

S 2B

STATEMENT OF INSOLVENCY PRACTICE

A LIQUIDATOR'S INVESTIGATION INTO THE AFFAIRS OF AN INSOLVENT COMPANY – REPUBLIC OF IRELAND

Contents

	<i>Paragraphs</i>
Introduction	1 - 6
Scope	7
Principles	8
Compliance Standards	
Obtaining information	9 - 12
Initial assessment	13 - 16
Further work/investigation	17 - 20
Legal proceedings	21 - 23
Reporting to creditors	24 - 25
Other reporting requirements	26
Documentation	27-28
Updated	29

Appendix – Practical Guidance

Revised February 2005

Revised January 2015

Updated 1 June 2015

S 2B

STATEMENT OF INSOLVENCY PRACTICE

A LIQUIDATOR'S INVESTIGATION INTO THE AFFAIRS OF AN INSOLVENT COMPANY – REPUBLIC OF IRELAND

S2B

***A liquidator's investigations into the affairs of an insolvent company
– Republic of Ireland***

© The Institute of Certified Public Accountants in Ireland

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 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. The supplemental practical guidance is intended to assist the insolvency practitioner to comply with the Statement. The insolvency practitioner is entitled to adopt alternative procedures in the detailed circumstances of a particular assignment where he/she judges that tailored approach to be more appropriate.
4. The purpose of the investigation is to determine the assets and liabilities of the company, to determine the reasons for the failure of the company, and to review the conduct, decisions and actions of the directors. The investigation enables the liquidator to comply with the specific duties imposed upon him or her, applicable whether there are assets or not, and to address, to the extent possible, the legitimate concerns of creditors and other interested parties.

S 2B

STATEMENT OF INSOLVENCY PRACTICE

A LIQUIDATOR'S INVESTIGATION INTO THE AFFAIRS OF AN INSOLVENT COMPANY – REPUBLIC OF IRELAND

5. The statutory obligation (Section 682, Companies Act, 2014) on liquidators to report to the Director of Corporate Enforcement concerning directors of insolvent companies is dealt with in the Statement of Insolvency Practice "*Reporting by Liquidators to the Director of Corporate Enforcement*" – S 18B.
6. The nature and extent of the investigation work will vary from company to company, but will generally include compliance with the standards outlined below.

SCOPE

7. This Statement deals specifically with the duty of a liquidator of an insolvent company to investigate the company's affairs.

PRINCIPLES

8. This Statement has been prepared taking account of the following principles.
 - The liquidator's investigation should be appropriate and proportionate to the circumstances of the particular company.
 - The liquidator should report clearly on the steps taken in the investigation and the results thereof.

S 2B

STATEMENT OF INSOLVENCY PRACTICE

A LIQUIDATOR'S INVESTIGATION INTO THE AFFAIRS OF AN INSOLVENT COMPANY – REPUBLIC OF IRELAND

COMPLIANCE STANDARDS

OBTAINING INFORMATION

9. At the creditors' meeting at which his/her appointment is made or confirmed, as well as in the first correspondence to the Committee of Inspection (where such Committee has been appointed), the liquidator should invite creditors to provide specific information on any particular concerns about the manner in which the company carried on business and on potential recoveries for the liquidation.
10. The liquidator should locate the company's books and records, ensure they are secured, and listed appropriately.
11. The liquidator should obtain a copy of the company's most recent set of audited financial statements.
12. Enquiries should be made of the directors (including former directors who held office during the two years prior to the date the company was placed in liquidation) and senior management in relation to the causes of the company's failure.

INITIAL ASSESSMENT

13. The liquidator decides in the light of the information obtained through application of the standards referred to above, together with any information gained from other sources, whether further information is required.
14. The statement of affairs is compared with the last audited financial statements to:
 - (a) Account for changes in the company's financial position during the intervening period.
 - (b) Determine material transactions in that period were made in the normal course of business.

S 2B

STATEMENT OF INSOLVENCY PRACTICE

A LIQUIDATOR'S INVESTIGATION INTO THE AFFAIRS OF AN INSOLVENT COMPANY – REPUBLIC OF IRELAND

- (c) Consider whether the circumstances in which assets were disposed of merit further investigation.
- 15. The liquidator should make an initial assessment of whether there may be potential recoveries for the liquidation and what further investigations may be appropriate.
- 16. The liquidator should determine the extent of the investigations in the circumstances of the particular liquidation, taking account of potential recoveries, the costs involved and the funds likely to be available to meet those costs.

FURTHER WORK/INVESTIGATION

- 17. When, following initial assessment, the liquidator decides the circumstances of the particular liquidation merit further investigation, he or she may decide to consult with the Committee of Inspection or, where such Committee has not been formed, convene a creditors' meeting to consider the matter.
- 18. Proposals put to the creditors regarding further investigation should provide sufficient information (having regard to legal privilege and commercial confidentiality) to enable the creditors to make an informed decision.
- 19. In circumstances where a related company as defined in Section 2(10), Companies Act, 2014, took part in the management of the company being wound-up, the liquidator considers whether the circumstances that led to the winding-up of the company are attributable to actions or omissions of the related company.
- 20. Where there are transactions, which are material on a stand-alone basis or in aggregate as part of a series of linked transactions, with related companies or connected persons (as defined in Section 2(10), Companies Act, 2014, and Section 559, Companies Act, 2014, respectively), the liquidator examines them to determine whether they were carried out on an arms-length basis.

S 2B

STATEMENT OF INSOLVENCY PRACTICE

A LIQUIDATOR'S INVESTIGATION INTO THE AFFAIRS OF AN INSOLVENT COMPANY – REPUBLIC OF IRELAND

LEGAL PROCEEDINGS

21. In deciding whether to bring or defend any actions or other legal proceedings in the name of and on behalf of the company, following the outcome of the investigation, the overriding consideration is the likelihood of any tangible benefit to the creditors arising from such action.
22. In a voluntary winding-up the liquidator should obtain the prior sanction of the Committee of Inspection. Where there is no Committee of Inspection the liquidator may decide to call a creditors meeting to consider the matter.
23. In a compulsory winding up the liquidator must obtain the prior sanction of the High Court.

REPORTING TO CREDITORS

24. Creditors should be given information regarding investigations, any action being taken, and whether (and, if so, what) funding is being provided by third parties. The extent of disclosure made will be subject to considerations of privilege and confidentiality and whether investigations or litigation might be compromised.
25. The liquidator should include a statement dealing with:
 - (a) Within the first annual or progress report to creditors, his or her initial assessment, whether any further investigations or action were considered, and the outcome; and
 - (b) Within subsequent reports, investigations and actions concluded during the period and those that are continuing

OTHER REPORTING REQUIREMENTS

26. The liquidator should consider the results of investigations in the context of his or her statutory obligation to report to the Director of Corporate

S 2B

STATEMENT OF INSOLVENCY PRACTICE

A LIQUIDATOR'S INVESTIGATION INTO THE AFFAIRS OF AN INSOLVENT COMPANY – REPUBLIC OF IRELAND

Enforcement and, in specified circumstances, to the Director of Public Prosecutions.

DOCUMENTATION

27. The liquidator should document, on a timely basis, initial assessments, investigations and conclusions, including any conclusion that further investigation or action is unnecessary or not practical/feasible.
28. The liquidator should document any decision to limit disclosure in reports to creditors.

UPDATED

29. This Statement was updated on 1 June 2015.

S 2B

STATEMENT OF INSOLVENCY PRACTICE

A LIQUIDATOR'S INVESTIGATION INTO THE AFFAIRS OF AN INSOLVENT COMPANY – REPUBLIC OF IRELAND

APPENDIX

PRACTICAL GUIDANCE

FURTHER WORK/INVESTIGATION

- A. 1 During the course of the investigation apparent preferences or rights of action may come to light. In those circumstances the liquidator determines, if necessary with the benefit of legal advice, whether or not particular transactions can be set aside.
- A. 2 The liquidator examines minute books, accounting records and other company records to establish whether significant transactions were entered into by the company which were not properly authorised by the directors.
- A. 3 Having obtained details of all security held by banks and other parties, the liquidator checks the registration and confirms the validity of any charge.
- A. 4 A floating charge may be invalid if it was created within 12 months (24 months if in favour of a director or connected person) prior to commencement of the winding up, unless it can be proved that the company was solvent immediately after the creation of the charge
–
Section 597, Companies Act, 2014, as amended.
- A.5 If the company was in receivership on his or her appointment the liquidator confirms the validity of the receiver's appointment.

S 2B

STATEMENT OF INSOLVENCY PRACTICE

A LIQUIDATOR'S INVESTIGATION INTO THE AFFAIRS OF AN INSOLVENT COMPANY – REPUBLIC OF IRELAND

- A.6 The liquidator considers whether any remedies exist where one or more persons appear to have contributed to the failure of the company. Such remedies include:
- (a) Disqualification or restriction of directors;
 - (b) Action for personal liability for
 - (i) Fraudulent trading or reckless trading
 - (ii) Failure to keep proper books of account;
 - (c) Return of monies or goods improperly transferred from the company.
- A.7 Notwithstanding consultation with the creditors' in general meeting, or with the Committee of Inspection, ultimately it is the liquidator's independent decision to pursue a particular course of action, or refrain from action.
- A.8 Having taken appropriate legal advice, the liquidator reports suspected criminal conduct in relation to the company to the Director of Public Prosecutions and to the Director of Corporate Enforcement in compliance with Section 723, Companies Act, 2014.
- A.9 When examining transactions between the company and one or more of its directors, the liquidator will also assess reductions in the company's bank overdraft or loans, as well as payments to creditors, where such borrowings or credit were supported by personal guarantees from one or more directors.