



# *Statement of Insolvency Practice 6*

## *Scotland*

### **DEEMED CONSENT AND DECISION PROCEDURES IN INSOLVENCY PROCEEDINGS**

#### **Introduction**

1. Insolvency practitioners play a key role in ensuring that persons entitled to participate in the making of decisions are able to make informed decisions and that their participation is properly facilitated. Stakeholder involvement in the making of decisions is essential to the maintenance of trust and confidence in insolvency proceedings.
2. This Statement of Insolvency Practice applies to the use of deemed consent and qualifying decision procedures conducted under the Insolvency Act 1986 (as amended).

#### **Principles**

3. An insolvency practitioner should facilitate participation in deemed consent and decision procedures by those stakeholders with an entitlement to participate.
4. An insolvency practitioner should take reasonable steps to ensure that those entitled to participate in deemed consent and decision procedures are treated fairly and able to participate on an informed basis.
5. Requests for additional information should be viewed upon their individual merits and treated by an insolvency practitioner in a fair and reasonable way. The provision of additional information should be proportionate to the circumstances of the case.
6. The formal record of a deemed consent or decision procedure should be an accurate and contemporaneous record, sufficient to explain the business conducted and the basis upon which any discretion was exercised.

#### **Key Compliance Standards**

##### **Provisions of General Application**

7. Information supplied in connection with a deemed consent or decision procedure should be presented in a manner which is transparent, consistent and useful to prospective participants, whilst being proportionate to the circumstances of the case.
8. An insolvency practitioner should have procedures in place to ensure that any deemed consent or decision procedure used is subject to sufficient and proportionate safeguards against participation by persons who are not properly entitled to participate.
9. When determining the authenticity of a prospective participant's authority to participate in a decision procedure, the insolvency practitioner should exercise their reasonable professional judgement to facilitate the participation of those who appear to be properly entitled.

##### **Provisions of Specific Application - CVL**

10. Where an insolvency practitioner is assisting in the obtaining of deemed consent or the convening of a decision procedure, the insolvency practitioner should take reasonable steps to ensure that:

- a) the convener is made fully aware of their duties and responsibilities;
  - b) that the instructions to the insolvency practitioner to assist are adequately recorded;
  - c) the convener and /or chair is informed that it may be appropriate for them to obtain independent assistance in determining the authenticity of a prospective participant's authority or entitlement to participate and the amount for which they are permitted to do so, in the event these are called into question.
11. An insolvency practitioner should disclose the extent of their (and that of their firm and/or associates) prior involvement with the company or its directors or shareholders, any threats identified to compliance with the fundamental principles of the Insolvency Code of Ethics, and the safeguards applied to mitigate those threats. This disclosure should be made with the notices convening the deemed consent or decision procedure.
12. An insolvency practitioner should seek to ensure that the information available in advance of a deemed consent or decision procedure for the purposes of appointing a liquidator facilitates the making of an informed decision by those that are entitled to participate. Key information likely to be of interest to prospective participants (in addition to that required by statute), will commonly be:
- a) the date of the instructions to the insolvency practitioner to assist in the deemed consent or decision procedure and by whom those instructions were given;
  - b) disclosure of any amounts paid by or on behalf of the company in respect of those instructions and to whom they were paid;
  - c) a summary of the company's relevant trading activity and financial history, which would typically include (but may not be limited to):
    - i. an explanation of the causes of the company's failure;
    - ii. the name(s) and company number(s) of parent, subsidiary and associated companies;
    - iii. extracts from the company's recent accounts (whether or not filed);
    - iv. an explanation of any material transactions conducted in the preceding 12 months, other than in the ordinary course of business.
  - d) By way of explanation of a statement of the company's affairs:
    - i. a deficiency account reconciling the position shown by the most recent balance sheet to the deficiency in the statement of affairs;
    - ii. the names and professional qualifications of any valuers whose valuations have been relied upon for the purpose of the statement of affairs and a summary of the basis of valuation adopted.

Any information should ordinarily be available, on request, not later than the business day prior to the decision date and may be made available via a website.

13. An insolvency practitioner should not accept instructions to assist in a procedure for the purpose of winding up a company unless that practitioner reasonably believes that a liquidator will be appointed.

**Effective Date: 6 April 2019**