



STATEMENT OF INSOLVENCY PRACTICE (SIP) 2

PRACTICAL GUIDANCE NOTE – SCOTLAND

1 This Practical Guidance Note sets out some practical matters arising from SIP 2 and should be read in conjunction with the SIP.

2 Initial assessment

The initial assessment undertaken by the office holder might include:

- enquiries arising from information provided by creditors and any committee following the invitations provided for in the SIP;
- enquiries of the officers of the company and other senior officials as to the company's affairs, including the reasons for failure and the location of its records and property; if the office holder encounters non-co-operation the steps taken should be recorded;
- comparison of the statement of affairs with the last filed accounts or management accounts over a twelve month period in order to ascertain whether all significant fixed and current assets can be identified and material movements in fixed and current assets can be properly explained;
- a preliminary review of the books, records and minutes for the last six months in order to identify any unusual or exceptional transactions.

3 Matters for detailed investigation

Where it is agreed to conduct further investigations, whether with a view to possible recoveries for the benefit of the estate, or because further information is needed to complete the directors conduct returns, the following points may usefully be borne in mind, depending on the circumstances of the case and the nature of the investigations:

- **Questioning directors and other key personnel**

The question of which individuals are relevant to the office holder's investigations is likely to depend on the information which the office holder believes they may hold. The individuals who may be relevant will normally include:

- a. all directors (by whatever name called), including directors who held office during the three years prior to the insolvency,
- b. the company secretary,
- c. other senior officials and employees,
- d. the company's professional advisers,



but may also include others from among the persons listed in section 235(3), or who come within the ambit of section 236, of the Insolvency Act 1986. An office holder may find it useful to issue questionnaires to obtain factual information.

- **Statutory books and minutes**

Examination of the statutory books of the company, including the minute book, and comparison with a search obtained from Companies House.

- **Records**

Can changes in the financial position of the company be satisfactorily accounted for from the records of the company (including, inter alia, bank statements) covering the period since the date of the last audited or filed accounts, or if none since the incorporation of the company? Is there a material difference between the deficiency disclosed in the statement of affairs and the last audited or filed accounts, or, if none, since the last management accounts or since the incorporation of the company, after taking into account matters such as writing down asset values? If so, consideration may be given to the preparation of trading and profit and loss accounts for the final trading period.

- **Validity of charges**

If the company has granted any charges, do the circumstances of the case render it appropriate or necessary to consider the validity of such charges or the validity of any receiver appointed pursuant to such charges?

- **Transactions with associated companies or connected persons**

Have there been any transactions involving directors, including any reduction in loan accounts, overdrafts or other debts supported by personal guarantees, or transactions with associated companies or connected persons (as defined in sections 435 and 249 respectively of the Insolvency Act 1986)? If so, can it be verified that they were carried out at arm's length?

In the period of five years prior to the resolution of the directors that the company be wound up, have there been any transactions (other than in the ordinary course of business) between the company and any company of which it is an associate, or any transactions with any one or more of its directors or any other associate of a director? If so, can the validity of the transactions be verified? Creditors may sometimes be able to provide information concerning transactions between directors and associated companies or connected parties.

4 Rights of action

The office holder's investigations may disclose possible rights of action which the company or the office holder may have against third parties. Rights may arise, for example, under the following provisions, though this list is not exhaustive:



Insolvency Act 1986

Section 76	Redemption or purchase of own shares
Section 127	Avoidance of property dispositions etc.
Section 128	Avoidance of attachments etc.
Sections 150 and 165	Uncalled capital
Section 212	Summary remedy for misfeasance and misapplication etc. of property
Sections 213 and 215	Fraudulent trading
Sections 214 and 215	Wrongful trading
Section 242	Gratuitous Alienation (NB also gratuitous alienation at common law)
Section 243	Unfair Preference (NB also fraudulent preference at common law)
Section 244	Extortionate credit transactions
Section 245	Avoidance of floating charges

Companies Act 2006

Sections 641 to 653	Unauthorised reduction of capital
Sections 677 to 723	Unlawful assistance/redemption in the purchase of own shares
Section 847	Unlawful distributions to members
Sections 190 - 196	Unlawful property transactions
Sections 197 - 214	Unlawful loans

5 Reporting duties

It is not the duty of office holders to investigate criminal conduct, but if it should come to an office-holder's notice that any past or present officer (or member) of the company may have been guilty of any offence in relation to the company for which he is criminally liable, then in an insolvent winding up the liquidator should report the matter to the Lord Advocate. (Insolvency Act 1986, section 218).

Office holders will have reporting duties under the Company Directors Disqualification Act 1986, and should also bear in mind their reporting duties under the Proceeds of Crime Act 2002.

September 2011