

## STATEMENT OF INSOLVENCY PRACTICE 9 (SCOTLAND)

### PAYMENTS TO INSOLVENCY OFFICE HOLDERS AND THEIR ASSOCIATES FROM AN ESTATE

#### INTRODUCTION

1. The particular nature of an insolvency office holder's position renders transparency and fairness of primary importance in all their dealings. Creditors and other interested parties<sup>1</sup> with a financial interest in the level of payments from an estate should be confident that the rules relating to the approval and disclosure of payments to insolvency office holders and their associates have been properly complied with.
2. The term associate is defined in the insolvency legislation. For the purposes of this statement of insolvency practice, office holders should, in addition to the definition in the insolvency legislation, consider the substance or likely perception of any association between the insolvency practitioner, their firm, or an individual within the insolvency practitioner's firm and the recipient of a payment. Where a reasonable and informed third party might consider there would be an association, payments should be treated as if they are being made to an associate, notwithstanding the nature of the association may not meet the definitions in legislation.
3. This statement applies to all forms of insolvency proceedings under the Insolvency Act 1986 and the Bankruptcy (Scotland) Act 2016, except for the following:
  - a) Moratoriums under Part A1 of the Insolvency Act 1986
  - b) Members' voluntary liquidation unless those paying the fees require such disclosures.

#### PRINCIPLES

4. All payments from an estate should be fair and reasonable and proportionate to the insolvency appointment.
5. Payments to an office holder from an estate should be fair and reasonable reflections of the work necessarily and properly undertaken in an insolvency appointment.
6. Payments to the associates of an office holder from an estate should be fair and reasonable reflections of the work necessarily and properly undertaken in an insolvency appointment.
7. All payments should be directly attributable to the estate from which they are being made or sought.
8. Payments that could reasonably be perceived as presenting a threat to the office holder's objectivity or independence by virtue of a professional or personal relationship, including to an associate, should not be made from the estate unless disclosed and approved in the same manner as an office holder's remuneration or category 2 expenses.
9. Payments should not be approved by any party with whom the office holder has a professional or personal relationship which gives rise to a conflict of interest.
10. Those responsible for approving payments from an estate to an office holder or their associates should be provided with sufficient information to enable them to make an informed judgement about the reasonableness of the office holder's requests.
11. Disclosures by an office holder should be of assistance to creditors and other interested parties<sup>1</sup> in understanding what was done, why it was done, and how much it cost.

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<sup>1</sup> "other interested parties" means those parties with rights pursuant to the prevailing insolvency legislation to information about the office holder's receipts and payments. This may include a creditors' committee (or the Court or a court reporter), the members (shareholders) of a company, or in personal insolvency, the debtor, commissioner or the Accountant in Bankruptcy.

12. Information provided by an office holder should be presented in a manner which is transparent, consistent throughout the life of the appointment and useful to creditors and other interested parties<sup>1</sup>, whilst being proportionate to the circumstances of the appointment.

## **KEY COMPLIANCE STANDARDS**

### **Provisions of general application**

13. An office holder should disclose:
- a) all payments, arising from an insolvency appointment to the office holder or their associates;
  - b) the form and nature of any professional or personal relationships between the office holder and their associates.
14. An office holder should inform creditors and other interested parties<sup>1</sup> of their rights under insolvency legislation. Creditors should be advised how they may access suitable information setting out their rights within the first communication with them and in each subsequent report. An insolvency practitioner is not precluded from providing information within pre-appointment communications (such as when assisting directors in commencing an insolvency process).
15. Where an office holder sub-contracts work that could otherwise be carried out by the office holder or their staff, this should be drawn to the attention of creditors and other interested parties<sup>1</sup> with an explanation of why it is being done, what is being done, and how much it will cost.
16. The key issues of concern to creditors and other interested parties<sup>1</sup> will commonly be:
- a) the work the office holder anticipates will be done and why that work is necessary;
  - b) the anticipated payment for that work;
  - c) whether it is anticipated that the work will provide a financial benefit to creditors, and if so what anticipated benefit (or if the work provides no direct financial benefit, but is required by statute);
  - d) the work actually done and why that work was necessary;
  - e) the actual payment for the work;
  - f) whether the work has provided a financial benefit to creditors, and if so what benefit (or if the work provided no direct financial benefit, but was required by statute).
17. When providing information about payments from an estate the office holder should do so in a way which clearly explains the key issues. Narrative explanations should be provided to support any numerical information supplied. Such an approach allows creditors and other interested parties<sup>1</sup> to better recognise the nature of an office holder's role and the work they intend to undertake, or have undertaken, in accordance with the key issues.
18. The following are not permissible as either remuneration or an expense:
- a) an expense or any other charge calculated as a percentage of remuneration;
  - b) an administration fee or charge additional to an office holder's remuneration;
  - c) the recovery of any overheads other than those absorbed in the charge out rates.

### **Provisions of specific application**

#### **Basis of remuneration**

19. The office holder should provide an indication of the likely return to creditors when seeking approval for the basis of their remuneration.
20. When approval for a set fee or a percentage basis is sought, the office holder should explain why the basis requested is expected to produce a fair and reasonable reflection of the work that the office holder anticipates will be undertaken. Where a set amount or a percentage basis is being used, an explanation should be provided of the direct costs included. The office holder should not seek to separately recover sums already included in a set amount or percentage basis fee and should be transparent in presenting any information.

21. When approval is sought on a time costs basis, an office holder should provide details of the minimum time units used and current charge-out rates, split by grades of staff, of those people who have been or that the office holder anticipates are likely to be involved in the time costs aspects of the case.
22. Where remuneration is sought on more than one basis, it should be clearly stated to which part of the office holder's activities each basis relates.
23. To provide creditors and other interested parties<sup>1</sup> with sufficient information to make an informed judgement, office holders should divide the narrative explanations into areas such as:
  - a) administration (including statutory reporting)
  - b) realisation of assets
  - c) creditors (claims and distribution)
  - d) investigations
  - e) trading (where applicable)
  - f) appointment specific matters (where applicable)
24. These are examples of common activities and not an exhaustive list. Alternative or further subdivisions may be appropriate, depending on the nature and complexity of the appointment and the bases of remuneration sought and/or approved. It is unlikely that the same divisions will be appropriate in all appointments and an office holder should consider what divisions are likely to be appropriate and proportionate in the circumstances of each appointment.
25. This statement does not mandate any particular fee basis. An insolvency practitioner's business model may influence the fee basis they choose. However, whatever the business model, the insolvency practitioner's commercial approach cannot override the principle that any work done for which payment is sought must be necessarily and properly undertaken in the context of an insolvency appointment.

## Expenses

26. Expenses are any payments from the estate which are neither an office holder's remuneration nor a distribution to a creditor or a member. Expenses also includes disbursements. Disbursements are payments which are first met by the office holder, and then reimbursed to the office holder from the estate.
27. Expenses are divided into those that do not need approval before they are charged to the estate (category 1) and those that do (category 2).
  - Category 1 expenses: These are payments to persons providing the service to which the expense relates who are not an associate of the office holder. Category 1 expenses can be paid without prior approval.
  - Category 2 expenses: These are payments to associates or which have an element of shared costs. Before being paid, category 2 expenses require approval in the same manner as an office holder's remuneration. Category 2 expenses require approval whether paid directly from the estate or as a disbursement.
28. When seeking approval of category 2 expenses, an office holder should explain for each expense the basis on which the expense is being charged to the estate.
29. Any shared or allocated payments incurred by the office holder or their firm are to be treated as category 2 expenses and approval sought before payment. This is irrespective of whether the payment is being made to an associate, because the office holder will be deciding how the expenses are being shared or allocated between insolvency appointments. Requiring approval of these payments enables those who are approving the expenses to confirm that the approach being taken by the office holder is reasonable.

30. If an office holder has obtained approval for the basis of category 2 expenses, that basis may continue to be used in a sequential appointment where further approval of the basis of remuneration is not required, or where the office holder is replaced.

### **Reports to creditors and other interested parties**

31. Any disclosure by an office holder of payments should be of assistance to those who have a financial interest in the level of payments from an estate in understanding what was done, why it was done, and how much it costs.
32. Reports to creditors and other interested parties<sup>1</sup> should include a narrative update in respect of the office holder's activity during the period being reported upon, using consistent divisions for each part of the work reported upon, as far as possible.
33. When reporting payments during a period, the office holder should use a consistent format throughout the appointment and provide figures for both the period being reported upon and on a cumulative basis.
34. An office holder should endeavour to use consistent divisions throughout the appointment. The use of additional categories or further division may become necessary where a task was not foreseen at the commencement of the appointment.
35. Requests for additional information about payments should be viewed upon their individual merits and treated by an office holder in a fair and reasonable way. The provision of additional information should be proportionate to the circumstances of the appointment.

### **Pre-appointment costs**

36. Where recovery of pre-appointment costs is expressly permitted by statute and approval is sought from creditors for payment from the estate of these costs, disclosure should follow the principles and standards contained in this statement.

### **Provision of information**

37. In order to facilitate information requests under statute or to support the reporting of the office holder's remuneration, time recording systems used by office holders should record time in units of not greater than six minutes for each grade of staff used.
38. Where realisations are sufficient for creditors to be paid in full with interest, the creditors will not have the principal financial interest in the level of payments from the estate. Once this has been established by the office holder, they should provide the beneficiaries of the anticipated surplus, on request, with information in accordance with the principles and standards contained in this statement.
39. When an office holder's appointment is followed by the appointment of another office holder, whether or not in the same proceedings, the prior office holder should provide the successor with information in accordance with the principles and standards contained in this statement. This is in addition to any statutory obligations imposed on an office holder to provide information.

**Effective Date: 1 April 2021**