

# Statement of Insolvency Practice 9

## Scotland

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

#### INTRODUCTION

1. The particular nature of an insolvency office holder's position renders transparency and fairness ~~in their dealings~~ of primary importance in all their dealings. Creditors and other interested parties<sup>1</sup> with a financial interest in the level of payments from an insolvent estate should be confident that the rules relating to ~~charging~~the approval and disclosure of payments to insolvency office holders and their associates have been properly complied with.

#### **Principles**

2. The term associate is defined in the insolvency legislation. For the purposes of this statement of insolvency practice, office holders should, in addition to the definition in the insolvency legislation, consider the substance or likely perception of any association between the insolvency practitioner, their firm, or an individual within the insolvency practitioner's firm and the recipient of a payment. Where a reasonable and informed third party might consider there would be an association, payments should be treated as if they are being made to an associate, notwithstanding the nature of the association may not meet the definitions in the Insolvency Act 1986 or Bankruptcy (Scotland) Act 2016.
3. This statement applies to all forms of insolvency proceedings under the Insolvency Act 1986 and the Bankruptcy (Scotland) Act 2016.

#### PRINCIPLES

4. All payments from an estate should be fair and reasonable and proportionate to the insolvency appointment.
5. Payments to an office holder ~~or his or her associates~~from an estate should be appropriate, fair and reasonable ~~and commensurate~~ reflections of the work necessarily and properly undertaken ~~in an insolvency appointment.~~
6. Payments to ~~the associates of~~ an office holder ~~or from an estate~~ should be fair and reasonable reflections of ~~the basis upon which the work necessarily and properly undertaken in an insolvency appointment.~~
7. All payments should be directly attributable to the estate from which they are ~~to be calculated~~being made or sought.

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

- ~~8. Payments should not be approved by any party with whom the office holder has a professional or personal relationship which gives rise to a conflict of interest.~~
- ~~9. Payments that could reasonably be perceived as presenting a threat to the office holder's objectivity or independence by virtue of a professional or personal relationship, including to an associate, should not be made unless disclosed and approved in the same manner as an office holder's remuneration or category 2 expenses.~~
- ~~3-10. Those responsible for approving payments from an estate to an office holder or their associates should be provided with sufficient information to enable them to make an informed judgement about the reasonableness of the office holder's requests.~~
- ~~11. Requests for additional information about payments to an office holder or their associates should be viewed upon their individual merits and treated Disclosures by an office holder in a fair should be of assistance to creditors and other interested parties<sup>1</sup> in understanding what was done, why it was done, and reasonable way. The provision of additional information how much it cost.~~
- ~~4-12. Information provided by an office holder should be presented in a manner which is transparent, consistent throughout the life of the appointment and useful to creditors and other interested parties<sup>1</sup>, whilst being proportionate to the circumstances of the case. appointment.~~

## KEY COMPLIANCE STANDARDS

### Provisions of general application

~~13. An office holder should disclose:~~

### ~~Provisions of general application~~

~~5. The information provided and the way in which the approval of payments to insolvency office holders and their associates for remuneration is sought should enable creditors and other interested parties to exercise properly their rights under the insolvency legislation.~~

~~6-1. An office holder should disclose:~~

- ~~a) payments, remuneration and expenses all payments, arising from an insolvency appointment to the office holder or his or her their associates; and~~
- ~~b) the form and nature of any business professional or personal relationships with parties responsible for approving his or her remuneration or who provide services to between the office holder in respect of the insolvency appointment where the relationship could give rise to a conflict of interest. and their associates.~~

~~7. An office holder should inform creditors and other interested parties<sup>1</sup> of their rights under insolvency legislation. Information on how to find a Creditors should be advised how they may access suitable explanatory note information setting out the their rights of creditors should be given in within the first communication with creditors following appointment them and in each subsequent report to creditors.~~

### **Suggested format**

~~8. A suggested format for the provision of information is in the Appendix, including the suggested levels at which the provision of further information may be appropriate.~~

~~9-14. Provision of information. An insolvency practitioner is not precluded from providing information within pre-appointment communications (such as when fixing the basis of remuneration assisting directors in commencing an insolvency process).~~

~~10. When seeking approval for the basis of remuneration, an office holder should provide sufficient supporting information to enable the approving body, having regard to all the circumstances of the case, to make an informed judgement as to whether the basis sought is appropriate. The nature and extent of the information provided will depend on the stage during the conduct of the case at which approval is being sought.~~

~~15. If the~~Where an office holder sub-contracts work that could otherwise be carried out by the office holder or their staff, this should be drawn to the attention of creditors and other interested parties<sup>1</sup> with an explanation of why it is being done.

16. The key issues of concern to creditors and other interested parties<sup>1</sup> will commonly be:

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

b) the anticipated payment for that work;

c) whether it is anticipated that the work will provide a financial benefit to creditors, and if so what anticipated benefit (or if the work provides no direct financial benefit, but is required by statute);

d) the work actually done and why that work was necessary;

e) the actual payment for the work;

f) whether the work has provided a financial benefit to creditors, and if so what benefit (or if the work provided no direct financial benefit, but was required by statute).

17. When providing information about payments from an insolvent estate the office holder should do so in a way which clearly explains the key issues. Narrative explanations should be provided to support any numerical information supplied. Such an approach allows creditors and other interested parties<sup>1</sup> to better recognise the nature of an office holder's role and the work they intend to undertake, or have undertaken, in accordance with the key issues.

18. The following are not permissible as either remuneration or an expense:

a) an expense or any other charge calculated as a percentage of remuneration;

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

c) the recovery of any overheads other than those absorbed in the charge out rates.

## **Provisions of specific application**

### **Basis of remuneration**

19. The office holder should provide an indication of the likely return to creditors when seeking approval for the basis of their remuneration.

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

~~44.~~21. When approval for remuneration is sought on a time costs basis, an office holder should provide details of the minimum time units used and current charge-out rates, split by grades of staff, of those people who have been or ~~wh~~that the office holder anticipates are likely to be involved in the time costs aspects of the case.

~~12. An office holder should also provide details and the cost of any work that has been or is intended to be sub-contracted out and that could otherwise be carried out by the office holder or his or her staff.~~

### **Provision of information when seeking approval of Where remuneration**

~~13. The requirements in this section are in addition to reporting requirements under insolvency legislation.~~

~~14. When seeking approval for his remuneration, an office holder should provide sufficient supporting information to enable the approving body, having regard to all the circumstances of the case, to make an informed judgement as to whether the remuneration is sought is reasonable. The nature and extent of the information provided will depend on the stage during the conduct of the case at which approval is being sought.~~

~~15.22. An office holder should state the proposed charge for the period to date and provide an explanation of what has been achieved in the period and how it was achieved, sufficient to enable the progress of the case to be assessed. Where the remuneration is on a time costs more than one basis, an office holder should disclose the charge in respect of the period, the time spent and the average charge-out rates, in larger cases split by grades of staff and analysed by appropriate activity. If there have been any changes to charge-out rates during the period under review, rates should be disclosed by grades of staff, split by the periods applicable. it should be clearly stated to which part of the office holder's activities each basis relates.~~

~~23. An-To provide creditors and other interested parties<sup>1</sup> with sufficient information to make an informed judgement, office holderholders should also provide details and divide the costnarrative explanations into areas such as:~~

- ~~a) administration (including statutory reporting)~~
- ~~b) realisation of any work that has been sub-contracted outassets~~
- ~~c) creditors (claims and that could otherwise distribution)~~
- ~~d) investigations~~
- ~~e) trading (where applicable)~~
- ~~f) appointment specific matters (where applicable).~~

~~16.24. These are examples of common activities and not an exhaustive list. Alternative or further sub-divisions may be carried out by appropriate, depending on the office holder or his or her staffnature and complexity of the appointment and the bases of remuneration sought and/or approved. It is unlikely that the same divisions will be appropriate in all appointments and an office holder should consider what divisions are likely to be appropriate and proportionate in the circumstances of each appointment.~~

### **Provision of information when reporting approval of remuneration**

~~17. When advising creditors of the quantum of the remuneration and disbursements which have been approved and advising of the rights of appeal, the office holder should provide an explanation of what has been achieved in the period and how it was achieved, sufficient to enable the progress of the case to be assessed. Creditors should be able to understand whether the remuneration charged is reasonable in the circumstances of the case (whilst recognising that the office holder must fulfil certain statutory obligations and regulatory requirements that might be perceived as bringing no added value for the estate).~~

~~18. Where the remuneration is on a time costs basis, an office holder should disclose the charge in respect of the period, the time spent and the average charge-out rates, in larger cases split~~

by grades of staff and analysed by appropriate activity. If there have been any changes to charge-out rates during the period under review, rates should be disclosed by grades of staff, split by the periods applicable. An office holder should also provide details and the cost of any work that has been sub-contracted out and that could otherwise be carried out by the office holder or his or her staff.

## **Disbursements**

~~19. Costs met by and reimbursed to an office holder in connection with an insolvency appointment should be appropriate and reasonable. Such costs will fall into two categories:~~

25. This statement does not mandate any particular fee basis. An insolvency practitioner's business model may influence the fee basis they choose. However, whatever the business model, the insolvency practitioner's commercial approach cannot override the principle that any work done for which payment is sought must be necessarily and properly undertaken in the context of an insolvency appointment.

## **Expenses**

26. Expenses are any payments from the estate which are neither an office holder's remuneration nor a distribution to a creditor. Expenses also includes disbursements. Disbursements are payments which are first met by, and then reimbursed to, an office holder.

27. Expenses are divided into those that do not need advance approval before they are charged (category 1) and those that do (category 2).

~~a) Category 1 disbursements: These are costs where there is specific expenditure directly referable both to the appointment in question and a payment to an independent third party. These may include, for example, advertising, room hire, storage, postage, telephone charges, travel expenses, and equivalent costs reimbursed to the office holder or his or her staff.~~

~~b) -: These are payments to persons who are not an associate. 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 expenses can be allocated to the appointment on a proper and reasonable basis, for example, business mileage.~~

- ~~• Category 1 disbursements can be drawn paid without prior approval, although an office holder should be prepared to disclose information about them in the same way as any other expenses.~~

- ~~• Category 2 disbursements may be drawn if they have been approved Category 2 expenses: These are payments to associates. Before being paid, category 2 expenses require approval in the same manner as an office holder's remuneration.~~

~~20-28. When seeking approval of category 2 expenses, an office holder should explain, for each category of expense, payment the basis on which the charge payment is being made.~~

~~21. The following are not permissible:~~

~~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.~~

29. Any shared or allocated payments incurred by the office holder or their firm are to be treated as category 2 expenses and approval sought before payment. This is irrespective of whether the payment is being made to an associate, because the office holder will be deciding how the expenses are being shared or allocated between insolvency appointments. Requiring approval of these payments enables those who are approving the expenses to confirm that the approach being taken by the office holder is reasonable.

~~22.30.~~ If an office holder has obtained approval for the basis ~~on which a charge for Category 2 disbursements is made~~of category 2 expenses, that basis may continue to be used ~~where he takes in~~ a sequential appointment ~~for which~~where further approval of the basis of remuneration is not required, or where ~~he the office holder~~ is replaced.

### **Reports to creditors and other interested parties<sup>1</sup>**

31. Any disclosure by an office holder of payments should be of assistance to those who have a financial interest in the level of payments from an insolvent estate in understanding what was done, why it was done, and how much it costs.

32. Reports to creditors and other interested parties<sup>1</sup> should include a narrative update in respect of the office holder's activity during the period being reported upon, using consistent divisions for each part of the work reported upon, as far as possible.

33. When reporting payments during a period, the office holder should use a consistent format throughout the appointment and provide figures for both the period being reported upon and on a cumulative basis.

34. An office holder should endeavour to use consistent divisions throughout the appointment. The use of additional categories or further division may become necessary where a task was not foreseen at the commencement of the appointment.

35. Requests for additional information about payments should be viewed upon their individual merits and treated by an office holder in a fair and reasonable way. The provision of additional information should be proportionate to the circumstances of the appointment

### **Pre-appointment costs**

~~23.36.~~ ~~When~~ Where recovery of pre-appointment costs is expressly permitted by statute and approval is sought from creditors ~~for the payment of outstanding costs incurred prior to an office holder's appointment~~from the estate of these costs, disclosure should follow the principles and standards contained in this statement.

### **Payments - Provision of information**

#### **In order to facilitate information requests under statute or to associates**

~~24. Where services are provided from within~~support ~~the practice or by a party with whom reporting of 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 association.~~

~~25. 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, time recording systems used by office holders**

~~26. When an office holder's appointment is followed by the appointment should record time in units 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.~~

~~27-37. Provision not greater than six minutes for each grade of information to interested parties staff used.~~

~~28-38. Where realisations are sufficient for payment of creditors to be paid in full with interest, the creditors will not have the principal financial interest in the level of remuneration. An payments from the estate. Once this has been established by the office holder, they should provide the beneficiaries of the anticipated surplus, on request, with information in accordance with the principles and standards contained in this statement.~~

~~39. When an office holder's appointment is followed by the appointment of another office holder, whether or not in the same proceedings, the prior office holder should provide the successor with information in accordance with the principles and standards contained in this statement. This is in addition to any statutory obligations imposed on an office holder to provide information.~~

**Effective Date:**