STATEMENT OF INSOLVENCY PRACTICE 8

CONDUCT AT MEETINGS OF CREDITORS HELD PURSUANT TO SECTION 98 OF THE INSOLVENCY ACT 1986

INTRODUCTION

1. This statement of insolvency practice is one of a series issued by the Council of the Society with a view to harmonising the approach of members to questions of insolvency practice. It should be read in conjunction with the Explanatory Foreword to the Statements of Insolvency Practice.

2. The statement has been prepared for the sole use of members in connection with liquidations of companies registered in England and Wales. Members are reminded that SPI Statements of Insolvency Practice are for the purpose of guidance only and may not be relied upon as definitive statements. No liability attaches to the Council or anyone involved in the preparation or publication of statements of insolvency practice.

3. This statement concentrates on creditors' meetings held under section 98 of the Insolvency Act 1986 (IA 1986), and does not purport to cover the practice to be adopted in respect of all creditors' meetings. Throughout this statement the member who has received instructions from the company's directors to advise in relation to the convening of the creditors' meeting will be referred to as the "advising member". An advising member is reminded that he must have regard to the relevant primary and secondary legislation; and that if he intends seeking nomination as liquidator he must be qualified to act as an insolvency practitioner in relation to the company.

4. All members and their staff should conduct themselves in a professional manner at all meetings of creditors.

Instructions to convene meeting

5. It is the responsibility of the company's directors to convene the creditors' meeting and to ensure that arrangements are made for the meeting to be held in accordance with current legislation. The advising member must therefore satisfy himself that the directors are aware of their responsibilities. He should also obtain written instructions from the Board of Directors which clearly define the matters on which he is to advise.

6. If the advising member receives instructions which would require him to act in a manner materially contrary to the statements of insolvency practice, he should only accept those instructions after careful consideration of the implications of acceptance in that particular case. Where the directors act contrary to the guidance contained in this statement the advising member may be called upon to show that the directors' actions were undertaken either without his knowledge or against his advice.

7. A member who is unable to accept an appointment as liquidator of a company because he or his firm has had a continuing professional relationship with the company during the preceding three years may

act as an advising member. However he should only do so after careful consideration of the implications of so acting in the light of his professional body's most recent guide to professional ethics.

8. A member who is asked to act as advising member in relation to any company should not agree to act unless he is satisfied that he is competent to provide the level of advice needed by the company in question.

9. It is most undesirable that shareholders should pass a resolution for the winding up of a company unless a liquidator is also appointed and accordingly no member should accept instructions to act as advising member unless he has good grounds for believing that such appointment will be made. If, having accepted instructions, the advising member concludes that although a winding up is desirable, a voluntary winding up is inappropriate, he should advise the directors and shareholders that steps leading to a compulsory winding up should be taken. Such a situation could arise where a liquidator is unlikely to be appointed under the voluntary winding up, or where there is a strong case in favour of the liquidation commencing before a meeting of shareholders can be held.

10. Where any person is entitled to appoint an administrative receiver for the company the member should normally advise the company to inform the debenture holder, prior to the notices being despatched, that a section 98 meeting is being convened.

Venue and time of meeting

11. When choosing the venue for the meeting, the advising member should not only fulfil the legal requirement to choose a place which is convenient for persons who are invited to attend, but he should also ensure that the accommodation is adequate for the number of persons likely to attend. Subject thereto, there is no objection to an advising member arranging for the meeting to be held at his own offices, provided that the requirements of Rule 4.60(1) are satisfied. He may charge the company for the use of the room if he wishes.

12. The date and time of the meeting should be fixed with the convenience of creditors in mind and having regard to their geographical location. As an example, notices of a meeting should not normally be despatched shortly before the commencement of a known holiday period with the meeting taking place immediately after the holiday.

13. It is for the advising member to advise the directors whether, in all the circumstances of a particular case, it would be preferable for the members' and creditors' meetings to be held on the same or different days.

Notice of the meeting

14. The notice convening the meeting should, where possible, be sent simultaneously to all classes of known creditors (including employees). The advising member should take all reasonable steps to ensure that the list of creditors provided by the directors is complete. Thus, for example, he should advise the company to identify and send notices to such creditors as hire purchase companies, lessors and former lessors and public utilities.

15. Although the legal requirement is to give a minimum of seven days' notice of the meeting, this is often insufficient time to enable creditors to arrange representation. For the convenience of creditors, the advising member should ensure that notices of the meeting are despatched as early as possible having regard to the circumstances of the case. This should be no later than the date when the notices are despatched to shareholders.

16. The notice advertised in the Gazette and local newspapers should appear as soon as possible and should not be deferred until shortly before the meeting. Also the advertised notice should meet the requirements of section 98(2) IA 1986.

17. Copies of the notice convening the shareholders' meeting should not be circulated to creditors. However, in order to reflect the provisions of section 183(2)(a) IA 1986, the notice of the creditors' meeting may contain a note of the convening of the shareholders' meeting.

18. A copy of the notice of the shareholders' meeting should be sent to all Under Sheriffs, Sheriff's Officers and County Courts known by the advising member to be interested in the company's affairs. In

addition, notice of the creditors' meeting should be sent where practicable to solicitors or debt collection agencies acting for creditors.

19. Documents in respect of acknowledgement of debt for VAT bad debt relief purposes should not be issued with the notice of the creditors' meeting unless the company is already in liquidation.

20. Section 98 IA 1986 requires that at least seven days' notice of the creditors' meeting shall be given. Occasions may arise when for the general benefit of creditors, a liquidator can be appointed before the day fixed for the creditors' meeting. Where the company is to be placed in liquidation and the creditors' meeting is held later, the advising member should, if possible, ensure that the secretary or a director of the company signs the notices of the creditors' meeting before the resolution to wind up is passed by the shareholders.

Provision of information prior to creditors' meeting

21. Where the directors have decided to arrange for an authorised insolvency practitioner to provide information to creditors under section 98(2)(a) IA 1986, the creditors are to be given "such information concerning the company's affairs as they may reasonably require". The information which it is reasonable to request will include information contained in the Statement of Affairs and the list of creditors, when available. Requests for information need not be made in writing. However, oral requests should be treated with caution and information should not be supplied unless the caller can show that he is a creditor or a representative of a creditor. The advising member may decline to comply with a particular request for information if he considers that:

(a) it is unreasonable to expect him to be in a position to supply such information within the time remaining before the meeting; or

(b) the information requested should remain confidential on the grounds that its release would be prejudicial to the company or its creditors.

22. If the directors have decided to make a list of creditors available for inspection under section 98(2)(b) IA 1986, the advising member should take steps to ensure that:

(a) the list provides details of the names and addresses of all known creditors but not necessarily the amounts due to them;

(b) the names are arranged in alphabetical order;

(c) it is available at least between the hours of 10 am and 4 pm on the two business days before the meeting;

(d) sufficient copies are available for inspection to avoid undue delays to creditors' representatives; and

(e) the place where the list is to be made available is, in all the circumstances, reasonably convenient for creditors.

Proxies

23. The forms of proxy accompanying the notice should conform to the Rules and should incorporate the name of the company and the date of the meeting before despatch in order to reduce the possibility of errors by creditors in completing the forms. The proxy must not be sent out with the name or description of any other person inserted on it.

24. Proxies to be used at the meeting are valid only if they are lodged by the time stated in the notice convening the meeting to the place specified in the notice. It should be noted that the Department of Trade and Industry is of the opinion that faxed proxies are not valid and Official Receivers do not accept them for meetings convened by them.

25. Proxies which are lodged out of time should be treated as invalid. Proxies which are incorrectly completed in a material way will be invalid. There is a requirement for proxies to be signed by the principal or by a person authorised by him, in which case the nature of the authority must be stated.

Proxies which are unsigned or which do not explain the authority under which they are signed will, therefore, be invalid. However, proxies should not be rejected simply because of a minor error in their completion provided:

(a) the form of proxy sent with the notice of the meeting (or a substantially similar form) has been used;

(b) the identity of the creditor and the proxy holder, the nature of the proxy holder's authority and any instructions given to the proxy holder are clear.

26. When advising the chairman of the meeting on the validity of proxies, a member should bear in mind that he has a personal interest if he has been appointed liquidator at the shareholders' meeting and seeks to retain office following the creditors' meeting or intends to seek appointment as liquidator at that meeting. Where circumstances so demand, he should suggest prior to the meeting that the chairman takes advice on the validity of proxies from an independent source, for example the company's solicitors.

27. There is no requirement for proxies which are considered invalid to be returned to the creditors who have lodged them.

Proofs of debt

28. Creditors may submit proofs at any time before voting, even during the course of the meeting itself. The admission or rejection of proofs for voting purposes is the responsibility of the chairman of the meeting. A proof should be accepted as valid for voting purposes, provided it identifies both the creditor and the amount claimed by him with sufficient clarity. The amount for which the chairman should be advised to admit the proof for voting purposes should normally be the lower of:

(a) the amount stated in the proof; and

(b) the amount considered by the company to be due to the creditor. The advising member may assist the chairman to decide the amounts for which claims should be admitted but if he intends to seek appointment as liquidator he should bear in mind that his own personal interests might create a conflict, in which case the chairman should be advised independently.

The amount for which the proof is admitted for voting purposes should be endorsed on it and in most instances it is expected that, prior to the meeting the chairman will do this.

Availability of proxies and proofs for inspection

29. Any person entitled to attend the meeting may inspect the proxies and proofs, either immediately before or during the meeting. Notwithstanding that a form of proxy submitted is ruled by the chairman to be invalid or a proof is rejected in whole or in part these documents should be made available for inspection.

Attendance at the creditors' meeting

30. A liquidator appointed by the shareholders before the creditor's meeting takes place and whose appointment has been certified by the chairman of the shareholders' meeting before the creditors' meeting, is required to attend the meeting of creditors personally. He must report to the meeting on any exercise of his powers under sections 112, 165 or 166 IA 1986. Such attendance is required even if the shareholders' appointment was made only shortly before the creditors' meeting. He must also attend any adjourned meeting. Where the shareholders have appointed joint liquidators, both should personally attend the subsequent creditors' meeting.

31. One of the directors of the company will have been nominated to act as chairman of the meeting and he must attend. In addition, the advising member should consider whether any other director or employee of the company will be able to provide information which is relevant to the meeting and if so, he should advise that the relevant notice to attend be served.

32. Creditors and their authorised representatives are entitled to attend. In addition, a person who holds himself out as representing a creditor should, in the absence of evidence to the contrary, be allowed admittance and to raise questions, but he may be unable to vote.

33. The chairman of the meeting should be advised that he must decide whether to allow any third parties, such as shareholders, the press or the police, to attend, after taking into account the views of the creditors present.

Information to be provided to the meeting

34. The advising member should ensure that a summary or a copy of the directors' sworn Statement of Affairs is handed to all those attending the meeting. This summary will normally be expected to include a list of the names of the major creditors and of the amounts owing to them. Sufficient copies of the full list of creditors should be available to facilitate its inspection by those attending the meeting. The meeting should be told that the sworn Statement of Affairs is available for inspection at the meeting.

35. Information to be given to the meeting should include:

(a) details of any prior involvement with the company or its directors by the advising member or, if a different person, the proposed liquidator;

(b) a report on the previously held shareholders' meeting, stating the date the notice of the meeting was issued, the date and time that the meeting was held and, if it was held at short notice, the reasons therefor and the fact that the required consents were received. The resolutions passed at the meeting should be reported and if the liquidator has not yet consented to act, that fact should be stated. If the shareholders' meeting was adjourned without a resolution for voluntary winding up being passed, there should be reported:

(i) the date and time to which the meeting had been adjourned; and

(ii) the fact that any resolutions passed at the section 98 meeting will come into effect if and when the winding up resolution is passed;

(c) the date on which the directors gave instructions for the meeting of creditors to be convened and the date on which the notices were despatched;

(d) the details of the costs paid by the company or on its behalf in connection with:

(i) the preparation of the Statement of Affairs; and

(ii) the organisation of the creditors' meeting;

the details for each category should include the name of the recipient, the amount, and the source of the payment;

(e) a brief report on the company's relevant trading history which should include:

(i) date of incorporation and registered number;

(ii) names of all persons who have acted as directors of the company or as its company secretary at any time during the three years preceding the meeting;

(iii) names of major shareholders together with details of their shareholdings;

(iv) details of all classes of shares issued;

(v) nature of the business conducted by the company;

(vi) location of the business and the address of the registered office;

(vii) details of parent, subsidiary, or associated companies;

(viii) the directors' reasons for the failure of the company;

(ix) extracts from any audited or, if none, draft accounts produced for periods covering the previous three years or for any earlier period which is relevant to the failure of the company. As a minimum, the extract should include details of turnover, net result, directors' remuneration, shareholders' funds, dividends paid, reserves carried forward at year end and the date of the auditors' report and any qualifications therein;

(x) a deficiency account reconciling the position shown by the most recent balance sheet to the deficiency in the Statement of Affairs;

(xi) the names and professional qualifications of any valuers whose valuations have been relied upon for the purpose of the Statement of Affairs, together with the basis or bases of valuation;

(xii) such other information as the advising member considers necessary to give the creditors a proper appreciation of the company's affairs;

(f) if the company is in receivership, the meeting should be provided with a report on the conduct of the receivership to date, including a summary of the receiver's receipts and payments, unless disclosure would be in breach of the receiver's duty to the debenture holder, for example where market sensitive information was involved. In such circumstances, a receipts and payments account only should be provided, together with an explanation of the circumstances which prevent further information being given. Where any member is an authorised practitioner and is an administrative receiver of a company whose shareholders pass a resolution for voluntary winding up, that member should assist the advising member by providing this information, and also provide such information to any other licensed practitioner who may be acting in the capacity of advising member;

(g) an explanation of the contents of the Statement of Affairs.

36. The advising member should take all practicable steps to ensure that there are available to hand to those attending the meeting a written summary of the more important statistical information which is contained in a report given orally to the meeting.

37. In assisting in the preparation of a report to be presented to the meeting, the advising member may rely upon information contained in the company's accounts and records and also upon information provided by directors and employees. He is not expected to conduct an investigation to ensure that the information is accurate, but should provide the creditors with any material conflicting information of which he is aware.

Conduct of the meeting

38. Although the chairman of the meeting must be a director of the company and his identity must be made clear at the outset, there is no reason why the meeting should not be conducted by the advising member or some other professional adviser. It should be explained to the meeting that, although this is being done on behalf of the directors, the report is their responsibility and is based upon information supplied by them. The chairman is the arbiter on all procedural matters but may seek advice from the advising member.

39. Creditors and their representatives attending the meeting are required to sign an attendance list. This list should be made available for inspection to anyone attending the meeting. In addition, any creditor or creditor's representative wishing to speak, ask questions, or make a nomination, should be asked to identify himself and the creditor he represents.

40. Creditors and their representatives should be given the opportunity to ask questions. Whilst every effort should be made to give a reasonable answer to such questions within the context of the meeting, the chairman may be advised to refuse a question to be put if, for example:

- the questioner refuses to give the name of the creditor he represents and his own name or that of his firm;
- the questioner does not claim to be or to represent a creditor;

or may decline to answer it if, for example,

- the answer could prejudice the successful outcome of the liquidation or creditors' interests;

- the answer could be construed as slanderous if subsequently proved incorrect.

The chairman should be advised to state the grounds on which he refuses to allow a question. Creditors are entitled to information on the causes of the company's failure but it is not appropriate for a detailed investigation of the company's affairs to be undertaken at a meeting of creditors.

41. Nominations for the appointment of a liquidator should be requested before any vote is taken. The holder of a proxy requiring him to vote for the appointment of a particular liquidator is required to nominate that person, and it is therefore possible that the chairman or any other holder of such proxies may need to make more than one nomination.

42. The chairman must accept all nominations and put them to the meeting, unless he has good grounds for supposing that the person nominated is not qualified to act as an insolvency practitioner in relation to the company, or is not prepared to act as liquidator if appointed.

43. The procedure to be followed when voting for the appointment of a liquidator should be explained to the meeting. It is acceptable in the first instance for a vote to be taken on an informal show of hands and if the result is accepted by all interested parties, the chairman of the meeting may conclude that a resolution has been passed. If a formal vote becomes necessary it should be conducted by stating the names of all those nominated and by the issue of voting papers on which those wishing to vote will be required to show their name, the name of the creditor they are representing, the amount of the creditor's claim and the name of the nominated person for whom they wish to vote. It is the advising member's responsibility to ensure that voting papers are available.

44. When all votes have been counted, the chairman should announce the result to the meeting, giving details of the total value of votes cast in favour of each nomination. He should also give details of votes which have been rejected, either in whole or in part, and should also state which nomination those creditors supported and the reasons for the rejection.

45. An absolute majority is required and if the first poll is not conclusive, the nominee receiving the least votes is excluded on the next poll where no other nominee has withdrawn. In the event of the withdrawal of at least one nominee, then the nominee with the least votes remains in the next poll. The same procedure should be followed in all successive polls.

46. The meeting should always be invited to establish a liquidation committee. If it wishes to do so, the meeting should be advised of any shareholders' nominations to the committee and of the voting procedure which will be followed. It is accepted that, when the constitution of the committee is not contentious, a resolution may be passed on a show of hands and may also appoint a committee *en bloc*. If there are more than five nominations for appointment to the liquidation committee, it is recommended that each creditor should be issued with a voting paper (the provision of which is the responsibility of the advising member) on which he should enter his own name, the name of the creditor he represents and the amount of his claim. Each creditor should be allowed to vote for up to five members of the committee and in doing so a creditor may vote for his own appointment.

47. When declaring the result the chairman should follow the same procedures as those outlined in paragraph 44 above.

48. Voting papers should be made available for inspection by any creditor or creditor's representative whose claim has been admitted for voting purposes at any time during the meeting or during normal business hours on the business day following the meeting.

49. Once the meeting has been closed, minutes should be prepared setting out details of the decisions reached and the chairman should be asked to sign them. The minutes should then be kept with the liquidation papers.

Provision of information to liquidator

50. In instances where the advising member has not been appointed to be the liquidator of the company, he must provide reasonable assistance to the liquidator. This will include handing over such of the company's books and papers as are held by him, together with documents he has received in relation to the meeting of creditors (eg proofs, proxies, Statement of Affairs, shareholders' resolutions, attendance lists, and minutes of the creditors' meeting). It is expected that this information will be handed over as quickly as possible and, in any event, within seven days of the conclusion of the creditors' meeting. Likewise, all sums received by the advising member from the company or on its behalf, less any proper disbursements which he has made, duly vouched, should also be handed over.

Report to creditors following the meeting

51. The liquidator shall send to creditors and contributories a report of the proceedings at the meeting, together with a copy or summary of the Statement of Affairs, drawing creditors' attention to the possibility of their claiming VAT bad debt relief, and if appropriate in light of VAT bad debt relief legislation, enclosing a claim form. If a list of creditors is not supplied, the liquidator should undertake to supply a copy to any creditor on request. The report on the meeting should include the name and address of the liquidator and the names of creditors appointed to the liquidation committee. It is not necessary to supply a detailed report on all that transpired at the meeting, but matters of particular relevance should be mentioned. Creditors should be asked to bring the liquidator's attention to any matters of which they consider he should be aware.

Solicitation to obtain nomination

52. Members are reminded of the provisions of section 164 IA 1986 (corrupt inducement), Rule 4.150 of the Insolvency Rules 1986 (solicitation) and his professional body's most recent guide to professional ethics.