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STATEMENT OF INSOLVENCY PRACTICE

REMUNERATION OF INSOLVENCY OFFICE HOLDERS - REPUBLIC OF IRELAND

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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. Departure from the standards set out in the Statements of Insolvency Practice is 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 who may fix the remuneration of insolvency office holders ("office holders") are summarised in Appendix 2. The practitioner will breach the law if he or she fails to comply with the relevant statutory requirements when drawing remuneration.

SCOPE

6. This Statement sets out required practice in the provision of information to those interested parties charged with approval of payments ("interested parties") made to office holders (but not personal insolvency practitioners).

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PRINCIPLES

7. This Statement has been prepared taking account of the following principles:
 - (a) Payments to the office holder or his or her associates should be appropriate, reasonable and commensurate with the work necessarily undertaken.
 - (b) Those responsible for approving the basis or bases of calculating payments should have sufficient information to make an informed judgement as to the reasonableness of the office holder's requests.
 - (c) Requests for additional information on payments should be considered as to their merits and proportionality in the circumstances of the particular assignment.

COMPLIANCE STANDARDS

General

8. Information should be provided and approval of remuneration sought in a manner which enables interested parties to exercise their rights under company legislation.
9. The office holder should disclose:
 - (a) All payments, remuneration and expenses arising from an insolvency appointment to the office holder or his or her associates.
 - (b) Any business or personal relationships with interested parties or which provides services to the office holder in respect of the insolvency assignment where the relationship could give rise to a conflict of interest.

Fixing bases of remuneration

10. When seeking approval for the basis or bases of remuneration, the officeholder should provide sufficient supporting information to enable the interested parties, taking account of the circumstances of the particular assignment, to make an informed judgement on the appropriateness of the basis/bases for which approval is sought.

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11. Where remuneration is sought on a time costs basis, the 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 are likely to be involved in the assignment.
12. The office holder should provide details and the cost of any work that has been, or is proposed to be, sub-contracted out that could be carried out by the office holder or his or her staff.
13. If work has already been carried out, the office holder should state the proposed charge for the period to date and provide an explanation of what has been achieved to date and how it was achieved. The information should be sufficient for the interested parties to assess the progress made and whether the proposed charge is reasonable.

After fixing bases of remuneration

14. The requirements in Paragraphs 15 to 18 below are in addition to those imposed by company law.
15. In periodic reports to creditors, the office holder provides an explanation of what was achieved in the reporting period and how it was achieved to enable the progress of the case to be assessed. Creditors need to understand whether, in the circumstances of the case, the remuneration charged is reasonable.
16. Where remuneration is on a time costs basis, the office holder should disclose the charge for the period, the time spent and the average charge-out rates. Where the practitioner considers further disclosure would facilitate creditors' understanding, or if sought by them, the disclosure would be split by grades of staff and analysed by appropriate/relevant activity.
17. Where charge-out rates changed during the reporting period, rates should be disclosed by grades of staff, split by the periods applicable.
18. The office holder should provide details and the cost of any work that has been sub-contracted out that could be carried out by the office holder or his or her staff.
19. In circumstances where a separate charge (expenses or disbursements) is made to recover the costs of facilities provided by the office holder's own practice, such charges should be disclosed to the interested parties, together with an explanation of their calculation and amount. The office holder should be able to demonstrate the charges wholly represent either expenses properly chargeable or incurred by the office holder in

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dealing with the assets, or necessary disbursements of the office holder in dealing with the case.

20. Where services are provided from within the practice or by a party with whom the practice, or an individual within the practice, has a business or personal relationship, the office holder should take particular care to ensure that the best value and service is being provided. The office holder should also have regard to relationships where the practice is held out to be part of a national or international association.

Provision of information to successive office holders

21. When an office holder's appointment is followed by the appointment 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.

Provision of information to interested parties

22. Where realisations are sufficient for payment of creditors in full with interest, the creditors will not have the principal financial interest in the level of remuneration. The office holder should provide the beneficiaries of the anticipated surplus, on request, with information in accordance with the principles and standards contained in this Statement.

UPDATED

23. This Statement was updated on 16 May 2016.

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Appendix 1

PRACTICAL GUIDANCE

Approval of remuneration - liquidator

- 1.1 Where the remuneration of the liquidator is to be fixed by a resolution of the members of the company in general meeting (members' voluntary liquidation- MVL), or by a resolution of a meeting of creditors (creditors' voluntary liquidation- CVL), the liquidator, when acting as chairman, cannot vote any proxies he or she holds in favour of such resolution.
- 1.2 Where the meeting at which the liquidator's remuneration will be voted upon is chaired by a third party, the chairman could vote any special proxies he or she holds in favour of the resolution approving the liquidator's remuneration.
- 1.3 If the liquidator's remuneration is not fixed by the members (MVL), or by the Committee of Inspection or the creditors (CVL), the liquidator must apply to the Court to have it fixed.
- 1.4 Where the liquidator realises an asset on behalf of a secured creditor and receives remuneration out of the proceeds, the amount of that remuneration should be disclosed to the Committee of Inspection (if established) and to any meeting of creditors at which the remuneration will be fixed.

Approval of remuneration - examiner

- 1.5 Generally, where the company/business has been restructured and the Court has sanctioned the scheme, the examiner's fees have been agreed with the company or the investors. Where that is not the case the examiner must obtain Court approval of his or her fees.

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Appendix 2

STATUTORY REQUIREMENTS

There are no statutory provisions governing the bases on which the remuneration of an office holder is to be calculated. The requirements governing the fixing and approval of such remuneration are set out below.

Members' Voluntary Liquidation ("MVL")

- 21 *Section 646(2)(c), Companies Act, 2014*, provides that the company's members may fix the remuneration of the liquidator at the general meeting at which he or she is appointed.
- 22 In circumstances where it was necessary to convert the MVL into a creditors' voluntary liquidation, in the event of a dispute regarding the costs or expenses incurred by the liquidator, the liquidator appointed by the members, the liquidator appointed by the creditors, or any creditor, can apply to the High Court ("the Court") to determine the dispute. (*Section 584(5), Companies Act, 2014*).
- 23 Payment of the liquidator's remuneration in a MVL (whether for all or part of the work carried out or as a payment on account) requires approval by resolution of the members of the company in general meeting. (*Section 647 (2)(c), Companies Act, 2014*).

Creditors' Voluntary Liquidation ("CVL")

- 24 *Section 646(2)(a) and (b), Companies Act, 2014*, empowers the Committee of Inspection, or the creditors (where no committee was established), to fix the remuneration of the liquidator.
- 25 *Section 701(7), Companies Act, 2014*, prohibits any proxy-holder from voting "... in favour of any resolution which would directly or indirectly place
 - (a) himself or herself,
 - (b) a partner of him or her, or
 - (c) an employer of him or her,

in a position to receive any remuneration out of the assets of the company otherwise than as a creditor rateably with the other creditors of the company."

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26 Payment of the liquidator's remuneration in a CVL (whether for all or part of the work carried out or as a payment on account) requires approval by the Committee of Inspection or, where such committee was not established, by resolution of the company's creditors. (*Section 647 (2)(a) and (b), Companies Act, 2014*).

2.7. Any creditor (or contributory), who alleges the remuneration fixed is excessive, may apply to the Court to fix the remuneration to be paid to the liquidator. Such application must be made within 28 days of the original decision of the Committee of Inspection or of the creditors, as the case may be. (*Section 648(4), Companies Act, 2014*).

Winding-Up by the Court

28 *Section 646(2)(a) and (b), Companies Act, 2014*, empowers the Committee of Inspection, or the creditors (where no committee was established), to fix the remuneration of the liquidator in a Court liquidation.

29 Payment of the liquidator's remuneration in a Court liquidation (whether for all or part of the work carried out or as a payment on account) requires approval by the Committee of Inspection or, where such committee was not established, by resolution of the company's creditors. (*Section 647 (2)(a) and (b), Companies Act, 2014*).

All liquidations

2.10 Where the members or the creditors, as the case may be, fail to fix the liquidator's remuneration, it is fixed by the Court in accordance with *Section 646(2)(d), Companies Act, 2014*, and *Rule 38, Order 74, Rules of the Superior Courts, as amended*.

2.11 The affidavit supporting the relevant application (*Rule 38*) shall contain " ... the particulars required by *Section 646(3)* of the Act and such other evidence (if any) as the Court shall require."

2.12 Where the members or creditors, as the case may be, fail to approve the liquidator's remuneration, it is fixed "... by the court or such person as the court may designate" in accordance with *Section 647(2)(d), Companies Act, 2014*.

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Receiverships

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- 2.13 Generally, the receiver's remuneration is a matter for agreement between the receiver and the holder of the charge under which he or she is appointed.
- 2.14 However, "... the Court may, on an application made to it by the liquidator of a company, or by any creditor or member of the company ..." make an order fixing the receiver's remuneration (*Section 444(1) and (2), Companies Act, 2014*). The Court can exercise this power even if the instrument under which the receiver was appointed fixed his or her remuneration.
- 2.15 Section 24(6), Conveyancing Act, 1881, limits the receiver's remuneration, together with costs, charges and expenses, to an aggregate total of 5% of the value of the property subject to the charge. Most debentures exclude this provision, but the practitioner considers obtaining legal advice in circumstances where it has not been excluded.
- 2.16 It was held in *Re Potters Oils Ltd. (No.2)* (1986) 1 WLR 201 that the Court should only intervene where the receiver's remuneration "can clearly be seen to be excessive". In *Re City Car Sales Ltd.* (1995) 1 ILRM 221 it was held that Section 318(1), Companies Act, 1963, (similar to *Section 444(1) and (2), Companies Act, 2014*) does not preclude payment of remuneration the amount of which exceeds the 5% of the value of realisations threshold set by Section 24(6), Conveyancing Act, 1881.
- 2.17 Apportionment of costs between those applicable to assets subject to the fixed charge and those applicable to assets subject to a floating charge can be difficult, particularly in circumstances where trading is continued with the aim of enhancing realisation of assets in both categories. This matter is addressed in greater detail in the Statement of Insolvency Practice "*A Receiver's Responsibility to Preferential Creditors – Republic of Ireland*" – SIP 14B.

Examiners

- 2.18 *Section 554(1), Companies Act, 2014*, provides that the examiner's remuneration may be fixed by the Court.
- 2.19 *Section 554(7)* obliges the examiner to "... in so far as is reasonably possible, make use of the services of the staff and facilities of the company to which he has been appointed to assist him in the performance of his or her functions."
- 2.20 The detailed provisions governing the examiner's application to the Court for payment of "remuneration and costs and reasonable expenses properly incurred" are contained in *Rule 22, Order 74A, Rules of the Superior Courts, as amended*. The examiner's affidavit "... shall set forth a full account of the work carried out by him to the date of the application and a full account of the costs and expenses incurred by him and shall vouch same and of the basis for the proposed remuneration which he is seeking to be paid."
- 2.21 "The affidavit of the examiner shall also specify what use, if any, he has made of the services of the staff and/or of the facilities of the company to which he has been appointed and the extent of such use." (*Rule 22, Order 74A, Rules of the Superior Courts, as amended*).