STATEMENT OF INSOLVENCY PRACTICE 8 (E&W)

SUMMONING AND HOLDING MEETINGS OF CREDITORS CONVENED PURSUANT TO SECTION 98 OF THE INSOLVENCY ACT 1986

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 agreed best practice and harmonising practitioners' approach to particular aspects of insolvency.

SIP 8 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)

Insolvency Practitioners are expected to have regard to SIPs in carrying out their professional work. 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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2. This statement has been prepared for the sole use of members in connection with liquidations of companies registered in England and Wales. 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.

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

Instructions to convene meeting

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

Venue and time of meeting

9. 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 4.60(1) are satisfied. He may make a reasonable charge for the use of the room.

10. 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.

11. 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

12. 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, lessors and former lessors and public utilities.

13. Although the legal requirement is that notices 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 the notices are sent and the day on which the meeting is held.

14. 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. The advertised notice should meet the requirements of section 98(2) IA 1986.

15. Copies of the notice convening the shareholders' meeting should not be circulated to creditors. However, in order to reflect the provisions of section 183(2)(a) IA 1986, the notice of the creditors' meeting may contain a note of the convening of the shareholders' meeting.

16. A copy of the notice of the shareholders' meeting should be sent to all Under Sheriffs, Sheriff's Officers and County Courts known by the advising member to be interested in the company's affairs. In addition, notice of the creditors' meeting should be sent where practicable to solicitors or debt collection agencies acting for creditors.

17. When dealing with the issue of notices of the meeting, members should have regard to the provisions of Statement of Insolvency Practice 9 (E & W) 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.

18. 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.

19. 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.

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 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. 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.

21. 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.

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

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:

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

(b) 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 section 375 of the Companies Act 1985. 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.

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:

(a) the amount stated in the proof; 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. 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 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.

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 that person be invited to attend the meeting.

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:

(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 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:

(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 or on its behalf in connection with:

(i) the preparation of the statement of affairs;

(ii) the arrangements for the creditors' meeting; and

(iii) 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.

(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 appointor, 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 a 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.

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 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 therefor 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 or is unwilling 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 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.

47. 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 8.5) 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.

48. 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 proofs which have not been wholly disallowed for voting purposes or rejected. The meeting should be advised of any shareholders' nominations to the committee and of the creditors' right to veto them (subject to court order) and 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.

49. When declaring the result the chairman should follow the same procedures as those outlined in paragraph 46 above. The five creditors receiving the greatest value of votes will form the committee, together with any shareholders' nominations which have not been vetoed.

50. 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.

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

- (unless it has been resolved to establish a liquidation committee) a resolution specifying the terms on which the liquidator is to be remunerated, or to defer consideration of that matter;
- 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.

52. A record of the meeting should be prepared in accordance with Statement of Insolvency Practice 12 (E&W).

Provision of Information to Liquidator

53. 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 (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

54. 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

55. Members are reminded of the provisions of section 164 IA 1986 (corrupt inducement), Rule 4.150 of the Insolvency Rules 1986 (solicitation) and their professional body's most recent guide to professional ethics.

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