

STATEMENT OF INSOLVENCY PRACTICE

A RECEIVER'S RESPONSIBILITY

FOR THE MORTGAGOR'S RECORDS – REPUBLIC OF IRELAND

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A receiver's responsibility for the mortgagor's records - Republic of Ireland

INTRODUCTION

1. This Statement of Insolvency Practice is one of a series issued by the 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.
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. Departure from the standards set out in the Statements of Insolvency Practice is a matter, which 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 the 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 nature and extent of information provided in each assignment will differ, but, generally, will include compliance with the standards outlined below.

SCOPE

5. This Statement addresses the receiver's responsibility for a mortgagor's records, both those maintained prior to his or her appointment which were made available to the receiver, and those prepared after the receiver's appointment.
6. A receiver may be appointed, depending on the provisions of the debenture, over
 - (a) Assets subject to a fixed and floating charge;
 - (b) Assets subject to a floating charge; or
 - (c) Assets subject to a fixed charge.
7. A receiver's appointment as set out under paragraph 6 above is over a company at points (a) and (b) while appointment at point (c) may be over a company or an individual's assets.
8. Unless the debenture specifies the practitioner is appointed as "receiver and manager", the receiver has no authority to become involved in running the business.
9. A receiver can be appointed by the High Court, for example where judgement has been obtained against the mortgagor, the mortgagor has insufficient assets to settle the debt, but the creditor has identified assets to be acquired by the mortgagor in the future. In such appointments the receiver is an officer of the court.

PRINCIPLES

10. This Statement has been produced taking account of the following principles:
 - The receiver should take control of those records of the mortgagor necessary to carry out the receivership.
 - The receiver should maintain appropriate records during the receivership.
 - The receiver should deal properly with the records under his or her control at the conclusion of the receivership.
11. A receiver should operate in line with the General Data Protection Regulation (the “**GDPR**”). The GDPR is a comprehensive scheme of rules governing the protection of natural persons with regard to privacy and security of their Personal Data. This document should be read in conjunction with Technical Release TR 02/19 *General Data Protection Guidance for Insolvency Practitioners* which relates to the duties and responsibilities of practitioners
12. It is likely that the receiver’s firm will be a Data Processor, as will any other service provider to the receiver. The receiver should ensure that an Article 28 Contract is in place with every Data Processor.
13. The degree to which GDPR will directly affect the performance of functions of a receiver will vary depending on the precise nature and scope of the appointment, viz whether it is a full floating charge appointment or limited to fixed assets, and whether the receiver is agent of the company.
14. The receiver must ensure that personal information is only collected and used for appropriate purposes. There should be a process for deleting Personal Data when it is no longer needed.

15. Once the receiver commences to make decisions determining the purpose and means of Processing that data after his or her appointment, the receiver becomes a Data Controller. He or she must observe the rules regarding the obligations of a Data Controller and ensure that all Processing of Personal Data is compliant with the GDPR.

COMPLIANCE STANDARDS

ON APPOINTMENT

16. The receiver should establish control over all relevant records that are necessary for discharging his or her duties when carrying out the receivership.
17. If the receiver to a company decides to change the company's registered office to that of the receiver's firm, a comprehensive list of the company's statutory non-accounting records, the various registers and minutes books the directors are obliged to maintain by the provisions of the Companies Act, 2014, should be made.

DURING RECEIVERSHIP

18. The receiver should establish and maintain appropriate accounting records as and from the date of appointment.
19. Where the receiver is holding statutory records for safe keeping on behalf of the directors (see Paragraph 16 above), which the company's directors remain under an obligation to maintain, the receiver should permit the directors access to those records to enable them to fulfill their statutory duties.

20. When disposing of or selling assets of the company, the original records relating to the specific asset are given to the purchaser. The receiver should ensure the sale agreement concerned specifies such original records will be made available:
 - (a) to the company on request; and
 - (b) to the receiver for an agreed period of time after completion of the sale.
21. If a liquidator is appointed prior to the completion of the receivership of a company, the receiver remains obliged to maintain appropriate accounting records and make the periodic statutory returns.

ON COMPLETION

Company

22.
 - (a) Any statutory non-accounting records held by the receiver for safe keeping on behalf of the directors;
 - (b) All accounting records and other non-statutory records taken into the receiver's possession, if any, and
 - (c) All those company records which exist as a result of the receiver carrying on the company's business and dealing with its assets, should be returned to the company's directors, or, if the company is in liquidation, to the liquidator.
23. A receiver's own records to facilitate the discharge of his or her professional duties are not required to be returned to the directors. A receiver's records should be held for the required statutory period following completion of the receivership.

Individual's assets

24. All records which exist as a result of the receiver dealing with the assets subject to the chargeholder's security should be returned to the owners.

UPDATED

25. This Statement was updated on 29 November 2019.

PRACTICAL GUIDANCE

COMPANY: STATUTORY NON-ACCOUNTING RECORDS

- A.1 The directors' statutory duties to maintain the company's statutory records continue and are unaffected by the appointment of the receiver.
- A.2 The receiver is entitled to inspect those statutory records as part of his or her right to take possession of, collect and get in the property of the company.
- A.3 It is appropriate for the receiver to take possession of the company seal.
- A.4 A receiver must operate in line with the GDPR. This document should be read in conjunction with Technical Release TR 02/19 *General Data Protection Guidance for Insolvency Practitioners* which relates to the duties and responsibilities of practitioners in their capacity as office holders and should be considered in full.

ACCOUNTING RECORDS AND NON-STATUTORY RECORDS

- A.5 There is no statutory duty upon the receiver to bring these records up to date to the date of appointment. However, it may be appropriate for the receiver to do so – for example, to provide prospective purchasers with an indication of/some insight into the financial position of the business.
- A.6 The categories of records within the scope of the Value Added Tax Act, 1972, as amended, include, inter alia, purchase orders, delivery notes, purchase and sale ledgers, credit and debit notes, bank statements, as well as the business records regarding value added tax.

- A.7 In circumstances where the receiver sells/disposes of the business to a third party as a going concern, the receiver (in the capacity of transferee) may be obliged by the Value Added Tax Act, 1972, to preserve any records relating to the business produced prior to the formal date of transfer.

OTHER RECORDS

Company records

- A.8 Company records include all those records which exist as a result of carrying on the business and dealing with its assets.
- A.9 In the English case of *Gomba Holdings UK Limited .v. Minorities Finance Limited* (1989) 5BCC 27 consideration was given to precisely which records fall within the definition of “company records”. It was held that a receiver acts in several capacities during the course of a receivership. In addition to being agent of the company, the receiver owes fiduciary obligations to the appointer and to the company. It is only documents generated or received pursuant to the receiver’s duty to manage the company’s business, or dispose of its assets, which belong to the company. The receiver has the right to retain, for such period as is necessary, those records necessary to enforce the security under which he or she is appointed, subject to the right of access of directors and the liquidator (if one is appointed) thereto.
- A.10 It is considered appropriate to determine which records belong to a business by having regard to the decision in the *Gomba* case.

Chargeholder's records

- A.11 In the Gomba case, referred to above, it was held that documents containing advice and information to the appointer, as well as notes, calculations and memoranda prepared to enable the receiver to discharge his or her professional duty to the appointer or to the company, belong either to the appointer (if he wishes to claim them) or to the receiver. They do not belong to the company.
- A.12 In the Irish case of *Kinsella .v. Somers* (1999) IEHC44 it was held that, in the absence of special circumstances, a company's directors and shareholders have no right to receive documents and/or accounts from the receiver.

Receiver's personal records

- A.13 These are the records prepared by the receiver to facilitate the discharge of his or her professional duties. For example, they would include the statutory records which the receiver to a company maintains in compliance with Section 441, Companies Act, 2014.
- A.14 Disclosure of a receiver's personal records is a matter for his or her discretion, however, this is subject to the requirements of the GDPR and compliance with Data Subject Access Requests. However, in any legal action brought against the receiver, if such records have not been disclosed they may be held to be discoverable.
- A.15 The Director of Corporate Enforcement is entitled under Section 446, Companies Act, 2014, "where he considers it necessary or appropriate", to request the receiver to provide the receiver's books of a particular receivership or of all receiverships undertaken by that person. The request can only be made in respect of books relating to a receivership that has concluded less than 6 years prior to the date of the Director's request. This power extends only to circumstances where the receiver was appointed to a company registered under the Companies Act, 2014.

COMPLETION OF RECEIVERSHIP

Disposal of records – company

- A.16 A receiver has no statutory power to destroy company records, even after the expiry of the statutory retention period (generally 6 years). Were the receiver to destroy such records without the authority of the company or its liquidator, the receiver would risk legal challenge from an affected party.
- A.17 Where there is no liquidator and the company's directors cannot be traced, or the directors refuse to accept responsibility for the company's records, or the receiver has reason to suppose the directors are not reliable, the receiver will need to consider his or her position regarding the retention of records and evaluate on a case by case basis.

Disposal of records – individual's assets

- A.18 If the asset owner(s) refuse to accept responsibility for the records, or they cannot be traced, the receiver will need to consider his or her position regarding the retention of records.