STATEMENT OF INSOLVENCY PRACTICE 16 (E & W)

PRE-PACKAGED SALES IN ADMINISTRATIONS

INTRODUCTION

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 16 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 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 Scotland

Competent Authority:

The Insolvency Service (for the Secretary of State for Business, Enterprise and
Regulatory Reform.)

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.

SIPs should not be relied upon as definitive statements of the law. No liability attaches to any body or person involved in the preparation or promulgation of SIPs.

STATEMENT OF INSOLVENCY PRACTICE

1. In this Statement of Insolvency Practice the term 'pre-packaged sale' (or 'pre-pack') 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 sale immediately on, or shortly after, his appointment.

2. Practitioners who are party to a pre-packaged sale, whether as adviser to the company before the appointment, as the appointed administrator, or both, should bear in mind the duties which they, and those who act on their advice, owe to parties who might be affected by the arrangement, and should have regard to the associated risks. They should keep a detailed record of the reasoning behind the decision to undertake a pre-packaged sale, and should be able to explain and justify why such a course of action was considered appropriate.

The legal authority for pre-packaged sales

3. In a series of cases[1] the courts have held that, where the circumstances of the case warrant it, an administrator has the power to sell assets without the prior approval of the creditors or the permission of the court. However, it should be borne in mind that reliance on such authority does not protect administrators from potential challenges to their conduct under paragraph 74, or claims for misfeasance under paragraph 75, of Schedule B1 to the Insolvency Act 1986. In order to avoid the risk of such exposure, care should be taken to ensure that such power is only exercised in genuine furtherance of the purpose of administration.

Preparatory work

4. The preparation for a pre-packaged sale highlights a number of issues which arise in other contexts, but which are thrown into sharper focus in the particular circumstances of a pre-pack.

5. Practitioners should be clear about the nature and extent of their role and their relationship with the directors in the pre-appointment period. Where they are instructed to advise the company, they should make it clear that their role is to advise the company and not to advise the directors on their personal position. The directors should be encouraged to take independent advice. This is particularly important if there is a possibility of the directors acquiring an interest in the assets in the pre-packaged sale.

---

[1] *T&D Industries Plc* [2001] 1 WLR 646; *Transbus International Ltd* [2004] EWHC 932 (Ch), [2004] All ER 911; *DKLL Solicitors* [2007] EWHC 2067 (Ch)

6. Practitioners should bear in mind the duties and obligations which are owed to creditors in the pre-appointment period. They should be mindful of 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.

7. When considering the manner of disposal of the business or assets, administrators should bear in mind the requirements of paragraphs 3(2) and 3(4) of Schedule B1 to the Insolvency Act 1986. These provide that:
   - the administrator must perform his functions in the interests of the company's creditors as a whole, and
   - where the objective is to realise property in order to make a distribution to secured or preferential creditors, the administrator has a duty to avoid unnecessarily harming the interests of the creditors as a whole.

   Administrators engaged in a pre-packaged sale should therefore be able to demonstrate that they have considered the above.

Disclosure

8. It is in the nature of a pre-packaged sale in an administration that unsecured creditors are not given the opportunity to consider the sale of the business or assets before it takes place. It is important, therefore, that they are provided with a detailed explanation and justification of why a pre-packaged sale was undertaken, so that they can be satisfied that the administrator has acted with due regard for their interests.

9. The following information should be disclosed to creditors in all cases where there is a pre-packaged sale, as far as the administrator is aware after making appropriate enquiries:
   - The source of the administrator's initial introduction
   - The extent of the administrator's involvement prior to appointment
   - Any marketing activities conducted by the company and/or the administrator
   - Any valuations obtained of the business or the underlying assets
   - The alternative courses of action that were considered by the administrator, with an explanation of possible financial outcomes
   - 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

- Whether efforts were made to consult with major creditors
- The date of the transaction
- Details of the assets involved and the nature of the transaction
- The consideration for the transaction, terms of payment, and any condition of the contract that could materially affect the consideration
- If the sale is part of a wider transaction, a description of the other aspects of the transaction
- The identity of the purchaser
- Any connection between the purchaser and the directors, shareholders or secured creditors of the company
- The names of any directors, or former directors, of the company who are involved in the management or ownership of the purchaser, or of any other entity into which any of the assets are transferred
- 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
- Any options, buy-back arrangements or similar conditions attached to the contract of sale

10. This information should be provided in all cases unless there are exceptional circumstances, and if this is the case, the reason why the information is not provided should be stated. If the sale is to a connected party it is unlikely that considerations of commercial confidentiality would outweigh the need for creditors to be provided with this information.

11. Unless it is impracticable to do so, this information should be provided with the first notification to creditors. In any case where a pre-packaged sale has been undertaken, the administrator should hold the initial creditors' meeting as soon as possible after his appointment. Where no initial creditors' meeting is to be held and it is impracticable to provide the information in the first notification to creditors it should be provided in the statement of proposals of the administrator which should be sent as soon as practicable after his appointment.

12. The Insolvency Act 1986 permits 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 from 1 January 2009