Statement of Insolvency Practice 2

~~England and Wales~~

INVESTIGATIONS AND ANALYSIS BY OFFICE HOLDERS IN ADMINISTRATIONS AND INSOLVENT LIQUIDATIONS AND THE SUBMISSION OF CONDUCT REPORTS BY OFFICE HOLDERS

Introduction

1. In any corporate insolvency there may be concerns regarding the way in which the business was conducted, how trading was controlled, whether proper decisions were made at the time, and whether assets have been sold at an under-value or otherwise dissipated. The way in which directors have acted may also be criticised by third parties.

2. Both an administrator and a liquidator of an insolvent entity have a duty to investigate what assets there are (including potential claims against third parties including the directors) and what recoveries can be made. Each of the above matters gives rise to the need for an office holder to carry out appropriate investigations, in order to satisfy the specific duties of the office holder and to allay, if possible, the legitimate concerns of creditors and other interested parties. This statement deals specifically with the investigations of an office holder in administration or insolvent liquidation.

3. Additionally, an administrator, liquidator, administrative receiver or receiver in Scotland may have a duty to report to the Secretary of State or, in Northern Ireland the Department for the Economy (DfE)~~Department of Enterprise, Trade and Investment (DETI)~~ on the conduct of those that formerly controlled the company. This statement also deals with these obligations.

Principles

4. This statement has been produced in recognition of the principles that:

a) An office holder should carry out investigations and analysis that are proportionate to the circumstances of each case.

b) An office holder should ~~report clearly~~clearly report on the steps taken ~~in relation to~~during investigations~~,~~ and ~~the~~resulting outcomes, while considering any impact this might have on recovery or enforcement actions.

c) Conduct reports ~~and any subsequent new information~~ should be submitted in a timely manner, noting the expectation that extensions to the statutorily prescribed period will only be considered in exceptional circumstances.

d) New information that would have been included in conduct reports if available at that time should be submitted promptly.

Key compliance standards

Seeking information

5. The information available to an office holder upon appointment will vary from case to case depending on the extent of the office holder's prior involvement with the company, the publicity surrounding the insolvency, the quality and completeness of the company's books and records, and whether there has been a meeting of creditors. Upon appointment ~~T~~the office holder should, if not already obtained, locate the company's books and records (in whatever form), and ensure that they are secured, and listed as appropriate.

6. In every case, the office holder should invite creditors to provide information on any concerns regarding the way in which the company's business has been conducted, and on potential recoveries for the estate, both:

a) at any meeting or decision procedure~~of creditors~~ at which the office holder's appointment is made or confirmed, or, in other cases, at any later meeting convened by the office holder; and

b) in the first communication sent to creditors by the office holder.

7. A similar invitation should also be extended to the members of any creditors' committee, upon or soon after the formation of the committee, and to any predecessor in office.

8. An office holder should ~~always have in mind~~ remain alert to the need to ascertain, and if necessary, investigate, what assets can be realised. Enquiries should encompass whether prior transactions by the company, or the conduct of any person involved with the company, could give rise to an action for recovery under the relevant legislation.

Initial assessment

9. Notwithstanding any shortage of funds, an office holder should consider the information acquired in the course of appraising and realising the business and assets of a company, together with any information provided by creditors or gained from other sources, and decide whether any further information is required or appropriate. The office holder should make enquiries of the directors and senior employees, by sending questionnaires and/or interviewing them, as appropriate.

10. In every case, an office holder should make an initial assessment as to whether there could be any matters that might lead to recoveries for the estate and what further investigations and analysis may be appropriate.

11. An office holder should determine the extent of the investigations and analysis required in the circumstances of each case, taking account of the public interest, potential recoveries, the funds likely to be available, either from within the estate and/or from other sources, to fund an investigation, and the costs involved.

Further steps to be taken

12. An office holder, subject both to the availability of funds and the appropriateness of using available funds for such purposes, may conclude that there are matters (for example, the conduct of management, prior transactions susceptible to challenge, or the consequences of possible criminal offences) that require early investigation, either as a matter of public policy or because there are real prospects of recoveries for the estate. It is for the office holder to decide whether investigation and subsequent legal action should proceed as quickly as possible, without consultation with, or sanction by, creditors or a creditors' committee (but subject to any statutory requirement to obtain sanction).

13. In other cases, the office holder may decide that further investigation and legal action should be carried out only after consultation or with sanction, in particular where the office holder concludes that the outcome is uncertain and the costs that would be incurred would materially affect the funds available for distribution. In such cases, the office holder may consult with major creditors (if that is appropriate) or convene a meeting of the creditors' committee or the creditors to discuss any proposals for investigation and/or action. Alternatively, consultation and approval can be carried out/sought by written resolution.

14. Any proposals should include sufficient information (subject to considerations of privilege and confidentiality) to enable an informed decision to be made by those consulted, and are likely to include the costs that could be incurred and the possible range of returns to creditors.

15. There may be circumstances where there are clearly insufficient funds to carry out a detailed investigation or to take action for recovery of assets, and an office holder should consider whether it is appropriate to seek funding from creditors or others and whether an assignment of claim is an available options (jurisdiction dependent) and if so is beneficial to the insolvency estate.

Record keeping

16. An office holder should document, at the time, assessments, investigations, analysis and conclusions, including any conclusion that further investigation or action is not required or feasible, and also any decision to restrict the content of reports to creditors.

Reporting to creditors

167. Creditors should be given information regarding investigations, any action being taken, and whether funding is being provided by third parties or claims are being assigned within any statutory reports.; disclosure would be subject to considerations of privilege and confidentiality and whether investigations and litigation might be compromised.

18~~7~~. Consideration should be given during disclosure to creditors within statutory reports to issues of privilege and confidentiality and whether investigations, litigation and recoveries might be compromised by that disclosure. ~~The times at which information is provided to creditors will vary from case to case, but as a minimum an office holder should:~~

~~a) include within the first progress report a statement dealing with the office holder's initial assessment, whether any further investigations or action were considered, and the outcome; and~~

~~b) include within subsequent reports a statement dealing with investigations and actions concluded during the period, and those that are continuing.~~

~~**Record keeping**~~

~~18. An office holder should document, at the time, initial assessments, investigations and conclusions, including any conclusion that further investigation or action is not required or feasible, and also any decision to restrict the content of reports to creditors.~~

Conduct reporting requirements

19. The submission of conduct reports is one of the statutory duties that automatically fall upon the office holder and, as such, shall be complied with notwithstanding any shortage of funds.

20. The office holder should base any conduct reporting on information coming to light in the ordinary course of their enquiries and is not required to carry out investigations specifically for the purpose of fulfilling their statutory reporting obligations. ~~The submission of conduct reports is one of the statutory duties that automatically fall upon the office holder and, as such, must be complied with notwithstanding any shortage of funds.~~

21~~0~~. If the office holder has not already interviewed the subject of the conduct report, the office holder ~~may~~should consider seeking a meeting with the subject, with a view to confirming the office holder's understanding of the facts.

22~~1~~. An office holder should be mindful that the content of conduct reports ~~are~~ is prepared for the purpose of the Secretary of State and DfE~~TI~~ discharging their statutory functions and should not be disclosed to third parties.

23~~2~~. Notwithstanding the confidential nature of conduct reports, office holders should be mindful that there may be circumstances in which the content of a conduct report is made available to the subject, or potentially others.

24. Office holders should be aware that the subject may make a disclosure request directly to the Secretary of State or DFE (as appropriate), which will usually result, (after appropriate redactions) in a copy being provided to them.

25. Should the subject of a conduct report request disclosure, an office holder should as soon as reasonably practicable contact the Secretary of State or DFE~~TI~~ (as appropriate) ~~as soon as a request is received~~ in order to consider whether any factors apply that may result in an exemption from disclosure being applicable.

~~Office holders should be aware that the subject may make a disclosure request directly to the Secretary of State or DETI (as appropriate), which will usually result, (after appropriate redactions) in a copy being provided to them.~~

26. Additionally, conduct reports may be disclosed by the Secretary of State or DFE~~TI~~ to other Regulatory Authorities, where disclosure is considered to be in the public interest.

27. An office holder should also bear in mind that, if disqualification proceedings are brought, the conduct report will usually be made available to the subject during the disclosure process.

2~~3~~8. When reporting on conduct or providing new information, the office holder should highlight whether recovery proceedings have or may be commenced against the subject of the report, as this may have an impact upon any decision taken by the Secretary of State or DFE~~TI~~ (as appropriate) to seek a compensation order or undertaking.

Other reporting requirements

29. An office holder should report possible offences disclosed during the course of their investigations to the relevant authorities. Those reporting responsibilities can on occasions require office holders to report disclosure of possible offences to more than one relevant authority (for example the submission of a Suspicious Activity Report does not preclude submission of those matters to the Secretary of State/DFE or vice versa).

Effective Date: ~~6 April 2016~~