S 13B

ACQUISITION OF ASSETS OF INSOLVENT COMPANIES BY DIRECTORS AND CONNECTED PERSONS – REPUBLIC OF IRELAND

Contents

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INTRODUCTION

1. This Statement of Insolvency Practice is one of a series issued by ACCA in Ireland to insolvency practitioners with the aim of maintaining standards by setting out required practice and harmonising members' approach to particular aspects of insolvency practice.

2. The purpose of Statements of Insolvency Practice is to set out basic principles and essential procedures with which insolvency practitioners are required to comply. Departures from the standards set out in the Statements of Insolvency Practice are a matter that may be considered by the Association for the purposes of possible disciplinary or regulatory action.

3. The supplemental practical guidance is intended to assist the insolvency practitioner ("the practitioner") to comply with this Statement. The practitioner is entitled to adopt alternative procedures in the detailed circumstances of a particular assignment where he or she judges that tailored approach to be more appropriate.

4. The acquisition of assets of insolvent businesses by directors (or former directors) or connected persons may give rise to concerns that assets may have been disposed of at less than market value. However, in the circumstances of a particular assignment, connected party transactions may be in the best interests of the company's creditors as a whole. This is best demonstrated when such transactions are conducted with the greatest degree of propriety and with adequate relevant disclosure to creditors and other relevant third parties as soon as reasonably practicable.

5. In this Statement the term "director/s" refers to director by whatever name called and shadow directors. The term "assets" refers to all tangible and intangible assets including goodwill and the right to use any trading name.

SCOPE

6. This Statement addresses transactions with directors and connected persons and the consequential obligations on practitioners when:

   . providing advice to the directors of a company which is insolvent; or

   . acting as receiver or provisional liquidator; or

   . acting as liquidator in a winding-up by the Court or in a creditors' voluntary liquidation.

7. Providing advice on particular aspects of creditors' meetings is dealt with in the Statement of Insolvency Practice *"Planning and Organisation of Creditors' Meetings"* – SIP 8B.

8. Pre-packaged sales in receiverships fall outside the scope of this Statement. However, a practitioner carrying out a "pre-pack" assignment may find the detailed guidance herein relevant where assets will be sold to directors or connected persons.

PRINCIPLES

9. This Statement has been produced taking account of the following principles:

   - Provision of advice prior to appointment should be clearly delineated from the functions and responsibilities of the insolvency officeholder.
   - Clear and relevant information is provided to creditors on a timely basis to facilitate their assessment of the appropriateness of the transaction/s.
   - Rationale is provided for the transaction/s with directors o**r** connected persons.

COMPLIANCE STANDARDS

Pre-appointment work

10. Clarity on the nature and extent of the role of adviser in the pre-appointment period is essential. Accordingly, on consenting to act the practitioner should obtain written instructions from the Board of Directors which specify clearly the matters on which advice is sought.

11. If the practitioner receives instructions which would require him or her to:

(a) act in a manner materially contrary to the Statements of Insolvency Practice; or

(b) engage in conduct which will undermine public confidence in the proper administration of insolvency procedures

those instructions should not be accepted.

12. The practitioner should be aware that, when asked to advise in relation to the planning or execution of a transaction, he or she may incur civil or criminal liability through participation, even in an advisory capacity.

13. The practitioner should cease to act if the directors ignore advice that a proposed action (or failure to act) would amount to misfeasance.

Acting as officeholder

14. When considering the manner of disposal of the company's assets, the practitioner should be able to demonstrate that in making the decision he or she considered relevant alternatives and had due regard to the obligations imposed on insolvency officeholders by company legislation and professional standards.

15. The obligations on both directors and officeholders in relation to the maximisation of realisations of assets, or the optimisation of the position of members and creditors of the company, do not in any way preclude disposals by way of connected party transactions.

16. The practitioner will have the assets of the company under his or her legal control. Accordingly, the practitioner's duty is to ensure that all transactions between the company of which he or she is acting as officeholder and directors and connected parties are conducted on a fully arms' length basis.

17. Where it is proposed to dispose of an asset, or group of assets, which exceed the "requisite value" (*Section 629(5), Companies Act, 2014*) through a connected party transaction, such assets should be valued by an independent competent valuer with adequate professional indemnity insurance.

18. If such appraisal is not carried out, the practitioner should disclose the reason/s why and be able to demonstrate the alternative procedures followed to satisfy himself or herself with the valuation obtained.

19. The practitioner has a statutory obligation "… to obtain the best price reasonably obtainable for the property as at the time of sale.".

20. Where assets are realised on an aggregated basis the allocation of the total consideration received between the constituent assets affects the interest of the various categories of creditors. Therefore, the practitioner should be satisfied the allocation basis chosen can be justified objectively.

21. Where the practitioner has been appointed as provisional liquidator, he or she should seek directions from the Court regarding any proposed acquisition of company assets by the directors or connected persons.

Disclosure

22. Disclosure should provide creditors with sufficient information on a timely basis to facilitate their understanding of the nature of the transaction/s. The information should be such as would enable a reasonable and informed third party to concur that the practitioner has acted in the best interests of the company's creditors as a whole.

23. The information provided should normally include the following:

- the date of the transaction;
- details of the assets involved and the nature of the transaction;
- the consideration for the transaction and when it will be paid;
- the name of the counterparty;
- the nature of the counterparty's connected party relationship with the vendor.

UPDATED

24. This Statement was updated on 24 April 2022.

Appendix

PRACTICAL GUIDANCE

Scope

A.1 *Section 559(1), Companies Act, 2014*, defines a person connected to a director as

"(a) a director of the company;

(b) a shadow director of the company;

(c) a person connected, within the meaning of *Section 220*, with a director of the company;

(d) a related company; or

(e) any trustee of, or surety or guarantor for the debt due, to any person referred to in *paragraph (a),(b),(c)* or *(d);…."*.

Compliance Standards

Pre-appointment work

A.2 An insolvency practitioner who is unable to accept appointment as officeholder because the practitioner, or the practitioner's firm, has had a significant professional relationship with the company. For example, acting as the company's auditor during the preceding twenty four months – may act solely in an advisory capacity – as per Section 635 of the Companies Act 2014. However, the practitioner should only do so after careful consideration of the implications of so acting in the light of the Associations Code of Ethics.

A.3 In the period preceding formal insolvency the acquisition of assets of a company by directors or connected persons may require prior formal approval by the members of the company (*Section 238, Companies Act, 2014*). The practitioner will remind the directors that any transaction requiring approval but undertaken without it will be voidable at the instance of the company, unless the conditions set out in *Section 238(3), Companies Act, 2014,* apply. Such unapproved transaction could give rise to claims against directors, seeking recovery of any gains made by them.

Acting as officeholder

A.4 *Section 629(3)* and *(4), Companies Act, 2014*, prohibits a liquidator from disposing of assets to an officer of the company, or to anyone who was an officer within the three year period prior to date of liquidation, unless the liquidator has given at least fourteen days' notice to all known creditors of his or her intention to do so. Section 629(3) governs a sale by private contract which can be defined to include all disposals except those by public auction.

A.5 The restriction applies to "non-cash assets" of "requisite value". *Section 629(5), Companies Act, 2014,* referring to *Section 238, Companies Act, 2014*, defines "requisite value" as being at least €5,000, but, subject to that minimum threshold, exceeding €65,000, or 10% of the company's relevant assets.

A.6 The obligation to give fourteen days' notice does not apply (*Section 629(9), Companies Act, 2014)* if, prior to the sale, express sanction for the transaction has been obtained from:

(a) in a Court or a creditors' voluntary liquidation, the Committee of Inspection or (if no committee was established) a majority in number and value of the creditors; or

(b) in a members' voluntary liquidation, a majority in number and value of the members.

A.7 The requirement for fourteen days prior notice of the liquidator's intention to sell assets by private contract to an officer (or former officer) of the company is extended to receivers by *Section 439(3), Companies Act, 2014.*

A.8 The concession granted under Section 629(9) is not available to receivers.

A.9 *Section 439(1), Companies Act, 2014*, obliges the receiver, when selling the company's property, to "… exercise all reasonable care to obtain the best price reasonably obtainable for the property as at the time of sale.". In Van Hool McArdle Ltd. v. Rohan Industrial Estates Ltd. IR 237 (1980), the Supreme Court held the main duty of the Official Liquidator is to get the maximum price for the company's assets.

A.10 However, this does not require the practitioner to obtain the maximum value for each individual asset if disposal of a parcel of assets, or of the assets as a whole, will maximise total realisations.

A.11 Where assets are realised on an aggregated basis the allocation of the total consideration received between the constituent assets affects the interests of the various categories of creditors. Further guidance on such allocation is contained in the Statement of Insolvency Practice *"A Receiver's Responsibility to Preferential Creditors*" – SIP 14B.