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## STATEMENT OF INSOLVENCY PRACTICE 3.3 (SCOTLAND)

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### TRUST DEEDS

#### INTRODUCTION

1. A trust deed is a voluntary deed granted by a debtor which conveys all or part of their estate to a trustee to be administered for the benefit of creditors and to effect the settlement of debts in whole or in part. A trustee may seek to make a trust deed protected by following the relevant statutory procedures. Where a debtor decides to grant a trust deed, an insolvency practitioner will be central to the process. The particular nature of an insolvency practitioner's position renders transparency and fairness in all dealings of primary importance.
2. It is not competent to have a conjoined trust deed signed by more than one party. Individual trust deeds are required for each separate legal person or entity. Partnerships, trusts and corporate and unincorporated bodies may enter into trust deeds.
3. Once signed, a trust deed is a binding obligation between debtor and trustee and cannot be revoked.
4. An insolvency practitioner should exercise judgement and consider the extent to which these principles and procedures apply where there is no intention that a trust deed should become protected.

#### PRINCIPLES

5. An insolvency practitioner should differentiate clearly between the stages and roles that are associated with a trust deed (these being the provision of initial advice, assisting with the execution and gaining protection of the deed as appropriate and acting as trustee) and ensure that they are explained to the debtor and the creditors.
6. An insolvency practitioner should act professionally and with objectivity in each role associated with the trust deed. Failure to do so might prejudice the interests of both the debtor and the creditors and is likely to bring the insolvency practitioner and the profession into disrepute.
7. An insolvency practitioner should ensure that information and explanations about all potential debt relief solutions available are provided to the debtor. This is to put the debtor in a position to make an informed judgement about whether a trust deed is an appropriate solution. The insolvency practitioner should ensure that the debtor has adequate time to think about the consequences and alternatives before signing a trust deed.

8. An insolvency practitioner should ensure that the explanation of all potential debt relief solutions is tailored to the circumstances of the debtor, detailed and documented.
9. An insolvency practitioner should explain to the debtor, the debtor's responsibilities (including disclosure requirements), the insolvency practitioner's role before and during a trust deed, and the process and consequences of a trust deed. At all stages of the process, communications with the debtor should be in a manner that is clear and understandable to the debtor as far as reasonably practicable.
10. Where a trust deed is to be proposed, an insolvency practitioner should be satisfied that it is achievable and that a fair balance is struck between the interests of the debtor and their creditors.
11. An insolvency practitioner's reports should provide sufficient information to enable creditors to make informed decisions in relation to the trust deed and should report accurately in a manner that is clear and useful.

## **KEY COMPLIANCE STANDARDS**

12. Certain key compliance standards are of general application, but others will depend on whether the insolvency practitioner is acting as adviser or trustee.
13. Certain key compliance standards will vary dependant on the trust deed being protected or not. Key compliance standards applicable to protected trust deeds are prefaced [PTD]. Key compliance standards which are applicable to unprotected trust deeds are prefaced [UTD]. Key compliance standards without being prefaced [PTD] or [UTD] are applicable to both.

## **STANDARDS OF GENERAL APPLICATION**

### **Advice involving multiple parties**

14. Where an insolvency practitioner is consulted by two individuals who are married, in a civil partnership, cohabiting or otherwise have a relationship which could give rise to a conflict of interest, the practitioner should ensure that each is assessed individually and offer advice based on each individual's own circumstances. Where an insolvency practitioner has been consulted by two or more parties and considers that there is a conflict of interest in the insolvency practitioner advising both or all parties, the insolvency practitioner should consider which appointment, if any, it is appropriate to accept.

### **Advice to the debtor**

15. An insolvency practitioner should have procedures in place to ensure that the information and explanations provided to the debtor at each stage of the process (that is, assessing the options available, and then proceeding with a trust deed) are comprehensible to the debtor and designed to set out clearly:
  - a) the advantages and disadvantages of each available option;
  - b) the key stages and the roles of the adviser and the trustee;

- c) whether the debtor will require additional assistance<sup>1</sup> which will not be provided by any trustee appointed, including the likely cost of that additional assistance, if known;
  - d) the likely duration of the trust deed and how this might be affected by any agreement concerning any heritable property;
  - e) any circumstances which might affect the duration of the trust deed and the potential impacts of any delays, complications or changes to the original trust deed terms;
  - f) the likely costs of implementation and how realisations will be applied to them;
  - g) what is required of the debtor, including full, accurate and proper disclosure by the debtor;
  - h) explanation of any areas of concerns about what the debtor has reported and of the consequences if the debtor fails to comply with their obligations;
  - i) the consequences of signing a trust deed;
  - j) [PTD] the rights of challenge to the trust deed becoming protected, the likelihood of the trust deed becoming protected and the potential consequences of it not becoming protected; and
  - k) what might happen if the trust deed is not successfully completed together with an assessment of the risk of not completing.
16. An Insolvency practitioner should minimise generic explanations and instead provide bespoke advice tailored to the debtor's circumstances.
17. An insolvency practitioner should ensure that there are procedures in place to ensure that:
- a) any interest which the debtor has in heritable property is identified and quantified at the earliest opportunity
  - b) it is explained to the debtor, and the debtor understands, the impact of a trust deed on their interest in heritable property and
  - c) an agreed approach to the realisation of any such interest in heritable property is reached prior to the trust deed being entered into by the debtor.
18. An insolvency practitioner should undertake sufficient due diligence on any referrer to identify whether they have advised the debtor and, if so, whether they are required to be authorised by the Financial Conduct Authority (FCA) for debt counselling or are able to rely on an exclusion or exemption in relation to the debt advice. The referrer's authorisation status should be evidenced, or details sufficiently documented and retained in each case. In each case where advice was given by the referrer any contractual arrangement between them and the insolvency practitioner should extend to the insolvency practitioner maintaining access to all the referrer's communications with the debtor, including call recordings or detailed written notes where calls were not recorded and transcripts of webchats or other communications where undertaken. Any shortcomings in the advice, including in relation to the

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<sup>1</sup> For example, support for a vulnerable individual

referrer's authorisation, should be remedied by the insolvency practitioner giving appropriate advice themselves.

### **Meeting the debtor**

19. A meeting should always be offered to the debtor. At each stage of the process, an assessment should be made as to whether an in-person meeting (whether a physical meeting or using conferencing technology) with the debtor is required, depending on factors such as the debtor's understanding and vulnerability, and the circumstances and complexity of the case<sup>2</sup>. All these meeting considerations and arrangements should be evidenced, documented and retained on file.
20. If the debtor is carrying on a business the insolvency practitioner should assess whether it is necessary to visit the business premises as part of the information gathering and planning exercise.

### **Assessment**

21. An insolvency practitioner should be satisfied, at each stage of the process, that there are procedures in place to ensure that a full assessment is made of the debtor's personal and financial circumstances. The assessment should be documented contemporaneously to record the debtor's circumstances and, if this is conducted by way of a telephone or video-conference call an electronic recording or, if none was made, a note of the call should form part of the records and be retained. The assessment should include the following:
  - a) the solutions available and their viability;
  - b) the debtor's understanding of the process, and commitment to it;
  - c) whether the debtor is subject to any factors that make them vulnerable and, if so, any necessary adjustments and, subject to the debtor's consent, an accurate record of the vulnerabilities disclosed;
  - d) whether the debtor is likely to be able to fulfil their obligations under the terms of the trust deed for its duration;
  - e) the likely attitude of any key creditors and the general body of creditors, in particular as to the fairness and balance of the trust deed terms;
  - f) [PTD] whether a trust deed would have a reasonable prospect of becoming protected;
  - g) whether the trust deed has a reasonable prospect of successfully completing; and
  - h) whether a moratorium is needed.

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<sup>2</sup> Vulnerability guidance issued by the Recognised Professional Bodies is a benchmark for those providing debt advice to consumers who might have vulnerabilities.

## **Documentation**

22. An insolvency practitioner should be able to demonstrate that proper steps have been taken at all stages of the trust deed by maintaining records of:

- a) discussions with the debtor, including the information and explanations provided, the options outlined, and the advantages and disadvantages of each, and an explanation of the role of the trustee;
- b) comments made by the debtor, and the debtor's preferred option;
- c) any discussions with creditors or their representatives;
- d) consideration of the impact of the trust deed on any third parties, including any joint creditors, guarantors or co-owners of property;
- e) the way in which any issues raised have been resolved; and
- f) the debtor being made aware of their right to make a complaint via the Insolvency Complaints Gateway.

If the insolvency practitioner considers it appropriate in the circumstances, or a request is made by the debtor, summaries of these discussions should be sent to the debtor.

## **Dealing with Assets and Contributions**

23. A trustee should follow the Accountant in Bankruptcy's guidance notes on trust deeds and sequestrations when dealing with assets. The trustee should prepare a comprehensive schedule of non-exempt assets in which the debtor has an interest, together with explanatory notes. The trustee should take steps to ascertain the value of the assets conveyed to the trustee.
24. If any asset is not going to be realised, or not realised in full, the reasons for this should be clearly explained in writing to creditors when the trust deed is presented to them for consideration for protection, or at any other time that such a decision is taken.

## **STANDARDS OF SPECIFIC APPLICATION**

### **Initial advice**

25. It is recommended that the debtor be interviewed using a similar style of questionnaire as is used in sequestration proceedings. The questionnaire and appendices should be signed and dated by the debtor.

26. An insolvency practitioner could be asked to give advice on a debtor's financial difficulties and the way in which those difficulties might be resolved. The insolvency practitioner should have procedures in place to ensure, taking account of the personal circumstances of the debtor, that:
- a) the role of adviser is explained to the debtor, namely providing advice that strikes a fair balance between the interests of the debtor and their creditors, in the context of identifying an appropriate and workable solution to the debtor's financial difficulties;
  - b) sufficient information is obtained to make a preliminary assessment of the solutions available and their viability;
  - c) the obligations of the debtor to cooperate and provide full disclosure are explained;
  - d) the insolvency practitioner is able to form a view of whether the debtor has a sufficient understanding of the situation and the consequences of signing a trust deed, and whether there will be full cooperation in seeking a solution;
  - e) when considering possible solutions, account is taken of the impact of each solution on the debtor and their assets, including any dwelling house (the debtor's sole or main residence over which there is a secured loan), and on any third parties;
  - f) consent is obtained, where appropriate, from any third-party individuals whose income is to be shown as included in the income and expenditure statement or who have an interest in any assets included in the trust deed; and
  - g) the debtor is provided with an explanation of all the options available, the advantages and disadvantages of each, and the likely costs of each so that a solution suited to the debtor's circumstances can be identified.
27. An Insolvency practitioner should avoid using generic advantages and disadvantages and should use the details provided by the debtor to provide bespoke information tailored to the debtor's circumstances. This explanation should be confirmed to the debtor in writing no later than the trust deed being received by the debtor for signing.
28. [PTD] An insolvency practitioner should ensure that the debtor is advised the dwelling house can be excluded from the trust deed and the trust deed can still qualify for protection. The insolvency practitioner should also ensure that the debtor is advised of the risks involved in excluding the dwelling house from the trust deed, and in particular, that if there is equity in the dwelling house that unsecured creditors may not agree to the trust deed becoming protected, and the implications thereof.
29. [PTD] Where heritable property is to be included in the trust deed an insolvency practitioner should ensure that the debtor is clearly advised that all such heritable property, including the debtor's home unless excluded, is conveyed by the trust deed. The debtor should also be advised that the full equity in the property is conveyed to the trustee and that the equity requires to be realised for the benefit of the creditors.

30. [PTD] The debtor should be asked to sign a separate statement confirming their understanding of the implications of and their decision in respect of heritable property being included or excluded from the trust deed. A copy of the statement should be sent to the debtor and one held on the case file.

### **Preparing for a trust deed**

31. When preparing for a trust deed, an insolvency practitioner should have procedures in place to ensure, taking account of the personal circumstances of the debtor and the nature of the debtor's finances, that:
- a) the debtor has had, or receives, the appropriate advice in relation to a trust deed, including other options which have been discussed and discounted, and this advice is confirmed in writing if the insolvency practitioner or their firm has not done so before;
  - b) the debtor's obligations, including to cooperate and provide full and accurate disclosure throughout the initial process and the duration of the trust deed, are explained alongside the consequences of not doing so.
  - c) the insolvency practitioner forms a view and records whether the debtor has a sufficient understanding of the process of a trust deed, its likely duration, and the consequences, including that it will involve a lengthy professional relationship with the trustee and whether there will be full cooperation and commitment from the debtor;
  - d) sufficient information is obtained to make an assessment of a trust deed as a solution including consideration of factors such as:
    - i.) the measures taken by the debtor, if any, to avoid recurrence of their financial difficulties
    - ii.) the likely expectations of creditors and
    - iii.) the effect of the trust deed on any third parties where their view or circumstances might have an effect on the viability of the trust deed.
  - e) proportionate enquiries are undertaken into the debtor's assets and liabilities and is evidenced on the file;
  - f) the debtor's and any third-party contributor's identity is checked and verified, and all evidence is kept on the file.

### **Information for creditors**

32. An insolvency practitioner should provide creditors with:
- a) sufficient information for creditors to understand the debtor's financial and trading history (where appropriate) including:
    - i.) the background and financial history of the debtor;
    - ii.) why the debtor has become insolvent;

- iii.) any other attempts that have been made to address the debtor's financial difficulties and the alternative options considered, both outside and within formal insolvency procedures, with specific reasons for not adopting them.
  - b) a comparison of the estimated outcome of the trust deed and the estimated outcome if the trust deed does not proceed;
  - c) where relevant, information to support any profit and cash projections, subject to any commercial sensitivity;
  - d) an explanation of the role and powers of the trustee;
  - e) details of any discussions which have taken place with key creditors.
  - f) an explanation of how debts are to be valued for voting purposes, in particular where the creditors include long-term or contingent liabilities;
  - g) the identity of the source of any referral of the debtor, whether the source undertook the regulated activity of debt counselling, and if so whether the source is FCA authorised or exempt in relation to debt counselling, and details of any prior relationship between the source and the debtor or the insolvency practitioner.
  - h) where any payment has been made or is proposed to be made to a referrer, the amount and reason for that payment (including how it represents value for the work/services provided to the insolvency practitioner);
  - i) details of the amounts and source of other payments made, or proposed to be made, directly or indirectly to the trustee or their firms in connection, or otherwise, with the trust deed, and the reason(s) for the payment(s);
  - j) details of any direct or indirect payments made, or to be made to any third parties or associates in connection with the trust deed, together with a description of the goods or services provided and the reasons for all payments;
  - k) an explanation of how debts which are included in the trust deed will be treated should the trust deed not complete successfully and the debtor not be discharged from their debt;
  - l) the circumstances in which the trust deed may terminate, including what might happen to the debtor in such circumstances; and
  - m) any specifically identifiable risks regarding the viability of the trust deed.
33. Where creditors may need assistance in understanding the consequences of a trust deed, the insolvency practitioner shall signpost sources of help.



34. [PTD] In the initial circular to creditors the insolvency practitioner should provide clear and accurate information to enable creditors to decide whether or not to object to the trust deed becoming protected and should advise of the procedure for objections.
35. [UTD] In the initial circular to creditors, the insolvency practitioner should provide information on the anticipated cost to the estate of the trustee's fee for the period of the trust deed together with a statement of the assumptions made in producing the estimate

## **Trustee**

36. When acting as trustee, an insolvency practitioner should have procedures in place to ensure that:
  - a) the trust deed is supervised in accordance with its terms;
  - b) the progress of the trust deed is monitored;
  - c) any departures from the terms of the trust deed are identified at an early stage and appropriate action is taken promptly by the trustee;
  - d) any discretions conferred on the trustee are exercised where necessary, on a timely basis, and that exercise is reported at the next available opportunity;
  - e) enquiries by the debtor and creditors are dealt with promptly and documented;
  - f) full disclosure is made in reports of the cost of the trust deed, including the cost of any work carried out by third parties or associates of the trustee or their firm; and
  - g) if the costs of the trust deed have increased beyond previously reported estimates, this increase should be explained and reported at the next available opportunity and in any event no later than when the trustee is seeking their discharge.

## **Dealing with Heritable Property & other Assets**

37. The trustee should obtain evidence of property ownership or rental status of heritable property owned or occupied by the debtor.
38. If the debtor owns any heritable property, in whole or in part, the trustee should obtain a professional valuation.
39. The trustee's attention is drawn to the provisions in the Accountant in Bankruptcy's guidance notes relating to heritable property.
40. A trustee should try to reach agreement, as soon as possible, as to how the equity in heritable property will be realised. In realising the equity the trustee should aim to achieve the best return to creditors in the circumstances of the case. The trustee should record on the case file the reasons for their decisions in relation to the heritable property.
41. The trustee should consider seeking legal advice when dealing with an unequal split of a jointly owned heritable property.

42. If the trustee disposes of or abandons their interest in heritable property, and a formal disposition or other conveyance has not been executed, a letter should be issued to the debtor confirming that the property has been reconveyed to the debtor.

### **Contributions**

43. [UTD] An insolvency practitioner should assess the debtor's surplus income and take proportionate steps to verify the debtor's income and expenditure and agree in writing with the debtor the amount and frequency of any income contributions. Where the assessment of surplus income is not using the Common Financial Tool then this should be clearly explained in the initial circular to creditors together with a summary of the debtor's income and expenditure and a detailed explanation of why the contribution agreed is considered appropriate.

### **Third Party Payments**

44. Where any third party payments are to be paid, an insolvency practitioner should try to enter into an enforceable written agreement with the third party for payment. The insolvency practitioner should recommend that the third party obtains independent legal advice.
45. The trustee should advise the creditors that all or part of the payments are to be paid by a third party, whether an enforceable agreement has been entered into with the third party and if there is no enforceable agreement that if the third party fails to make payment, the third party cannot be forced to pay.

### **Trading**

46. If the debtor owns or has an interest in a business, the trustee should consider the manner in which they will deal with that business. The trustee should consider whether trading should continue and if so, on what terms.
47. Where the trustee decides to continue trading the debtor's business, such a decision should be supported by cash flow and trading forecasts. The trustee should be able to demonstrate the matters considered and that their actions are in the best interests of creditors. The trustee will be responsible for any ongoing trading of the debtor's business and should introduce appropriate controls. The trustee should be aware that they could be personally liable for loss incurred where they continue trading after the trust deed has been signed and as a result the value of the estate is diminished.

### **Meeting of creditors**

48. There is no statutory requirement to call a meeting of creditors. If however the trustee considers that it is in the interests of creditors such a meeting can be called.
49. The trustee should record in the Sederunt Book all requests by creditors to hold a creditors' meeting. If the trustee considers a meeting would be in the interest of creditors, a meeting should be convened. If a meeting is not convened the trustee should record in writing in the Sederunt Book the reason for their decision.

## **Accounting, reporting and remuneration**

50. The trust deed should set out the basis on which the trustee will be remunerated.
51. [UTD] The trustee should set out the basis and procedure for approval of remuneration and outlays and the rights of creditors to appeal.
52. [UTD] Where the trustee's fees have not been fixed the trustee should advise creditors of their right to have the accounts audited and fees fixed by the Accountant in Bankruptcy. The trustee should delay payment of the fee until 14 days after the issue of the report to creditors.
53. Where there is a fixed fee (including a percentage of contributions and/or realisations) approval of the trust deed is deemed to be approval of the fees. In fixed fee cases fees should not be taken until 14 days have elapsed since the issue of the relevant circular and in any event not before the expiry of the 5 week period for objections to the trust deed becoming protected. In all other cases, the notification to creditors of the trustee's estimated fee does not amount to approval of the fee and all fees should be properly approved in the course of the trust deed and in advance of being paid.
54. Where creditors were informed that the debtor had undertaken to pay regular contributions from income and payments equivalent to two consecutive months' contributions have not been received, without a formal payment break being agreed, the creditors should be informed of this in the next annual report. The creditors should be advised of the reasons for non-payment, what action the trustee has taken in respect of the missed contributions and the impact on the expected final return to creditors.
55. Copies of all written communications to creditors should be sent to the debtor.
56. [UTD] At the conclusion of a trust deed a final receipts and payments account should be sent to creditors and the debtor.

## **Distributions to creditors**

57. If the funds of the debtor's estate are sufficient, and it is practicable to do so, the trustee should pay a dividend to the creditors as early as possible. In such circumstances, a first dividend should be paid no later than 12 months after the date on which the trust deed is granted, with subsequent dividend periods of 3 months beginning with the end of the previous dividend period.
58. The funds of the debtor's estate are sufficient if, after deduction of the trustee's fees and outlays and making allowance for future contingencies, a dividend may be paid to the creditors amounting to at least 5 pence for each pound sterling of the debtor's debt admitted under the trust deed.
59. In considering whether it is practicable to pay a dividend at an early stage or with increased frequency, the trustee should consider the views of creditors as well as the financial viability of making the payments.

## **Trust deeds for entities**

### Partnership trust deeds

60. A partnership trust deed is not a joint and several version of an individual trust deed entered into by an individual. The principles and standards of compliance set out in this statement of insolvency practice should also be applied in relation to partnership trust deeds.
61. The trust deed is entered into by the partnership and requires the consent of all the existing partners for the trust deed to be granted. As such, the estate conveyed to the trustee is that of the partnership, not the estate of the partners as individual debtors, and does not extend to the partners' personal assets. Similarly, only the partnership's liabilities are included.

## **Ending of the trust deed**

### Protected trust deed achieving its purpose

62. [PTD] Where the trust deed contains provisions on bringing the trust deed to a close these should be followed in so far as they do not conflict with statutory provisions.

### Protected trust deed not achieving its purpose

63. [PTD] If the trustee considers the trust deed is not achieving its purpose the trustee should consider appropriate alternatives given the circumstances of the case and bearing in mind the interests of creditors.
64. [PTD] It is not appropriate to refuse to discharge a debtor because of circumstances beyond their control. If the trustee does not intend to make a statement that, to the best of the trustee's knowledge, the debtor has met their obligations in terms of the trust deed and co-operated with the administration of the trust, then the Accountant in Bankruptcy should be informed following the procedures set out in the Accountant in Bankruptcy's guidance notes.

### Trust deed failing to become protected

65. If the debtor's estate is subsequently sequestrated, the trustee should conclude the trust deed and seek their discharge from creditors. If the trustee is also appointed trustee in the subsequent sequestration steps should be taken to ensure that the Trust is terminated (see 67 and 68)
66. In a trust deed which has not become protected, there is no statutory procedure for bringing the trust deed to a close. It is normal practice for a receipt for the final dividend to incorporate a discharge of the trustee and a discharge of the debtor. Creditors who have not acceded to the trust deed have no requirement to grant a discharge to the debtor.

#### Ending of the Trust and subsequent sequestration

67. It is generally accepted where there is a subsequent procedure such as sequestration that the trust deed is suspended and may revive on completion of the other procedure. The trustee should therefore ensure that the style of trust deed used contains provisions for termination of the trust in appropriate circumstances and he should adhere to those provisions.
68. In view of the possibility of the trust reviving after the sequestration process has been completed the trustee should have processes in place to deal with such an eventuality.

#### Trust deed not completed but no further process.

69. If the trustee concludes that the terms of the trust deed will not be met: they should seek their own discharge and bring the trust deed to a conclusion.
70. [UTD] The trustee should consider whether to discharge the debtor. It is not appropriate to refuse to discharge a debtor because of circumstances beyond their control.

#### Trust deed contains provisions on termination

71. It is generally accepted that where the trust deed contains provisions on termination, such provisions if complied with will be effective in terminating the trust deed. trustees should ensure that the style of trust deed used contains provisions for ending the trust on sequestration and on final distribution.

***Effective date: 1 November 2023***

*This SIP applies to trust deeds signed on or after the effective date.*