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STATEMENT OF INSOLVENCY PRACTICE

A RECEIVER'S RESPONSIBILITY TO PREFERENTIAL CREDITORS – REPUBLIC OF IRELAND

Contents

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INTRODUCTION

1. This Statement of Insolvency Practice is one of a series issued by the Institute of Certified Public Accountants in Ireland to insolvency practitioners with the aim of maintaining standards by setting out required practice and harmonising members' approach to particular aspects of insolvency.

2. The purpose of Statements of Insolvency Practice is to set basic principles and essential procedures with which insolvency practitioners are expected to comply. Departures from the standards set out in the Statements of Insolvency Practice are a matter which may be considered by the Institute for the purposes of possible disciplinary or regulatory action.

3. The supplemental practical guidance is intended to assist the insolvency practitioner ("the practitioner") to comply with this Statement. The practitioner is entitled to adopt alternative procedures in the detailed circumstances of a particular assignment where he or she judges that tailored approach to be more appropriate.

4. The nature and extent of information provided in each assignment will differ, but, generally, will include compliance with the standards outlined below.

5. Statutory provisions governing the extent to which certain creditors can claim preferential status and the relative ranking of such preferential creditors are summarised in Appendix 2. The standards and practical guidance within this Statement have regard, where appropriate, to that statutory framework.

SCOPE

6. This Statement governs assignments where the practitioner is appointed as receiver over assets of a company which are subject to a floating charge and, at the date of appointment, the company is not being wound up. In those circumstances the receiver has statutory obligations to the company's preferential creditors.

PRINCIPLES

7. This Statement has been prepared taking account of the following principles:

    a) Assets are properly categorised as being subject to fixed or floating charges and costs and expenses of the receivership appropriately allocated;

    b) Information is provided to preferential creditors and their queries answered in a timely manner to assist the ascertainment of the amount of the preferential debts;

    c) Payments to preferential creditors are made as soon as practicable prior to any distribution to floating charge holders.

COMPLIANCE STANDARDS

Categorisation of assets and allocation of proceeds

8. The receiver must determine, by reference to the instrument under which he or she was appointed, which assets are subject to a fixed charge and which are subject to a floating charge. This categorisation procedure enables the receiver to ascertain which of the company's assets are subject to the claims of the preferential creditors.

9. The type of charge at the date of creation of the charge determines whether the assets subject to that charge are available to meet the claims of the preferential creditors, following the appointment of the receiver.

10. In cases of doubt as to the correct categorisation of certain assets it may be possible, having consulted the preferential creditors, to reach agreement with them and the charge holder.

11. However, where doubts as to the correct categorisation cannot be resolved by the receiver and his or her legal advisers, it may be necessary to apply to the High Court ("the Court") for directions.

12. Where the company is disposed of as a going concern, or a number of assets are sold together in a single transaction (with some subject to a fixed charge and others subject to a floating charge), the receiver should ensure he or she is able to discharge the obligation to account to holders of fixed charges on the one hand and to preferential creditors on the other.

Apportionment of costs and expenses

13. Where liabilities incurred by the company and costs and expenses of the receivership can be clearly identified as arising on the collection and realisation of either assets subject to a fixed charge or assets subject to a floating charge they should be so recorded in the receiver's records and deducted from the realisation proceeds when determining the amount available for each class of creditors.

14. Should the receiver decide to continue some or all of the company's activities, the receiver should be mindful of the potential impact of that decision on realisations of the different categories of assets and on the apportionment of costs and expenses.

15. In fulfilling the obligation to apportion costs and expenses appropriately, the receiver exercises his or her professional judgement having considered:
    - The claims of preferential creditors (see Appendix 2);
    - The provisions of the instrument under which the receiver was appointed;
    - The maintenance of a proper balance between classes of creditors, each with their separate/differing legal rights.

16. In allocating costs the receiver should have regard to:

- The objectives for which the particular costs were incurred;
- The benefits obtained for those with a financial interest in one or other asset category; and
- Whether the benefits to those with a financial interest in assets subject to a fixed charge have been enhanced by action which could be detrimental to those with a financial interest in assets subject to a floating charge.

17. Allocation of the receiver's remuneration and disbursements should be determined using the principles applicable to costs.

18. When apportioning the costs and expenses incurred in complying with the statutory duties applicable to the individual assignment the receiver takes account of the principles set out in Paragraph 16 and in particular the maintenance of a proper balance between classes of creditors.

Assessment of preferential creditors' claims

General

19. Prior to commencing his or her detailed assessment of preferential creditors' claims, the receiver considers whether the anticipated funds realised on collection and/or disposal of assets subject to a floating charge are likely to be sufficient to pay a distribution.

20. Where it is probable that no distribution will be made to preferential creditors, the receiver should write to the preferential creditors explaining why no payment will be made to them.

21. Where it is probable a distribution will be made to preferential creditors, the receiver should invite them to submit their claims. If requested by a creditor, where possible, the receiver should provide it with information to assist calculation of the claim.

Employees

22. The receiver cannot assume an individual employee has full knowledge of his or her rights and entitlements. Accordingly, the receiver should obtain information from the company's records and/or the employee to assist calculation of the claim.

23. The transfer of employment contracts where the business (or part thereof) is disposed of as a going concern will impact upon any claims from the employees concerned.

24. Where an employee's preferential claim has been paid by the Minister for Jobs, Enterprise and Innovation, the Minister acquires the status of preferential creditor for that amount.

Payments

25. As soon as practicable after the amount of preferential creditors' claims have been ascertained and funds become available, the receiver should arrange for payments to be made to those creditors.

26. Where preferential creditors will not be paid in full, the payment should be accompanied by an apportionment account detailing the calculation.

UPDATED

27. This Statement was updated on 1 January 2018.

APPENDIX 1

PRACTICAL GUIDANCE

General

1.1 Where the receiver is appointed under a debenture secured by a floating charge and the company is not being wound up at the date of appointment, the preferential creditors are paid out of the assets collected and realised by the receiver prior to any claim for principal or interest in respect of the debenture. However, this requirement does not apply to assets subject to a fixed charge where the receiver is appointed under both fixed and floating charges.

1.2 Failure by a receiver to pay preferential creditors out of available assets is not only a breach of statutory duty, but can also give rise to a claim for damages against the receiver by those who have been wrongly deprived of monies to which they were entitled.

Categorisation of assets and allocation of costs and expenses

1.3 Although the charge document states an asset is subject to a fixed charge, the courts have established the overriding principle that statement of itself is not sufficient/insufficient for the asset to be subject to the fixed charge.

1.4 Section 440(1), Companies Act, 2014, requires that the preferential creditors "… shall be paid out of any assets [subject to the floating charge] coming to the hands of the receiver…". Therefore, the receiver gives serious consideration to the risks of any action which he or she proposes to take which could result in a reduction of the funds available to meet preferential creditors' claims.

Apportionment of costs and expenses

1.5 The receiver maintains contemporaneous records of the primary/principal reasons for incurring costs and expenses. This assists the receiver to:

- Allocate costs and expenses on an appropriate basis;
- Provide explanations as to how the receiver made the allocation; and
- Provide evidence should the receiver's allocation be challenged by any of the interested parties.

1.6 Similarly the receiver ensures that contemporaneous records are maintained of remuneration and disbursements which will enable him or her to allocate appropriately that expenditure over the various categories of assets.

Assessment of preferential creditors' claims

1.7 The receiver may have been appointed under a second or subsequent charge. In such circumstances it can be difficult to determine the right of preferential creditors to be paid in priority to a prior floating charge holder. The receiver seeks legal advice and, in some cases, may need to apply to the Court for directions.

1.8 Where a receiver is appointed to a company which is already in the process of being wound up, the receiver may need legal advice on the appropriate treatment of the claims of preferential creditors.

1.9 Preferential creditors are not obliged to prove their claims formally in a receivership.

1.10 Public notification of the receiver's appointment is required by Sections 429 and 430, Companies Act, 2014. The receiver is not obliged to advertise for claims.

Payments

1.11 Any surplus arising on the realisation of assets solely subject to a fixed charge, following discharge of costs and expenses related to the realisation and the amount due to the secured creditor, does not form part of the fund for payment of preferential creditors in a receivership.

APPENDIX 2

STATUTORY REQUIREMENTS

The practitioner appointed as receiver over assets of a company which are subject to a floating charge has statutory obligations to the company's preferential creditors. The table below summarises the various categories of preferential creditors in a winding up, but does not purport to be a detailed analysis of the underlying statutory provisions. The receiver should refer to the actual legislation to determine the precise requirements relevant to an individual assignment.

The table reflects the applicable entitlements in 2017**.**

Taxes

2.1 Taxes assessed or assessable (being Income Tax, Corporation Tax, Capital Gains Tax and other assessed taxes) under the Taxes Consolidation Act, 1997, as amended, in respect of a tax period ending on or before the "relevant date". (*Section 621(2)(a)(ii), CA 2014* and *Sections 931, 974, 976, and 1080, TCA 1997)*

The Revenue Commissioners' preferential status applies for one year of their choosing.

2.2 Income Tax deductions made from payments to sub-contractors during the 12 months period ending on the relevant date. *(Section 1007, TCA 1997)*

2.3 Net VAT liability, together with interest thereon, for taxable periods which ended within the 12 months period ending before the relevant date. *(Section 621(2)(a)(iv), CA 2014 and Section …, VATCA 2010)*

2.4 PAYE, PRSI, USC.

2.5 Social welfare payments deducted by the employer from employees' remuneration, as well as contributions by the employer, for the 12 months period prior to the relevant date *(Section 621(2)(d), CA 2014)*

Amounts due for social welfare payments **do not** have preferential status where the company is wound up "… merely for the purposes of reconstruction or amalgamation with another company …".

2.6 Local property tax which the company is liable to pay prior to the relevant date - whether in respect of its own property or in respect of an employee for whom the company has received a deduction order from the Revenue Commissioners, together with the interest thereon *(Section 621(2)(a)(v), CA 2014).*

Preferential status for the amount due by the company on its own property is restricted to that amount which should have been paid in the 12 months period prior to the relevant date.

Employees

2.7 Wages and salaries (including commission and payments for piecework) for services rendered by an employee during the 4 months prior to the relevant date, subject to a maximum claim of €10,000 per individual employee *(Section 621(2)(b) and (4), CA 2014)*

A farm labourer who is to receive portion of wages as a lump sum at the end of the year of hiring has priority for "… the whole of such sum, or such part thereof as the court may decide …". *(Section 621(5), CA 2014)*

Items such as health insurance, union, or savings deductions can form part of the employee's claim.

Directors fees are not preferential. Care should be taken before admitting other amounts due to a director or to the company secretary.

2.8 Accrued holiday pay due to an employee – without limitation on period or amount. *(Section 621(2)(c), CA 2014)*

2.9 Compensation awarded to an employee by an adjudication officer or the Labour Court. *(Section 49, WRA 2015 and Section 621(3), CA 2014)*

2.10 Statutory redundancy lump sums due to the employee. (Section 42(1), RPA 1967, as amended by Section 14, RPA 1979 and Section 621(3), CA 2014). The employer's redundancy contributions due for the 12 month period prior to the relevant date (included in social welfare contributions – see 2.5 above). *(Section 42(3), RPA 1967, as amended by Section 14, RPA 1979 and Section 621(3), CA 2014)*

2.11 Compensation awarded to an employee for unfair dismissal. *(Section 12 UDA, 1977, and Section 621(3), CA 2014)*

2.12 Amount due to an employee pursuant to a sick pay scheme. *(Section 621(2)(f), CA 2014)*

2.13 Company contributions and contributions deducted from employees in respect of any superannuation scheme. *(Section 621(2)(g), CA 2014)*

2.14 Amount due to an employee in connection with an accident which happened in the course of his or her employment and before the relevant date. *(Section 621(2)(e), CA 2014)*

Amounts due as accident compensation do not have preferential status where the company is wound up "… merely for the purposes of reconstruction or amalgamation with another company …".

2.15 Where payment has been made to an employee who was due wages, salary, holiday pay, sick pay, or superannuation benefits (only these categories), out of money advanced by another person, that person acquires the preferential status that would otherwise have been held by the employee concerned. *(Section 621(6), CA 2014)*

2.16 If the Redundancy and Employers' Insolvency Fund has made payments to an employee in respect of claims which would rank as preferential, that Fund is entitled to be repaid in priority to any other unsatisfied claim of the employee. *(Section 10 PEEIA, 1984, and Section 621(3), CA 2014)*

Other

2.17 Local rates due which were struck within the 12 months period before the relevant date. (*Section 621(2)(a)(i), CA 2014)*

2.18 Should a landlord or other person distrain a company's "… goods or effects…" within 3 months of the relevant date, the claims of the preferential creditors specified in Section 621 shall be a first charge on those goods or effects. *(Section 622(1), CA 2014)*

2.19 Training levy payable on gross payroll within the 12 month period prior to the relevant date. *(Section 6B, NTFA 2000)*

NOTES

(a) *All categories of preferential creditors listed above rank equally among themselves for payment. If there are insufficient funds to pay their claims in full, they abate in equal proportions*. (Section 621(7), CA 2014).

(b) *The "**relevant date**" referred to in Appendix 2 is defined as the date of appointment of a provisional liquidator or the date of the winding up order if no appointment was made, unless, in either case, a voluntary winding up had commenced before that date. Where none of those three circumstances apply, the relevant date is the date the resolution to wind up the company was passed* (Section 621(7), CA 2014).

*If the company is not being wound up when the receiver is appointed the **relevant periods** referred to in Section 621 **begin after** the date of appointment of the receiver*. *(Section 440(3), CA 2014)*

(c) Key to abbreviated legislative references:

1.	CA 2014	Companies Act, 2014
2.	NTFA 2000	National Training Fund Act, 2000
3,	RPA 1967	Redundancy Payments Act, 1967
4.	RPA 1979	Redundancy Payments Act, 1979
5.	TCA 1997	Taxes Consolidation Act, 1997
6.	UDA 1977	Unfair Dismissals Act, 1977
7.	VATCA 2010	Value Added Tax Consolidation Act, 2010
8.	WRA 2015	Workplace Relations Act, 2015