ACCA Insolvency Newsletter

This is the first issue of a new newsletter which will carry regulatory and technical information of significance to ACCA's insolvency licence holders. This material will include information on new Statements on Insolvency Practice (SIPs), interim guidance issued by ACCA or the Joint Insolvency Committee (JIC), pronouncements made by the Insolvency Practices Council, information on bonding and licensing arrangements and information of a disciplinary nature. It will not attempt to duplicate guidance which is already available to most licence holders via R3 and the Insolvency Service but will rather aim to supplement that guidance. It will also serve as the channel through which ACCA's Council and staff communicate essential compliance information to members.

The intention is that the newsletter will be produced on a twice-yearly basis but that ad hoc issues will be prepared in order to communicate time-sensitive information.

The production of this newsletter follows ACCA Council's decision, in March 2002, to establish a new, streamlined procedure for the approval of regulatory guidance to insolvency practitioner members. The new Insolvency Task Force, chaired by past president George Auger, has delegated authority from Council to approve for issue to members new and amended SIPs and other guidance with which members are expected to comply in their professional work.

Issue 1 – June 2002

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June 2002

About ACCA

The Association of Chartered Certified Accountants (ACCA) is the largest, fastest growing, global professional accountancy body, with nearly 300,000 members and students in 160 countries.

1. Technical Guidance

1.1 ACCA SIP BOOKLET

The full collection of Statements of Insolvency Practice are to be found in the 2002 Booklet, which all licence holders should already have received. Individual SIPs can be viewed and downloaded from the ACCA web site at http://www.accaglobal.com/practicechannel/publications/sips_index

The 2002 Booklet contains SIP 15: 'Reporting and providing information on their functions to committees in formal insolvencies', which was issued in May 2001, and the revised version of SIP 8: 'Summoning and holding meetings of creditors convened pursuant to s98 of the Insolvency Act 1986', which was issued in January 2002.

The revised SIP 8 incorporates the following changes:

1) Charging for the use of the practitioner's premises

It is stressed that, although an IP may charge the estate for the use of his premises for the creditor's meeting, any such charge must be 'reasonable'. *(para 9)*

2) Notice of the creditors' meeting

IPs are reminded that meeting notices should be sent to secured creditors (as well as other creditors). *(para 12)*

The seven days' notice which must be given to creditors is to be seven clear days. *(para 13)*

Where a company has recently changed its name, the former name should be referred to in the notice and advertisement of the meeting. *(para 18)*

3) Proxies

Faxed proxies are not invalid just because they are sent by fax. *(para 23)*

4) Attendance at creditors meeting

In setting out the circumstances in which a liquidator must attend the creditors meeting, the previous reference to **a liquidator whose appointment has been certified by the chairman of the prior members' meeting** (which proved contentious) is deleted. Thus, a liquidator need not wait for the signed certification before having to attend the s98 meeting. *(para 30)*

Para 30 also stresses that attendance is obligatory even if the prior meeting was shortly before the creditors' meeting and that he is liable to a fine for failure to comply without reasonable excuse.

5) Proxy voting

There is a new reference to what a proxy may do if the candidate whom he has been instructed to vote for has been eliminated. *(para 47).*

6) Liquidation committee

There is a new, more pro-active requirement for the IP to explain to creditors their right to appoint a liquidation committee, and to describe its role. *(para 48)*

7) Other motions

There is a new paragraph setting out what additional business may be conducted at the s98 meeting. *(para 51)*

1.2 SIP 3: VOLUNTARY ARRANGEMENTS/SIP 4: DISQUALIFICATION OF DIRECTORS

The following is the text of a communication which is being sent to licence holders by all RPBs, at the request of JIC. A hard copy of this communication is being sent to licence holders by post.

Dear Member

STATEMENT OF INSOLVENCY PRACTICE 3 – VOLUNTARY ARRANGEMENTS
STATEMENT OF INSOLVENCY PRACTICE 4 – DISQUALIFICATION OF DIRECTORS

This letter contains important advance information about changes which are to be incorporated into revised versions of Statement of Insolvency Practice (SIP) 3 on voluntary arrangements and SIP 4 on disqualification of directors. Members should act on this letter now.

SIP 3

A fully revised version of SIP 3 will be issued when the rules supporting the voluntary arrangement provisions of the Insolvency Act 2000 come into effect. In the meantime a number of issues have been identified, by the Insolvency Practices Council and others, which it is felt need to be addressed in the SIP. These relate principally to:

- The quality of advice given to debtors considering entering into an individual voluntary arrangement.

- The disclosure of information about referrals and prior financial transactions in relation to voluntary arrangements generally.

The revised SIP 3 will contain the following additional provisions with which members will be expected to comply:

- **[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 an IVA 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 attached leaflet, 'Is a Voluntary Arrangement Right for Me?' explains the IVA procedure and sets out the alternatives available to insolvent debtors. Before deciding on a course of action the debtor should be provided with a copy of the leaflet

and confirm in writing that he has read and understood it.

- Either in the proposal or in the nominee's comments the following information should be provided:

  – The source of any referrals to him 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.

- At the meeting of creditors held under section 3 or section 257 the chairman should provide information on any changes in the circumstances of the debtor/company from that presented in the proposal which need to be brought to the attention of creditors.

SIP 4

The revised SIP 4 will incorporate the following amendment to bring the SIP in line with best practice and the expectations of the Disqualification Unit:

- [Paragraph 7, penultimate sentence:] 'For this reason the Unit hopes to receive reports within nine months whenever it is not possible for them to be submitted within the six month period.'

Members will be expected to comply with the requirements set out in this letter with effect from 1 July 2002. Departure from these requirements is a matter that may be considered by ACCA for the purposes of possible disciplinary or regulatory action.

1.3 DISCLOSURE OF NAME OF RPB

Members are reminded that, following a recommendation made by the Insolvency Practices Council, they are urged to ensure that they disclose the name of their licensing body to those with an interest in an insolvency administration as early as is practicable. For information, the text of ACCA's circular to members on this issue, dated November 2000, is reproduced below:

Notification of licensing authority

One of the recommendations made in the 1999 report by the insolvency regulation working party was that 'authorised insolvency practitioners should inform those with whom they deal in insolvency processes of the name of their individual authorising bodies, such information to be given in an appropriate manner and at an early stage in the insolvency process'.

As a member of the working party that produced the report, ACCA endorses this recommendation. At present, there are no plans to enshrine it in a formal rule, although ACCA and the other RPBs may decide otherwise at some stage in the future. Nonetheless, ACCA, in line with guidance now being given by the other RPBs, asks its licence-holders to take account of and implement the recommendation forthwith.

As is evident from its wording, the recommendation does not stipulate any specific means by which notification is to be made, or when exactly it is to be made. Practitioners are, accordingly, invited to use their discretion on these matters in the circumstances of particular cases. The simplest means of observing the guidance would appear to be to ensure that the required information is carried on the practitioner's business stationery, provided that such stationery was received by the interested parties at the required early stage in a new process.

Whatever means is decided upon, it is clear from the wording of the recommendation that practitioners are expected to volunteer the information to interested parties and that compliance should not be restricted to responding to direct requests from creditors and others. ACCA would expect, in any case, licence-holders always to divulge details of their licensing body on receipt of a direct request for that information.

1.4 RESPONDING TO CORRESPONDENCE

As members may be aware, the Insolvency Practices Council (IPC) has recommended that the profession should take action to ensure that IPs keep debtors/creditors informed of what is happening during the administration and that correspondence from debtors/creditors is answered within at least ten working days. If it is not for any reason possible to reply within

ten days, IPC recommends that a holding acknowledgement should be sent, explaining the position and stating when a substantive response might be expected.

The Joint Insolvency Committtee (JIC) has encouraged RPBs to issue guidance to their members in respect of this recommendation. ACCA now formally does so.

In ACCA's view, the IPC recommendation is helpful in that it serves to reiterate not only that prompt attention to case correspondence is good professional practice but also that it is likely to be conducive to effective and expeditious case management.

ACCA believes that the ten day deadline referred to in the IPC recommendation should be seen by members as a benchmark for the purposes of ensuring prompt management of correspondence. In most cases, a reply or at least an acknowledgement within ten working days should be well within the capability of IPs to arrange. Where a firm is properly resourced and the workload allows, it may be possible for IPs and their staff to reply, or at least send an acknowledgement, within five working days: where this can be done, licence holders are encouraged to do so.

In some circumstances, though, for example where the firm is small and the member is on holiday or is on extended absence from the office on business, it may not always be feasible to provide a response within ten days. Accordingly, while members are encouraged to aim to offer a reply or an acknowledgement within a maximum of ten days, it is not ACCA's intention to construe failure to reply within that timescale as necessarily amounting to misconduct.

ACCA's ultimate guidance in this matter remains that contained in the Fundamental Principles of the Rules of Professional Conduct. In particular, members are referred to paragraph 5 of statement 3.1, which says that 'members should carry out their professional work with due skill, care, diligence and expedition and with proper regard for the technical and professional standards expected of them as members.' The IPC recommendation, as interpreted in this statement, should be read within this context.

1.5 IVAs – STANDARD CONDITIONS

As members of R3 will be aware, R3 has produced a model set of terms for IVAs. This document is not mandatory but members are encouraged to invite debtors to adopt it as the basis for their arrangements. The document addresses long-standing areas of difficulty in IVAs including action following breach and supervisor's fees and expenses.

1.6 SIP 4 – DISQUALIFICATION OF DIRECTORS

R3 has approved a minor change to paragraph 7 of SIP 4, regarding the timescale within which the Disqualification Unit hopes to receive final reports from practitioners where an interim report has been sent. The timescale has now been reduced from a year to 9 months.

2. Regulatory Guidance

2.1 BONDING FOR NOMINEES

In January 2002 a letter was sent to licence holders giving them advance notice of the provisions of section 4(2) of the Insolvency Act 2000. Under section 4(2), when a person holds the office of nominee in a voluntary arrangement, he or she will be deemed to be "acting as an insolvency practitioner." This has implications for the bonding arrangements of Insolvency Practitioners. The information provided to licence holders in January 2002 regarding changes to bonding arrangements has, however, since been revised following discussions between The Insolvency Service and the bond providers. The difference is that, rather than dealing with an appointment as a nominee under the general bond, a specific penalty bond will be required. The Insolvency Service indicates that the intention is to introduce secondary legislation to give effect to the following scheme for bonding for nominees:

a) Cover when acting as nominee will be dealt with under specific bonds and, as with other insolvency procedures, the general bond will underpin it.

b) Cover will begin with the date of appointment as nominee.

c) As soon as the insolvency practitioner becomes nominee, he or she should enter the case on the bordereau with the value of the assets estimated, having regard to the same matters to which the practitioner would have regard if he or she were the supervisor.

d) If, at the meeting of creditors, the proposal is accepted and the nominee becomes the supervisor, no new specific bond will be required and the bordereau should be noted to show that the insolvency practitioner is now supervisor.

e) If, at the meeting of creditors, the proposal is accepted but another insolvency practitioner is appointed supervisor:
   i) The first insolvency practitioner should note the bordereau to show that they are no longer in office;
   ii) The insolvency practitioner appointed supervisor should note their bordereau to show that they have been appointed in order to obtain a specific bond and provide information as to the value of the assets.

The implementation of these proposals should not result in an increase in the cost of specific bonds where the same insolvency practitioner acts as both nominee and supervisor.

These arrangements are not a statutory requirement until section 4(2) is brought into force, and ACCA has been unable to obtain a timescale for this from The Insolvency Service. In the interim, some bond providers are now operating schemes that incorporate these revised arrangement: if your bond provider is doing so, then you should comply with their requirements.

2.2 MONITORING ISSUES

There have recently been a number of changes to personnel in the ACCA Insolvency Monitoring Unit. The Unit is now managed by Gareth Limb, the former Head of The Insolvency Service's Insolvency Practitioner Compliance Unit, who joined ACCA in December 2001. Barbara MacKenzie remains with the Unit as a Monitoring Officer, and will now be joined by Bill Burch. Bill, an ACCA member, joins ACCA in early June, having previously worked for The Insolvency Service.

Future editions of this Newsletter will contain details of common themes and problems found on insolvency monitoring visits. In addition, it will provide members with more information about ACCA's Insolvency Monitoring Programme upon completion of a review currently being undertaken, and in the light of the revision of the Standards for Monitoring currently being considered by the JIC.

2.3 CENTRAL ACCOUNTING USER GROUP

ACCA is represented on the Central Accounting Unit (CAU) User Group, a body drawn from a cross section of the insolvency profession to provide feedback on the services provided by CAU, to make suggestions for improvements, and to comment on proposed changes. The User Group meets twice a year and copies of the minutes of the meetings can be found at http://www.insolvency.gov.uk

A new financial system is to be introduced by April 2004, to coincide with the

implementation of the Enterprise Act (see item 3.1). A presentation was given recently to the Users Group outlining the On Line Services that CAU is looking to make available under the system. It is planning to provide interactive services so that insolvency practitioners can undertake actions such as making account amendments, viewing statements, running queries, making payment requests, and making investments On Line. Security and levels of access to information are high on CAU's agenda.

In another major move that will streamline the financial process, CAU is looking to encode account information on bank giro credits, so that funds received are automatically and immediately allocated to estate accounts, rather than having to be manually allocated as at present.

CAU also updated the Users Group on the position regarding its On Line Read Only Access to estate information. This service was due to have been introduced already, but it has been delayed because of problems with The Insolvency Service's Internet Service Provider. No timescale for its introduction was given.

CAU gave the meeting examples of some of the handful of fraudulently altered ISA cheques that have been presented for payment. Members are reminded that if CAU provides them with details of a fraudulently altered cheque drawn on an estate account where they are office holder, they should make further enquiries to determine whether the fraud occurred before or after the cheque had been issued from their practice, and consider whether their own internal procedures need to be altered. Members should also report the matter to the police in all instances.

In order to reduce the opportunity for fraud, members are encouraged to use the BACS facility now provided by CAU, particularly for large payments, and indeed for payment of their fees. BACS replaces a cheque sent to the Member with an automated credit direct to the recipient's bank account. Members are encouraged to make use of this payment system, although since it requires accurate and up-to-date bank details for the recipient it does lend itself to payments to regular known recipients, such as the member, agents, solicitors, financial institutions, utilities, Crown Bodies etc.

Members will be aware from Dear IP Articles and The Insolvency Service's web-site that information about out-of-date cheques is regularly passed by CAU to tracing agents. The

tracing agent will then negotiate a fee, typically 20%, with the payees whom they locate and reunite with their cheques. ACCA does not consider that it is appropriate for tracing agents to become involved when the cheques represent payment of an interim dividend, and that it should be for the member to trace such missing creditors. CAU is prepared to provide practitioners with information about any uncashed interim dividend cheques, and members are strongly encouraged to contact CAU, say 5 months after the payment of an interim dividend, in order to obtain details of any uncashed cheques. They should then take steps to trace those creditors.

Finally, members are advised that the database underpinning CAU's financial system attaches **one** address for the member to each case. In a voluntary liquidation the address that is initially attached to a case is that which appears in the advertisement of the appointment of a liquidator in the London Gazette. In a compulsory liquidation or a bankruptcy it is the address that appears on the Certificate of Appointment. This means that cheques and statements issued by CAU can only be sent automatically to that one address. If the Member wants a cheque or statement to be sent to another address, for example where the case is now being administered from another of the member's firm's offices, then CAU needs to make manual adjustments to each cheques and statement, which can lead to delay. Consequently, in order to ensure that CAU continues to provide its current good level of service, it would be helpful if members were to notify CAU, in writing, whenever they want to change the address attached to a particular case, ie where they want cheques and statements to be sent to an address other than that at which the case was originally advertised or was recorded on the Certificate of Appointment, as appropriate. There will, however, always be the potential for delay where in a particular case the member wants statements sent to one address, and cheques to another.

3. Legislation

3.1 THE ENTERPRISE BILL

The Enterprise Bill was published on 26 March, and is expected to gain Royal Assent by July. The Bill contains a number of measures which will reform aspects of the Insolvency Act 1986, all already discussed in the White Paper issued in 2001.

Firstly, Crown preference is to be abolished in respect of all formal insolvency procedures. The Treasury estimates that this will free up to £100m pa for trade creditors.

Secondly, secured creditors who take out their security after the commencement of the Act will lose the right to appoint an administrative receiver in all but specified circumstances, which relate to transactions involving capital markets, PPPs, utilities, project finance and financial markets. As an alternative to receivership, floating charge holders will have the right to appoint Administrators via out-of-court procedures.

Thirdly, the standard period of bankruptcy will be reduced from three years to a maximum of one year. The Official Receiver will, however, be required to investigate the affairs of each debtor within twelve months and make a report to the court where he thinks that a 'bankruptcy restriction order' (BRO) would be appropriate in the circumstances: a new Schedule 4A to the Insolvency Act 1986 will set out a number of grounds on which a BRO may be appropriate, including giving a preference, fraudulent conduct, making of excessive pension contributions and failing to co-operate with the trustee or official receiver. Like director disqualification orders, the duration of BROs may vary between two and fifteen years depending on the gravity of the bankrupt's conduct. The effect of a BRO will be to impose restrictions on the specified bankrupt akin to those currently applying to all bankrupts under the Insolvency Act 1986.

Fourthly, there is to be a change in the method of funding of The Insolvency Service. In summary, under the proposed changes Secretary of State fees will no longer be charged in voluntary liquidations; there will no longer be a requirement to remit funds to the Insolvency Services Account (ISA) in voluntary liquidations; a full market rate of interest will be paid on all funds held in the ISA; an account administration fee will be charged by Central Accounting Unit (CAU); and the current 65p cheque fee will be increased, possibly to £1.Other proposed future developments by CAU are detailed at Item 2.3 above.

The DTI web site contains a special sub-site devoted to the Enterprise Bill. This can be found at www.dti.gov.uk/enterprisebill/index.htm

3.2 NEW PRIVACY OPTION FOR DIRECTORS

Until now, all directors of all companies have been obliged to notify Companies House of their usual residential address, which then is made publicly-available as part of each company's official record. Following a series of threats made to directors of companies which engage in animal research and similar activities, the rules have been changed. As from 2 April, directors who consider themselves or their families to be under threat of violence or intimidation as the result of the activities of their companies are able to apply to Companies House for a Confidentiality Order. If Companies House agrees that the applicant director's circumstances merits the granting of an Order, the director concerned will be able to file a service address on the public register, and place his residential details on a separate, secure register which will only be open to inspection by designated, authorised persons, which include persons acting as insolvency practitioners. The application fee for a Confidentiality Order is £100. Applications are to be made on form 723B, which is available from The Administrator, PO Box 4082, Cardiff CF14 3WE.

3.3 EC REGULATION ON INSOLVENCY PROCEEDINGS

All members should have received a copy of a communication from the Inspector general of the insolvency Service relating to the above. The communication contains a copy of the Regulation and guidance notes prepared by the Insolvency Service. Further copies of the guidance notes are available on the Service's web site - www.insolvency.gov.uk. The site will also carry links to the statutory instruments currently being prepared to implement the Regulation in the UK.

4. Recent Cases

4.1 OBLIGATION TO CONVENE A CREDITORS MEETING

Liquidators applied for an order confirming that they were not obliged to comply with a request for a creditors meeting pursuant to IR 4.54. The meeting would have sought to remove the liquidators from office. The liquidators argued that their removal would not be in the best interests of all the creditors in the insolvency.

The court held that, in deciding whether to override the liquidator's general duty under s168(2) IA 86, a two-stage test would be carried out, viz whether the requested meeting would further the proper operation of the liquidation and whether the meeting would help to do justice to all parties in the insolvency. The meeting sought in this particular case would not meet this test.

Re Barings plc (in liquidation) [2001] 2 BCLC 159

4.2 INNOCENT DEFENCE

S353 of the Insolvency Act provides for a defence of innocent intention with respect to designated bankruptcy offences listed in Chapter VI of Part IX of the Insolvency Act 1986. The defence is available where the defendant can prove that, at the time of the offence, he had no intent to defraud or to conceal the state of his affairs.

The Court of Appeal considered an appeal against a Crown Court conviction under s354 of the Act of concealing from the trustee a debt due to the bankrupt of £75,000. The defendant argued that the ruling in the case of R v Carass ([2002] EWCA Crim 2845) should be applied to his case. The Carass ruling, in respect of the corresponding provision regarding liquidations in s206(4) of the Act, stated that the defence of 'no intention to defraud' should be read not as imposing a requirement to prove that he had no intention to defraud but to 'adduce sufficient evidence to raise an issue that he had no intent to defraud, unless, if he does so, the prosecution proves the contrary beyond reasonable doubt'.

The Appeal Court agreed that the lower burden of proof should apply to s352 as it does to s206. Since the case in question was heard prior to the implementation of the Human Rights Act 1998, however, it was agreed that the section should not be read as imposing an

evidential burden only, and the lower court's ruling was correct.

Regina v Daniel, The Times, 8 April 2002 (judgment 22 March 2002)

4.3 TRACING ASSETS OF BANKRUPTS

The Court of Appeal ruled that s354 of the Insolvency Act, which makes it a criminal offence for a bankrupt to fail, without reasonable excuse, to deliver up to a trustee the property comprised in his estate, was a matter of public interest and did not infringe a bankrupt's right of silence nor his right not to incriminate himself under the Human Rights Act.

The defendant had previously pleaded guilty to a charge of failing without reasonable excuse to account for the loss of £22,400 incurred in the period between the presentation of the bankruptcy petition on 17 September 1998 and 11 November 1998.

The court ruled that the provisions of s354 were a proportionate response to the administration and investigation of bankrupt estates and did not mean that a defendant could not have a fair trial within the meaning of article 6 of the Human Rights Convention.

R v Kearns, The Times, 4 April 2002 (judgment 22 March 2002)

4.4 CVAs

A company which had entered into a company voluntary arrangement subsequently went into insolvent liquidation. The liquidators applied to the court for directions as to whether assets held by the supervisor continued to be held on trust for creditors of the CVA, or whether the winding up of the company brought an end to the trust.

In its directions, the court ruled that there was nothing in law which prevented the trust of a CVA continuing after the winding up. In the absence of an express provision to the contrary, the trust continued. The liquidators appealed.

The Court of Appeal dismissed the appeal, though it varied the terms of the previous order. It laid down a number of guidelines for future cases, for application to IVAs and CVAs alike, as follows;

i) where a CVA or IVA provided for moneys or other assets to be paid to or transferred or held for the benefit of the VA creditors, that would create a trust;

ii) the effect of a subsequent liquidation or bankruptcy of the debtor entity on the trust would depend on the provisions of the VA;

iii) if the VA contained provision as to what would happen in the event of liquidation or bankruptcy (or failure of the VA) then those provisions would prevail;

iv) if the VA contained no such provision, the trust would continue subsequent to a liquidation or bankruptcy;

v) the VA creditors could prove in the liquidation or bankruptcy for so much of their debt as remained after payment of what had been or would be recovered from the trust.

Re NT Gallagher & Sons Ltd ([2002] EWCA Civ 404).
Judgment 26 March 2002

TECH-INS-001

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