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STATEMENT OF INSOLVENCY PRACTICE

APPOINTMENT AS EXAMINER UNDER THE COMPANIES (AMENDMENT) ACT, 1990

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Appointment as Examiner under the Companies (Amendment) Act, 1990

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INTRODUCTION

1. The Statement of Insolvency Practice is one of a series issued by the Institute of Certified Public Accountants in Ireland to insolvency practitioners with a view to 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 out basic principles and essential procedures with which insolvency practitioners are required to comply. Departure from the standards set out in the Statements of Insolvency Practice is a matter that may be considered by the Institute for the purposes of possible disciplinary or regulatory action.
3. This Statement addresses
 - The statutory basis for appointment of an examiner
 - The independent accountant's report
 - Timing, communication and administration in the examination process
 - Role of the examiner
 - Powers and duties of directors of the company.
4. Remuneration of the examiner is dealt with in the Statement of Insolvency Practice "Remuneration of Insolvency Officeholders – Republic of Ireland" – S 9B.

STATUTORY BASIS

5. The statutory framework governing the appointment of an examiner, the work to be carried out, reports required, and the timeframe for the process is contained in the Companies (Amendment) Act, 1990 ("the Act").

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6. Specific requirements governing the examination process are set out in Orders 75A and 75B, Rules of the Superior Courts. These Orders were promulgated by Statutory Instrument – S.I. 147 and 278 of 1991. Additionally, insolvency practitioners will have regard to the impact of Court decisions on developing practice.
7. In considering a petition for appointment of an examiner the Court must first form the view:
 - (i) The company is, or is likely to be, unable to pay its debts;
 - (ii) There is no resolution for the winding-up of the company; and
 - (iii) No order has been made for the winding-up of the company.

Following that initial consideration, the Court can only make an order appointing the examiner “....where it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern”.

8. Section 3(6) of the Act specifies that the Court will not hear a petition for appointment of an examiner if a receiver has been appointed to the company at least 3 days prior to the presentation of the petition.
9. The petition for appointment of an examiner must be accompanied by:
 - (i) A consent signed by the person nominated to be examiner;
 - (ii) A copy of a compromise or scheme of arrangement in relation to the company's affairs (if already prepared); and
 - (iii) A report in relation to the company by an independent accountant.

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INDEPENDENT ACCOUNTANT'S REPORT

10. Section 3(3B) of the Act specifies the detailed contents of the independent accountant's report. The more significant requirements are the independent accountant's opinion as to whether:
 - (i) The company, and the whole or any part of its undertaking, would have a reasonable prospect of survival as a going concern (with a statement of the conditions which he/she considers are essential to ensure such survival).
 - (ii) The formulation, acceptance and confirmation of proposals for a compromise or scheme of arrangement would offer a reasonable prospect of the survival of the company, and the whole or any part of its undertaking, as a going concern.
 - (iii) An attempt to continue the whole or any part of the undertaking would be likely to be more advantageous to the members as a whole and the creditors as a whole than a winding-up of the company.
11. Addressing the obligation on the Court to be "...satisfied that there is a reasonable prospect of the survival..." of the company as a going concern, Judge McCracken in *Re. Tuskar Resources plc.* stated

"If the Court is "satisfied", it must be satisfied on the evidence before it, which is in the first instance the evidence of the petitioner. If that evidence does not satisfy the Court, the order cannot be made, and in my view that is tantamount to saying there is an onus of proof on the petitioner at the initial stage to satisfy the Court that there is a reasonable prospect of survival."

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12. In delivering judgement in the matter of Vantive Holdings and Others, Judge Murray stated

“In order to be satisfied that a company has a reasonable prospect of survival as a going concern the Court must have before it sufficient evidence or material which will permit it to arrive at such a conclusion on the basis of an objective appraisal of that evidence or material.....

The opinion of the independent accountant as set out in the report which a petitioner is required to provide to the Court under the provisions of the Act must be given due weight. Again, the weight to be attached to the accountant’s opinion will depend on the degree and extent to which he supports that opinion by his or her own objective reasoning and the appraisal of material or factors relied upon for reaching his or her conclusions.”.

13. During the hearing of the petition the independent accountant is likely to be questioned on aspects of the work he/she has carried out and the reasoning leading to the formation of the opinion that the company has a reasonable prospect of survival as a going concern.

14. Preparation of the independent accountant’s report constitutes an assurance engagement as defined by the International Auditing and Assurance Standards Board – IAASB. The IAASB definition of an assurance engagement is one

“...in which the practitioner expresses a conclusion designed to enhance the degree of confidence of the intended users other than the responsible party about the outcome of the evaluation or measurement of a subject matter against criteria.”.

15. The “responsible party” in the context of this report is the company. The directors draw comfort from the report in preparing the petition for appointment of an examiner. The Court relies thereon in determining whether “...there is a reasonable prospect of survival.”.

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16. In the context of Section 3 of the Act, the outcome of the evaluation is the opinion that the company, and the whole or any part of its undertaking, would have a reasonable prospect of survival.
17. The relevant framework guidance for assurance engagements is contained in the International Standard on Assurance Engagements "Assurance Engagements other than Audits or Reviews of Historical Financial Information." – ISAE 3000. Copies of ISAE 3000 can be obtained @ www.IFAC.org/IAASB.
18. Examples of enquiries and procedures which the independent accountant may consider appropriate are contained in the Appendix to this Statement.
19. Section 3C of the Act requires the independent accountant to supply a copy of the report to "...any interested party on written application being made to him...".
20. Given the significance of the independent accountant's report, together with the obligatory and evidential nature of the report as supporting evidence to the petition for appointment of an examiner, the accountant will be conscious of practical matters which may preclude him/her from accepting the assignment or being able to form the opinion that the company and the whole or any part of its undertaking would have a reasonable prospect of survival as a going concern.
21. Examples of circumstances that could constrain the accountant include:
 - (i) Time constraints where a petition is made within 3 days of a receiver's appointment.
 - (ii) Lack of information and/or satisfactory evidence to support the directors' "belief" that appointment of an examiner would save some or all of the company's business.
 - (iii) The cumulative impact of significant caveats and/or uncertainties referred to within the report where that report expresses the opinion the appointment of an examiner would be more advantageous than liquidation.

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WORK OF THE EXAMINER

Timing

22. The period in which the company is deemed to be under the protection of the Court is limited to 70 days. However, the Court may, if the criteria in Section 18(3) of the Act are satisfied, grant a 30 day extension to that protection period.
23. An initial consideration of the company's corporate governance will inform the examiner's consideration of whether an application should be made under Section 9 of the Act for a Court order that all, or any, of the functions or powers of the directors should be exercised solely by the examiner.
24. Circumstances may arise, the significance of which are such that they should be brought to the attention of the Court without delay to enable it to give directions or make such orders as it sees fit. Examples of such circumstances include:
 - The examiner forms the opinion that it will not be possible to agree the proposed scheme of arrangement or compromise.
 - Information obtained by the examiner indicates that offences under Section 297, Companies Act, 1963, may have occurred.
 - There is no longer a "reasonable prospect" of the continuance of all or a significant part of the company's business.
25. The examiner will consider the decision of the independent accountant regarding establishment of a Committee of Inspection.
26. The examiner is required by Section 18 (2) of the Act to "...convene and preside at such meetings of members and creditors as he thinks proper..." to consider proposals for a compromise or scheme of arrangement.
27. Unless the Court grants a longer period, the examiner is required to report to the Court regarding the proposals and on the outcome of the "Section 18 meetings" within 35 days of appointment.

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28. After the relevant creditors' meetings have been held and the examiner presents the proposed scheme of arrangement to the Court for approval, the Court may extend the period during which the company is under Court protection – where the Court considers it appropriate to do so in the particular circumstances of that company.

Communication

29. As noted in Paragraph 39 below, generally, the powers and duties of the directors are unaltered following the appointment of the examiner including the power to purchase goods and services on the company's behalf.
30. The examiner will arrange for the company to write to all its creditors informing them that an examiner has been appointed to the company, confirming that the directors continue to operate the business, providing contact details for the examiner and inviting them to submit claims for the amounts owed to them.
31. Section 12(4) of the Act requires
- “... every invoice, order for goods or business letter issued by or on behalf of the company, being a document on or in which the name of the company appears, shall immediately after the mention of that name, include the words “in examination (under the Companies (Amendment) Act, 1990).”
32. The company's directors remain responsible for its operations following the examiner's appointment. Accordingly, if contacted directly by the company's creditors, the examiner will emphasise that the fact that the company is “in examination” and “under the protection of the Court” does not constitute a guarantee that liabilities incurred during the examiner's term of appointment will be paid.

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Administration

33. As noted in Paragraph 26 above, the examiner must "...convene and preside..." at meetings of members and creditors. The detailed requirements, specified in Rule 18, Order 75A, Rules of the Superior Courts, include:
- Notice to be sent by post at least 3 days before the meeting date.
 - A quorum of at least 3 creditors (or 2 members, if a meeting of members) must be present or represented at the meeting.
 - A list of those present must be kept and signed by the examiner.
 - The examiner must arrange for minutes of the meeting to be taken, entered into a minutes book and signed by him/her.

ROLE OF THE EXAMINER

34. The role of the examiner is to oversee the formulation, acceptance and confirmation of proposals for a compromise or scheme of arrangement to facilitate the survival of the company.
35. Accordingly, he/she acts independently of the company, its Board of Directors, shareholders, creditors, or prospective investors.
36. The role of the examiner varies during the assignment, occasionally being analogous to that of a chairman overseeing the development of proposals, at other times to that of an investment banker seeking new investors for the company, and sometimes to that of an executive director negotiating the proposals.
37. In discharging the function of examiner, professional judgment is exercised to ensure that all stakeholders in the process are dealt with in a manner which takes account of the commercial and legal issues arising in the development of the compromise or scheme of arrangement. This assists the examiner to form the opinion that he/she has achieved the best possible outcome for all stakeholders in the process.

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38. If the examination is to come to a successful conclusion, the examiner must be able to recommend the proposed compromise or scheme of arrangement to each class of creditor. When chairing the meetings of each class of creditor, the examiner needs to explain to each class of creditor why the proposed compromise or scheme of arrangement offers a better outcome to that class than would a liquidation.

POWERS AND DUTIES OF DIRECTORS

39. The powers and duties of directors under the Companies Acts, 1963 to 2009, are, generally, unaltered following the appointment of an examiner to the company. In particular, the directors' obligation to maintain the company's statutory records, including its books of account, remain unaltered.
40. Additional obligations imposed on directors include to:
- Produce to the examiner all books and documents of, or relating to, the company which are in their custody or power.
 - Provide assistance to the examiner in connection with his/her functions.
 - Meet with the examiner when required to do so.
 - Provide the examiner with reasonable notice of all meetings of the Board of Directors and all general meetings of the company.

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APPENDIX

This Appendix is persuasive rather than prescriptive and is indicative of good practice.

It is intended to assist the practitioner in applying Paragraphs 10 to 21, Statement of Insolvency Practice S 19B, in a comprehensive and consistent manner.

Set out below are examples of enquiries and procedures which may be appropriate in, and relevant to, particular aspects of the assignment carried out by the independent accountant in the context of the report required under Section 3, Companies (Amendment) Act, 1990, as amended.

GENERAL

- A1. The Independent Accountant („IA“) submits his/her report to the High Court as an essential element of the petition for appointment of an examiner under the Companies (Amendment) Act, 1990, as amended.
- A2. In addition to the contents of the report specified by Section 3(3B), Companies (Amendment) Act, 1990, the report would also contain the following supplementary information.
 - A brief outline (specific to the company in question) as to why the company needs protection
 - Statement that the IA has relied on information and/or documentation provided by the directors and management, existing knowledge of the company through being its auditor, etc.
 - The following company secretarial details, having checked the company's file at the Companies Registration Office (“CRO”)
 - o Company registered number
 - o Date of incorporation
 - o Registered office
 - o Details of company share capital
 - Where applicable, details of the holding company, subsidiaries, related

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companies as per the group structure attached as an appendix.

- The principal activities of the company
- Number of employees
- A narrative on the company covering :
 - o The company's history i.e. when the company was founded, by whom, original principal activities, details of acquiring other businesses, trades, diversification, etc.
 - o More detailed description of the company's current activities. Significant business segments should be identified and explained.
 - o A detailed description of the company's fixed assets, how they are used to generate revenue, etc.
- A trading history of the company showing:
 - o Accumulated profits / losses per the latest audited financial statements.
 - o An analysis of the revenue per business segment for the last five years reconciled to turnover per the audited financial statements.
 - o Net profit / loss for the last five years per the audited financial statements
- The factors the directors attribute the current financial circumstances of the business to. These would be discussed with the directors and assessed by the IA as to reasonableness during the course of the assignment.

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CONTENTS OF THE REPORT SPECIFIED BY SECTION 3B, COMPANIES (AMENDMENT) ACT, 1990

“The names and permanent addresses of the officers of the company and, in so far as the independent accountant can establish, any person in accordance with whose directions or instructions the directors of the company are accustomed to act”
(Section 3B(a))

A3. These details are checked against the company's file at the CRO.

“The names of any other bodies corporate of which the directors of the company are also directors”. (Section 3B(b))

A4. These details are confirmed with the directors and checked against the company's file at the CRO.

“A statement as to the affairs of the company, showing, in so far as it is reasonably possible to do so, particulars of the company's assets, and liabilities (including contingent and prospective liabilities) as at the latest practicable date, the names and addresses of its creditors, the securities held by them respectively and the dates when the securities were respectively given”. (Section 3B(c))

A5. The Independent Accountants Report (“IAR”) includes a description of the assets of the company. It is not necessary to give an in-depth breakdown of assets, e.g. the detailed debtors listing. However, sufficient narrative should be provided covering, inter alia, location, use, net book value, etc., to enable the Court to get a clear picture of the assets.

A6. Detailed schedules of creditor names, addresses and balances outstanding will be contained in appendices to the IAR.

A7. Details of the securities held by creditors will be noted in the IAR.
The list of charges and mortgage debentures registered against the company are checked against the company's file at the CRO. The IA inspects any security agreements, together with any facility letters provided by financial institutions.

“Whether in the opinion of the independent accountant any deficiency between the assets and the liabilities of the company has been satisfactorily accounted for or, if not, whether there is evidence of a substantial disappearance of property that is not adequately accounted for”. (Section 3B(d))

A8. In forming his/her opinion as to whether the deficit of the company has been properly explained, the IA will weigh up all the evidence available, having reviewed the books and records of the company and discussed the current financial position with management. The IA documents the basis for the opinion.

A9. Any significant inadequate explanations obtained or queries unresolved relating to the company's books and records should be investigated thoroughly and conclusions documented accordingly. Any concerns the IA has that cannot be satisfactorily resolved should be stated in the IAR.

The IA considers the reporting obligations to the ODCE if any financial irregularities are uncovered.

“A statement of opinion by the independent accountant as to whether the company, and the whole or any part of its undertaking, would have a reasonable prospect of survival as a going concern and a statement of the conditions which he considers are

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essential to ensure such survival, whether as regards the internal management and controls of the company or otherwise". (Section 3B(e))

A10. The basis for this opinion will be thoroughly documented in the working papers. Analysis undertaken by the IA as part of the process of forming the opinion as to whether or not the company would have a reasonable prospect of survival would include:

- Review of financial projections for the company for a suitable period. The projections should include profit and loss accounts, balance sheets and cash flow statements. (see also Paragraph A11 below).
- The IA vouches the opening bank balances to the company's books and records and reconciles them to the bank statements.
- Comparison of the financial projections to prior period actual results for reasonableness. For example, forecast gross margins compared to previous gross margins achieved, current cost movements, market price movements, etc.
- Determination that all recovery assumptions are adequately incorporated into the forecast model.
- Assumptions and assertions are discussed with management, assessed for reasonableness and documented.
- Where the projections include assumptions based on future market conditions, these are compared to the views of independent experts in the sector.
- Where the projections include assumptions re. current market prices, these assumptions are tested against relevant third party information where appropriate. For example, where property prices are an integral part of the projections an independent valuation by a suitably qualified professional would be obtained.
- Where no third party information is available the IA's working papers state this, noting what attempts were made to obtain same.

A11. The IA reviews projected cash flows of the company for the period of protection, assesses whether these are realistic and documents his/her conclusions. The review would include:

- Comparing the cashflow projections to the management accounts and assessing whether all the costs the company will incur during the protection period are taken into account. The IA reviews prior period management accounts and ascertains the costs likely to be incurred.
- Discussing the pattern of receipts with management and comparing them to prior periods.
- Assessing the collectability of debtors during the protection period.
- Obtaining third party formal confirmation of any sources of funding (for example, additional bank facilities) to be provided during the protection period.

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- For sources of funds where independent confirmation is unavailable, for example, where the directors are to inject new funds into the business, the IA obtains written confirmation of this commitment .
- If no investment is available the IA assesses the likelihood of an examiner, if appointed, being able to secure investment in the company during the period. The IA includes this assessment within the IAR.

A12. The IA assesses major parts of the company individually and in aggregate, e.g. its various businesses and revenue streams, in order to determine whether the company has a reasonable prospect of survival.

A13. If the company is of the opinion that the whole undertaking does not have a reasonable prospect of survival, the IA, where concurring, specifies the parts of the undertaking he/she feels do not, stating the reasons why.

A14. The IA states his/her opinion as to the conditions to be satisfied in order for the company to have a reasonable prospect of survival.

- The IA assesses what funding requirements the company will need in future, and makes an assessment of whether the company can reasonably be expected to secure these funds.
- The IA includes any plans formulated and included within management's projections, together with the opinion formed from his/her own assessment of the company.
- The IA expresses his/her opinion on future necessary changes, if any, to the management or direction of the company.

This will be based on an assessment of whether the management team have provided the appropriate skills, expertise and direction to the company, and whether they can provide the required expertise in the future.

“His opinion as to whether the formulation, acceptance and confirmation of proposals for a compromise or scheme of arrangement would offer a reasonable prospect of the survival of the company, and the whole or any part of its undertaking, as a going concern”. (Section 3B(f))

A15. This opinion is based on the IA's analysis of the future viability of the company and its trade, as supported by his/her analysis of the projections provided by management.

“Whether, in his opinion, an attempt to continue the whole or any part of the undertaking would be likely to be more advantageous to the members as a whole and the creditors as a whole, than a winding up of the company”. (Section 3B(g))

A16. In forming this opinion the IA considers what dividend/s would be available for the creditors on liquidation. This involves the preparation of a Liquidation Statement of Affairs („„Liquidation SoA““).

A17. In preparing the Liquidation SoA the following matters are considered:

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- The Liquidation SoA is prepared based on the same management accounts used in the preparation of the SoA on a going concern basis, i.e. the latest available.
- Assets are valued in the Liquidation SoA based on what they would realise if sold in a liquidation. The directors should provide these “liquidation values”. Significant assumptions used by the directors when valuing the assets will be appropriately disclosed in the IA’s report.
- The IA analyses these assumptions thoroughly, seeking third party confirmation of the asset values and assumptions used where possible. The IA’s experience and knowledge of the business and the industry inform the decision as to whether these assumptions are appropriate. If third party confirmation is not available, this fact is clearly stated in the IA’s working papers. The IA’s rationale for agreeing with the values shown is documented also.
- The liabilities of the company per the Going Concern SoA will remain on a liquidation of the company. However, the IA takes account of further potential liabilities, if any, that may crystallise on a liquidation and includes these in the Liquidation SoA.
- Employee redundancy entitlements on a liquidation are included in the Liquidation SoA.

A calculation for this amount should be provided by the directors and assessed by the IA for its reasonableness and accuracy. The IA compares the details per the calculation to the company’s books and records, i.e. the Gross to Nett payroll reports.

A18. The IA examines the company’s books and records to determine whether there may be sufficient assets available within the company to propose a reasonable dividend to creditors. The IA also enquires of the directors if there any potential sources of investment into the company.

“Recommendations as to the course he thinks should be taken in relation to the company including, if warranted, draft proposals for a compromise or scheme of arrangement”. (Section 3B(h))

A19. In the first instance, the IA states whether it is appropriate for the company to seek Court protection with a view to preparing proposals for a Scheme of Arrangement.

A20. The IA expresses his/her opinion as to what restructuring is required to be undertaken for the company to be viable as a going concern in the future.

- The IA’s opinion outlines what are considered to be the necessary terms of a Scheme of Arrangement for the company. In order to put a Scheme of Arrangement together funds are required to permit proposal of a dividend to creditors in return for full and final settlement of the company’s liabilities as at the Fixed Date.

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- If there are any potential investors into the company the IA seeks third party confirmation of the intention to invest in the company. Where this confirmation is not forthcoming the IA notes this in the working papers and seeks a written statement from directors that this investment is potentially available. Conditions and/or lack of information on the potential investment are documented in the IAR.
- If no investment is available the IA assesses the likelihood of an examiner, if appointed, being able to secure investment in the company during the period. The IA includes this assessment within the IAR.

“His opinion as to whether the facts disclosed would warrant further enquiries with a view to proceedings under Section 297 or 297A of the Principal Act”. (Section 3B(i))

- A21. An opinion that further enquiries are needed arises if analysis of the company and its books and records indicates any matters that would require further investigation.
- A22. If the IA is aware of any such matters he/she considers need to be investigated these are clearly stated in the IAR and documented thoroughly in the working papers.
- A23. If the IAR has been prepared in a short time frame, the IA notes that the examiner may become aware subsequently of matters which may be required to be brought to the attention of the Court.

“Details of the extent of the funding required to enable the company to continue trading during the period of protection and the sources of that funding”. Section 3B(j))

- A24. The IA, based on assessment of the projected cash flow statement and the timing of inflows and outflows (see Paragraph A10 above), forms the opinion as to whether the company can meet its liabilities as they fall due during the period of protection.
- A25. Where the opinion is that the company can continue trading during the period of protection, the IAR specifies the funding required.

“His recommendations as to which liabilities incurred before the presentation of the petition should be paid”. (Section 3B(k))

- A26. The IA discusses with the directors/management whether there are any liabilities, already incurred by the company, the non-payment of which would raise serious doubts over the company's ability to continue as a going concern.
- A27. The IAR specifies the creditors the IA considers should be paid, noting the amounts to be paid.

“His opinion as to whether the work of the examiner would be assisted by a direction of the Court in relation to the role or membership of any creditors' committee referred to in Section 21”. (Section 3B(l))

- A28. If in the IA's opinion the examiner would be assisted by the formation of a creditors committee, the IAR contains any recommendations he/she deems appropriate regarding the role or composition of a creditors' committee, or asks the Court to give directions re. same.

“Such other matters as he thinks relevant”. (Section 3B(m))

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A29. Other matters the IAR refers to, if relevant, include;

- Any litigation or legal issues pending. The IA reviews any legal documentation regarding such issues and includes copies thereof in his/her working papers.
- Any correspondence received from creditors. The IA includes copies in his/her working papers.

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