall on the nominee and the responsibilities which fall on the directors during the moratorium.

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

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

4. Statement of Affairs and Obtaining Additional Information

4.1 The statement of affairs should detail the nature and amount of all the company's/debtor's assets and liabilities, including the liabilities set out in paragraph 4.3(a)(i) - (vii) below. A misstatement of the amount of the assets and liabilities can constitute a 'material irregularity' (within the meaning of sections 6 and 262, and paragraph 38 of Schedule A1, IA 1986) being a ground on which an approved VA may be challenged by an aggrieved creditor. In addition, a director/debtor commits an offence if he makes any false representations or commits any other fraud for the purpose of obtaining the approval of the creditors to the proposed arrangement. The directors/debtor should be informed of these dangers.

4.2 **[IVA]** Where the debtor is an undischarged bankrupt and has already delivered a statement of affairs under section 272 or 288 he need not deliver a further statement unless so required by the nominee.

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

(a) Creditors

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

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

(ii) preferential claims;

(iii) guarantee liabilities;

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

(v) creditors who are:

[CVA] persons connected with the company ('connected persons') (as defined in section 249 IA 1986);

[IVA] 'associates' (as defined in section 435 IA 1986);

(vi) guarantors of the company's/debtor's debts, including connected persons/associates;

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

contingent liabilities;

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

He should also:

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

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

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

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

(xii) establish whether connected persons/associates may consider withdrawing or deferring their claims;

(b) Assets

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

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

(c) Antecedent Transactions

The member should enquire as to:

(i) possible transactions at an undervalue (sections 238, 339 and 423 IA 1986);

(ii) payments which may be preferences (sections 239, 340 IA 1986);

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

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

(v) liabilities which may be extortionate credit transactions, both those outstanding and paid (sections 244, 343 IA 1986);

(d) General

The member should also consider:

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

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

(iii) the timetable for the VA.

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

5. Consideration of the Proposal

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

(a) the directors'/debtor's attitude;

(b) the likelihood of the company/debtor adhering to the terms of the proposal;

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

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

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

- Is it feasible?
- Is it fair to the creditors?
- Is it an acceptable alternative to formal insolvency?
- Is it fit to be considered by the creditors?
- Is it fair to the company/debtor?

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

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

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

- The source of any referrals to the nominee or his firm in relation to the proposed VA.
- Any payments made, or proposed to be made, to the source of such referrals.

- Any payments made, or proposed to be made, to the nominee or his firm by the company/debtor whether in connection with the proposed VA or otherwise.
- An estimate of the total fee to be paid to the supervisor together with a statement of the assumptions made in producing the estimate.

6. The Nominee's Statement/Report and Comments

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

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

In cases where the directors intend to obtain a moratorium under Schedule A1 IA 1986 this statement must form part of the statement which the nominee is required to submit to the directors and which they in turn are required to file in court. In all other cases it must be included in the nominee's report to the court.

Where a moratorium is in force under Schedule A1 IA 1986 the nominee is required as part of his monitoring duties to keep under review the question of whether the proposal has a reasonable prospect of being approved and implemented, and must withdraw his consent to act if he forms the view that it no longer does.

6.2 In the case of *Re A Debtor (No 140 IO of 1995), Greystoke v Hamilton-Smith and Others* ([1996] 2 BCLC 429; [1997] BPIR 24) the court set out three tests which the nominee should apply before concluding that a meeting should or should not be summoned and held that he should satisfy himself on all three counts. They are:

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

(b) that the directors'/debtor's proposal has a real prospect of being implemented in the way it is to be represented it will be;

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

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

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

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

(b) the basis upon which assets have been valued;

(c) the extent to which the nominee considers that reliance can be placed upon the directors'/debtor's estimate of the liabilities to be included in the VA;

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

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

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

(g) details of any previous history of failures in which (any of) the directors/debtor has been involved, in so far as they are known to the nominee;

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

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

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

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

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

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

7. The Meeting of Creditors (and [CVA] of Members)

7.1 Notice of the meeting must be given to all creditors of whose claim the person summoning the meeting is aware, in strict accordance with the Rules. The minimum notice period of fourteen days excludes the day of sending the notice and the day of the meeting.

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

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

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

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

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

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

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

(f) consider voting rights and requisite majority.

7.4 The chairman must decide the amount for which creditors are to be allowed to vote, and must have regard to the provisions of the Rules. Proxies and statements of claim to be used at the meeting may be lodged at any time, even during the course of the meeting (although the courts have taken the view that they have discretion to make orders varying the statutory provisions if the circumstances of the case require).

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

7.6 **[IVA]** The nominee should request the debtor to attend the creditors' meeting in order to answer questions and to give consideration to proposed modifications. If the debtor is not available to consider modifications which are proposed, the meeting will have to be adjourned as his consent to them is required by law.

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

7.8 If modifications are proposed by a creditor the chairman should give careful consideration to the manner in which he will use specific instructions given to him by creditors to vote for either the acceptance or the rejection of the original proposal. If the words in the proxy form allowing the

exercise of discretion in the absence of specific instructions have not been deleted so as to entitle the proxy holder to vote only as directed, the proxy holder is entitled to vote or abstain on any modification at his discretion.

7.9 However, the chairman should consider most carefully the impact of the exercise of his discretion upon the expressed intentions of any creditor who has completed a proxy requiring a vote on any particular resolution. He should bear in mind that, if a creditor is aggrieved that a vote on proposed modifications has been taken and a decision reached which might have been different if creditors represented by proxy had been present at the meeting or had been given the opportunity of amending their proxy, the aggrieved creditor may challenge the decision by an application to the Court (sections 6 and 262 IA 1986). Accordingly, the chairman should consider an adjournment or suspension of the meeting to give him an opportunity to explain the circumstances to the creditor or creditors from whom he holds a proxy and to obtain their further instructions.

7.10 If a majority for approval of the VA is not obtained at the creditors' meeting, the chairman may adjourn the meeting, and must adjourn it if it is so resolved. The maximum period for adjournment allowed by the Rules is 14 days from the original meeting date, but in the case of an IVA this period may be extended by the court. Within this period there can be more than one adjournment. The chairman must give notice to the court that the meeting is adjourned. He should also consider the need to inform creditors of the adjournment and, where substantial modifications are proposed, of those modifications.

7.11 **[IVA]** In the event of an adjournment the chairman should consider the need to apply for an extension of any IO.

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

8. Implementation Following the Meeting of Creditors

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

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

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

9. Conclusion/Termination of the Arrangement

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

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

proposes to take. The standard terms and conditions produced by The Association of Business Recovery Professionals contain comprehensive provisions for dealing with breach of the arrangement.

9.3 **[IVA]** Where the debtor commits an act of 'default' (within the meaning of section 276(1) IA), the supervisor is empowered by the Act to initiate bankruptcy proceedings against the debtor. Whilst 'failure' and 'default' will often be synonymous, this will not always be the case.

9.4 In the event of failure particular care must be taken to ascertain who is entitled to the remaining assets, and in the event of the presentation of a winding-up or bankruptcy petition, whether disposal of the assets would be void under section 127 or 284 of the Insolvency Act 1986. In the case of *Shierson and Another v Tomlinson and Another (Re N T Gallagher & Son Limited)* ([2002] 2 BCLC 133; [2002] BPIR 565) the Court of Appeal held that:

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

9.5 Where a supervening winding-up/bankruptcy order is made against the company/debtor, the member should advise the official receiver of the circumstances. If the effect of the order is that the VA is terminated, the member should arrange for the prompt handover of assets, funds, books and records to the official receiver or liquidator/trustee in bankruptcy as appropriate.

10. Implementation

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