STATEMENT OF INSOLVENCY PRACTICE 9
(ENGLAND AND WALES)
PAYMENTS TO INSOLVENCY OFFICE HOLDERS AND THEIR ASSOCIATES

INTRODUCTION

1. The particular nature of an insolvency office holder's position renders transparency and fairness in all dealings of primary importance. Creditors and other interested parties[1] with a financial interest in the level of payments from an insolvent estate should be confident that the rules relating to approval and disclosure of fees and expenses have been properly complied with.

2. This statement applies to all forms of proceedings under the Insolvency Act 1986.

PRINCIPLES

3. Payments to an office holder or their associates, and expenses incurred by an office holder, should be appropriate, reasonable and commensurate reflections of the work necessarily and properly undertaken.

4. Those responsible for approving payments to an office holder or their associates should be provided with sufficient information to make an informed judgement about the reasonableness of the office holder's requests. Requests for additional information about payments to an office holder or their associates, or about expenses incurred by an office holder, should be treated by an office holder in a fair and reasonable way. The provision of additional information should be proportionate to the circumstances of the case.

5. Information provided by an office holder should be presented in a manner which is transparent, consistent throughout the life of the case and useful to creditors and other interested parties, whilst being proportionate to the circumstances of the case.

KEY COMPLIANCE STANDARDS

PROVISIONS OF GENERAL APPLICATION

6. An office holder should disclose:

a) payments, remuneration and expenses arising from an insolvency appointment to the office holder or his or her associates;

b) any business or personal relationships with parties responsible for approving his or her remuneration or who provide services to the office holder in respect of the insolvency appointment where the relationship could give rise to a conflict of interest.

7. An office holder should inform creditors and other interested parties of their rights under insolvency legislation. Creditors should be advised how they may access suitable information setting out their rights (e.g. the R3 Creditor Insolvency Guide), 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).

1 "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 creditors' committee, the members (shareholders) of a company, or in personal insolvency, the debtor.

Comment [M1]: I'm still confused whether this SIP applies to MVLs! (2) refers to all IA proceedings but then the context throughout (e.g. here and 6a) is to insolvents. Perhaps it could be stated clearly whether MVLs are included or not.

Comment [M2]: It seems an unnecessary burden to apply this to ADRs and Recs, when appointors have their own ways of dealing with fees and reporting.

Comment [M3]: Whose first communication? The directors' or the IPs'?

Comment [M4]: This says nothing. Of course, the IP is not precluded from providing information in his pre-appointment communications; he can write whatever he likes (provided it's ethical)!

If this is an attempt to confirm that IPs can provide fee-related information in order that a resolution may be passed at the S98 meeting, it should say so, particularly as the context suggests that the "information" it is referring to is simply how to access the R3 website (not fees estimates etc.).

If (understandably) the JIC does not feel it can confirm that the Rules allow this, then I wonder why this sentence is here at all.

8. Where an office holder sub-contracts out work that could otherwise be carried out by the office holder or his or her staff, this should be drawn to the attention of creditors with an explanation of why it is being done.

KEY ISSUES

9. The key issues of concern to those who have a financial interest in the level of payments from the insolvent~~cy~~ estate will commonly be:

• the work the office holder anticipates will be done and why that work is necessary;

• the anticipated cost of that work, including any expenses expected to be incurred in connection with it;

• 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);

• the work actually done and why that work was necessary;

• the actual costs of the work, including any expenses incurred in connection with it, as against any estimate provided;

• 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);

When providing information about payments, fees and expenses to those with a financial interest in the level of payments from an insolvent estate, the office holder should do so in a way which facilitates clarity of understanding of these key issues. Such an approach allows creditors and other interested parties 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.

10. Each part of an office holder's activities will require different levels of expertise, and therefore related cost. It will generally assist the understanding of creditors and other interested parties to divide the office holder's explanations into areas such as:

• Statutory compliance

• Asset realisation

• Distribution

• Investigations

These are examples of common activities and not an exhaustive list. Alternative or further sub-divisions may be appropriate, depending on the nature and complexity of the case and the bases of remuneration sought and/or approved. It is unlikely that the same divisions will be appropriate in all cases and an office holder should consider what divisions are likely to be appropriate and proportionate in the circumstances of each case. An office holder should endeavour to use consistent divisions throughout the duration of the case. The use of additional categories or further division may become necessary where a task was not foreseen at the commencement of the appointment.

11. When providing a fee estimate of time to be spent, creditors and other interested parties may find a blended rate[2] (or rates) and total hours anticipated to be spent on each activity more easily understandable and comparable than detail covering each grade or person working on the case. The estimate should also clearly describe what activities are anticipated to be conducted in respect of the

2 "A blended rate is calculated as the prospective average cost per hour for the case (or category of work in the case), based upon the estimated time to be expended by each grade of staff at their specific charge out rate.

Comment [M5]: Not all work is necessary (e.g. where the IP is proposing a strategy to maximise realisations)… does that make it wrong?

Comment [M6]: Please could this be made clearer? The Rules just require the *total* rem charged to be disclosed, so would it be sufficient to compare this against the *total* fee estimate? Or, as the fees estimate provides the anticipated cost per part of the work, is the expectation that this broken-down estimate is compared against the actual costs per part of the work? Or are you leaving it ambiguous so that IPs can be proportionate..? ☺

Comment [M7]: So an Administrator does not have to disclose all this information to unsecureds, if it's a Para 52(1)(b) case?

Comment [M8]: Doesn't proportionality come into it? If the costs (excluding office holder's material fees) far outweigh the realisations, does he still need to help creditors understand all these issues?

Comment [M9]: Whilst I appreciate that this para refers to "explanations" being divided up this way, I assume the intention is that the estimates of hours to be spent in these areas, as required by the Rules for fees estimates, also follow on these lines, would that be correct? If so, it would be helpful if that expectation could be made clear.

If this is the intention, I do question whether the drafter appreciates the complications regarding, not only amending time recording systems to operate on these lines, but also in being able immediately to create fees estimates using these suggested divisions when one has been accustomed to the old SIP9 categories for so long, and most difficult of all, being able to remain consistent in reporting on pre-Oct cases whilst using a new system for new cases. I appreciate that these divisions are only suggestions in the SIP, but I do wonder how practical they are.

Comment [M10]: It seems to me that statute requires assets to be realised and distributed as well as a level of investigation. Maybe this should be "other" statutory work

Comment [M11]: You're not wrong! What about file maintenance, case reviews, strategy and planning, dealing with creditors (where there is no distribution)?

Comment [M12]: Why tell IPs what they *don't* need to provide? This level of detail per activity isn't required by the Rules or this SIP (say, in order to meet para 9), so I'm not sure why the SIP offers blended rates as an alternative. Personally, I'd be inclined to provide neither! ☺

Comment [M13]: So the specific charge out rates are still used to calculate rem to be drawn, is that what you mean..? In which case, it seems to me that the IP *must* provide the specific charge out rates (per new R13.13(18A)(b))… so surely providing blended rate information *in addition* to this is not going to improve clarity, is it?

estimated fee. When subsequently reporting to creditors, the average rate (or rates) of the costs charged for each activity should be provided for comparison purposes.

12. When approval for a fixed amount or a percentage basis is sought, the office holder should explain why the basis requested is expected to produce an appropriate, reasonable and commensurate reflection of the work that the office holder anticipates will be necessarily and properly undertaken. Where approval for a fixed amount is sought, the office holder should disclose the anticipated timing for the drawing of that remuneration.

13. When providing a fee estimate and/or details of the expenses an office holder anticipates will, or are likely to be, incurred, the office holder should ensure that the information is provided in sufficient time to facilitate that body making an informed judgement about the reasonableness of the office holder's requests. Fee estimates should be based on all of the information available to the office holder at the time that the estimate is provided and may not be presented on the basis of alternative scenarios and/or provide a range of estimated charges.

REPORTS TO CREDITORS AND OTHER INTERESTED PARTIES

14. The officer holder should ensure that any disclosure of payments, remuneration and expenses is of assistance to those who have a financial interest in the level of payments from an insolvent estate in understanding what was done, why it was done, and how much it cost~~s~~.

15. Irrespective of the basis or bases of remuneration approved, reports to creditors and interested parties should include a narrative update on the matters referred to in paragraphs 8-10, in respect of the period under review.

16. When reporting upon the amount of remuneration charged or expenses incurred during a period, the office holder should use a consistent format throughout the life of the case and provide figures for both the period under review and on a cumulative basis.

DISBURSEMENTS

17. Costs met by and reimbursed to an office holder in connection with an insolvency appointment will fall into two categories; Category 1 and Category 2 disbursements.

18. **Category 1 disbursements**: These are payments to independent third parties where there is specific expenditure directly referable to the appointment in question. Category 1 disbursements can be drawn without prior approval, although an office holder should be prepared to disclose information about them in the same way as any other expenses.

19. **Category 2 disbursements**: These are costs that are directly referable to the appointment in question but not to a payment to an independent third party. They may include shared or allocated costs that may be incurred by the office holder or their firm, and that can be allocated to the appointment on a proper and reasonable basis. When seeking approval, an office holder should explain, for each category of cost, the basis on which the charge is being made. If an office holder has obtained approval for the basis of Category 2 disbursements, 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.

20. The following are not permissible as disbursements:

a) a charge calculated as a percentage of remuneration;

b) an administration fee or charge additional to an office holder's remuneration;

c) recovery of basic overhead costs such as office and equipment rental, depreciation and finance charges.

PRE-APPOINTMENT COSTS

21. Where recovery of pre-appointment cost is expressly permitted and approval is sought for the payment of outstanding costs from the insolvent estate, disclosure should follow the principles and standards contained in this statement.

Comment [M14]: Is this required only where blended rates are used in the fee estimate? Please would you make it clear?

Comment [M15]: On some IVAs and MVLs, IPs might argue that the fee is not a commensurate reflection of the work (at least not on a time cost basis)! Does this make it inappropriate? Or is this meant to indicate that the IP effectively states that the fixed/% fee is not expected to be more than it would be if the IP were to charge on a time costs basis?

Does this mean that a fixed/% basis can only be proposed for "necessary" work, not speculative/risky work?

Comment [M16]: Para 9 includes future work, but presumably these words mean that progress reports don't need to update on future work, would that be right?

Comment [M17]: This seems to contradict with the final words, "and on a cumulative basis", which suggests that IPs are reporting not only on the rem/exps in the period. Do you mean that reports should summarise *all* rem/exps, those charged/incurred in the review period as well as those charged/incurred over the whole of the administration?

I don't think it needs to attach itself to the Rules' requirement like this, because it could mean that, if a particular expense was not incurred during the period under review (but instead in a previous period), it would not get past this first hurdle so it would not be disclosed.

Comment [M18]: There have been many rumours and much confusion about whether this para in the current SIP9 refers only to pre-Admin costs or to all pre-appt costs. If – as I had been led to believe via Chinese Whispers – this does only refer to pre-Admin costs, please could this be amended?

If it is not restricted to pre-Admin costs, then does this effectively outlaw SoA/S98 fees where creditors have not been circulated with para 9/10 information prior to the meeting (as presumably para 4 is achieved by circulating para 9/10 information pre-S98 meeting)?

I guess Nominee's reports could go to the para 9/10 detail on pre-VA/Nominee fees, but this would be a material change too. Is this what is intended?

PAYMENTS TO ASSOCIATES

25. Where services are provided from within the practice or by a party with whom the practice, or an individual within the practice, has a business or personal relationship, an office holder should take particular care to ensure that the best value and service is being provided. An office holder should also have regard to relationships where the practice is held out to be part of a national or international network.

26. Payments that could reasonably be perceived as presenting a threat to the office holder's objectivity by virtue of a professional or personal relationship should not be made unless approved in the same manner as an office holder's remuneration or category 2 disbursements.

PROVISION OF INFORMATION TO SUCCESSIVE OFFICE HOLDERS

27. When an office holder's appointment is followed by the appointment of another insolvency practitioner, 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.

PROVISION OF INFORMATION TO INTERESTED PARTIES

28. Where realisations are sufficient for payment of creditors in full with interest, the creditors will not have the principal financial interest in the level of remuneration. An office holder should provide the beneficiaries of the anticipated surplus, on request, with information in accordance with the principles and standards contained in this statement.

Effective Date: This SIP applies to insolvency appointments starting on or after **[1 October 2015].**

Comment [M19]: Not sure what happened to 22 to 24?

Comment [M20]: With the new Rules, I think this should be decided in one way or the other. Either payments to associates are like Cat 2s, which means that they are included in the original expenses estimate, the basis is approved, and then the IP can pay out to associates as much as he sees fit. Or they're approved in the same way as the IP's fees, in which case – presumably only if they're on a time cost basis – the estimate acts as a cap and the IP has to seek further approval if he wants to exceed that.

If the IP is left with the choice as it stands here, could the IP be criticised if he treated payments to associates the same as his fees… and later incurs statutorily-unnecessary costs in seeking approval for expenses in excess of the original estimate?

Comment [M21]: Is that IA appointments (including MVLs) or appointments over insolvent entities (excluding MVLs)?

Comment [M22]: So an IP is appointed Nominee in Sept and Supervisor in Oct. Likely he will be in breach of the SIP as I doubt that the Proposal/Nom's report will meet all these requirements… but that'll be forgiven..?

EXPLANATORY NOTE TO ACCOMPANY SIP 9 - PAYMENTS TO INSOLVENCY OFFICE HOLDERS AND THEIR ASSOCIATES

This explanatory note does not form part of the mandatory guidance included within the Statement of Insolvency Practice covering payments to insolvency office holders and their associates. It has been prepared to assist Insolvency Practitioners ("IPs") in their understanding of the expectations that arise for those IPs.

Why has the SIP changed so much?

Currently, the insolvency profession is self-regulated. Consequently, the Recognised Professional Bodies, and the Insolvency Service as the Oversight Regulator, rightly have high expectations of IPs. IPs need to ensure that they reach those expectations, in particular around independence, objectivity and transparency in their dealings with stakeholders.

In the latest iterations of the Statements of Insolvency Practice there has been a clear and deliberate shift towards principles based mandatory regulation and away from the detailed and prescriptive formats previously used. This approach reflects a collective decision of the RPBs, in accordance with the *Principles of Better Regulation.*

In relation to SIP 9, whilst providing suggested formats may assist the IP, and allow a level of comparison from estate to estate, reports based on such formats have been characterised by creditors as overly formulaic, repetitious and unhelpful. The aim of the principles based approach here is to enable a creditor to better understand what was done, why it was done, and how much it costs.

What is the SIP seeking to achieve?

Consumers of goods and services expect to have a clear understanding of the price they are paying for such goods and services. The issue of payments to Insolvency Practitioners is emotive, not least because there is often a level of confusion between creditors and other stakeholders as to why the IP should be paid when they are not receiving any return. An explanation at this most basic level may be sufficient to satisfy an enquiry from an unsecured creditor or other stakeholder. IPs need to recognise that many creditors and other stakeholders do not have the practical experience that they have of both managing and purchasing professional services. However, at this most basic level IPs need to ensure that they engage. The key objective of the Officeholder should be to ensure that the disclosure they are providing is assisting those who have a financial interest in the level of payments from an insolvency estate in understanding what was done, why it was done and how much it costs. IPs should not be deterred from providing this information in a transparent manner. Even if there is no likely dividend to creditors, creditors are still paying for the IP's fees from assets which would otherwise be available to them.

Changes in the law mean IPs can be more flexible in their fees strategy

Changes in the legislation around payments to Insolvency Practitioners have broadened the options for an Insolvency Practitioner. It is no longer necessary to select either a fixed fee, or a time and rate approach, or a percentage basis on realisation and distribution. The IP, working with the stakeholders can determine what in his mind provides the creditors with the best return, having taken into consideration the risk and

Comment [M23]: Unnecessary – are you trying to imply something..?

Comment [M24]: What about the Competent Authorities? Don't they have high expectations of IPs?

Comment [M25]: You seem to be saying that, if a creditor expresses dissatisfaction, the IP should remind the creditor simply of the fact that an IP should be paid even if it means no return to them. I don't think this is helpful, is it?

Comment [M26]: What does this mean? The first appearance of "this most basic level" in this para relates to responding to *enquiries*, but the rest of this para seems to be referring to what the SIP is concerned with, which is requesting and reporting on fees. And how can IPs "ensure they engage"? It takes two to engage. Are you saying that, when an IP responds to a creditor, they should follow it up to make sure that the creditor has read, understood and accepted the explanation?

Comment [M27]: …So if an IP receives an enquiry from someone without a financial interest, e.g. debtor or shareholder, he can ignore it then? Or have we moved from enquiries to reporting here..?

Comment [M28]: Not always the case. It may depend on which creditors have the financial interest. It also cannot follow that some assets not converted to cash would be available to creditors… and then what about voidable transactions..?

Comment [M29]: It is beneath the drafter to spin the legislative changes in this way! The 2015 Rules do not "broaden the options for an IP" in the slightest.

Comment [M30]: It has not been necessary since 2010. It is shameful that the drafter has promoted this as a piece of apparent good news in the legislative changes. Surely it is only the 2015 Rules that have prompted the SIP/Note release!

rewards which the IP has carried. It is therefore possible to adopt a mix of approaches to fees, which, for instance may include an appropriate fixed fee to cover the statutory steps and a time and rate for investigations. Alternatively where the IP wishes, they may seek the agreement of the approving body to a percentage based on sums recovered, but with a fixed fee for the statutory steps. In each case the IP needs to ensure that the stakeholders understand what was done, and why it was done, and how much it costs or is expected to cost.

When should IPs be providing information to creditors?

In all circumstances IPs must be aware that sufficient information should be given to enable the approving body to consider the request at the earliest opportunity. This may arise sometime after the Insolvency Practitioner's appointment, and in those instances the IP should be transparent about the steps he has taken, and why those steps were taken prior to seeking the agreement of the approving body.

Where possible an indication of the likely return to creditors should be given

In those instances where it is possible for the IP to give creditors an indication of the return at the commencement of an assignment such information should be provided to enable creditors to have a clear link between the value they will recover and the costs that will be associated with that recovery. Such information should assist the creditors or other approving body to understand the IP's request.

The full range of payments to the IP and their associates should be included

To ensure sufficient transparency creditors should be given sufficient information to enable them to assess each of the payments which go to an Insolvency Practitioner's firm for fees, for the expenses of the estate paid to him or his firm, and any other expenses that are paid to the IP, or his firm, or to a party with whom the practice, or an individual within the practice, has a business or personal relationship. Third party funding either to enable trading or possibly litigation should also be clearly disclosed by an IP.

Recommended Actions

Nothing in this explanatory note is prepared or contemplated to amend the statutory obligations which an Insolvency Practitioner holds, and Insolvency Practitioners should understand that the statutory requirements have not been altered by it, and nor have the relevant regulations. IPs are encouraged to familiarise themselves with those regulations.

This note should be read in conjunction with the SIP, the relevant Act, Rules and Regulations so that an IP has a holistic view of the requirements upon them.

Comment [M31]: Risk/reward is only part of the equation. As this Note explains above, the main reason why the IP does not offer to provide the "best return" *possible* to creditors is because he should be paid for doing the job.

Comment [M32]: An alternative which suggests – again – that there be a fixed fee for statutory steps is hardly an alternative. Given the introductory paragraph, are we to understand from this that the "expectations" are that IPs will propose fixed fees for statutory work?

Comment [M33]: SIP para 13 states that information should be provided "in sufficient time to facilitate that body making an informed judgment", but this seems to go further with a "should". Also, does "at the earliest opportunity" mean as soon after appointment (or perhaps even before) as possible or immediately after the IP has decided to seek fee approval (as opposed to sometime after notices for the meeting/decision have been issued)?

Comment [M34]: This is not in the SIP but adds a new "should". So… an Administrator's Proposals should explain why he didn't convene a general meeting to consider a fees resolution immediately on appointment but spent his time considering CVA, selling the business etc..?

Comment [M35]: So… if an Administrator has a fair idea of prospects for creditors at the start, he should disclose that in his appointment notification letter..?

Comment [M36]: Or perhaps the drafter meant "creditors as the approving body"… in which case Administrators would not be expected to provide the information to unsecureds on Para 52(1)(b) cases… and neither would MVL liquidators.

Comment [M37]: Is this prospective or retrospective disclosure? If it's retrospective, then I think that SIP7 already covers it. If it's prospective, then I think it should be clear – and in the SIP – that this is what is intended.

Comment [M38]: So, in effect, they *do* form part of the mandatory SIP. One cannot state this, pepper the Note with "should"s and then claim, as per the introduction, that it does not form part of the mandatory guidance.