

Consultation/Call for evidence

Improving the transparency of, and confidence in, pre-packaged sales in administrations

March 2010

Foreword

Pre-packs can often deliver the best result for creditors. Pre-packs are where the sale of a business, and the assets of an insolvent company, is arranged prior to the onset of formal insolvency and effected immediately on the administrator's appointment.

In January 2009 we put in place a Statement of Insolvency Practice to strengthen information for creditors and to ensure that it was provided promptly. Since then we have been monitoring how this has been working in practice. We have found that creditors are now getting better and more timely information, but this is not happening in all cases and confidence in the system is being damaged.

I therefore want to invite views on whether new measures are needed to strengthen transparency and confidence. This document sets out a number of options. I very much look forward to hearing your views on the scale of this issue and possible solutions.

Ian Lucas MP
Minister for Business and
Regulatory Reform
Department for Business
Innovation & Skills

This document invites your views on how the transparency of, and confidence in, pre-packaged sales can be improved. A pre-pack is a deal for the sale of an insolvent company's business, or assets, which is put in place before the company goes into formal insolvency, usually administration. The sale is then executed immediately following the appointment of the office-holder, usually an administrator.

We have drafted various options for consideration, which are set out below, and would require varying degrees of legislative change. In addition to receiving views on these options, we would very much be interested in receiving views on other ways of achieving the aim of improving transparency and confidence in pre-pack sales.

The options that we have identified are:

1. No change. All options will be considered against the alternative of making no regulatory change. Some changes to the Insolvency Rules 1986 that will come into force on 6th April may incentivise insolvency practitioners to provide fuller details of their pre-appointment work when involved with pre-pack sales.
2. Giving statutory force to the disclosure requirements currently in Statement of Insolvency Practice (SIP) 16 (Pre-packaged sales in administrations), and providing penalties for non-compliance.
3. Following a pre-pack administration, restrict exit to compulsory liquidation, so as to achieve automatic scrutiny of the directors' and administrators' actions by the Official Receiver.
4. Require different insolvency practitioners to undertake pre and post-administration appointment work.
5. Require the approval of the court or creditors, or both, for the approval for all pre-pack business sales to connected parties.

We set out below the background and details of the five identified options. There is no Impact Assessment being issued with this consultation, although it is our intention to develop one in parallel with the consultation. We would therefore be grateful if consultees could, wherever possible, provide estimates of, and comments on, expected costs and benefits of the options when responding to the consultation.

Overview

Pre-packs, when used appropriately, are a useful and valuable tool for preserving economic value and saving jobs. Research has shown that in 82% of pre-pack cases, 100% of jobs are saved, which is significantly better than results from business sales arranged after a company has entered administration.

A survey conducted in April 2009 by R3, the trade association for insolvency practitioners, was supportive of those findings. The survey showed that in the 89 pre-packs covered by the survey, 4,846 of the 5,478 jobs that were at risk were saved by the pre-pack.

Recent reported research by Dr Sandra Frisby, of Nottingham University, has shown that unsecured creditors in a pre-pack are marginally better off than in other business sales (average return of 5% compared to 4% in non pre-pack sales).

Despite the potential benefits of pre-packs there has been considerable concern amongst creditors, business and the public about their use. Much of the concern is voiced by unsecured creditors who perceive the procedure as not transparent, given that negotiations for the sale take place before the company goes into administration and usually without overt marketing of the assets. Unsecured creditors also have concerns about their inability to have any influence on the process before the sale takes place, and that sales, particularly to the same management team, may be at an under-value.

Concerns have also been voiced by business, particularly competitors of pre-packed businesses, that the purchaser obtains a competitive advantage, having 'dumped debts' and consequently reducing their costs. There are also concerns that the economic benefits of pre-packs may be short lived, and that jobs saved in the failed company may be at the cost of jobs lost elsewhere in the economy through the effect on formerly solvent companies who consequently suffer bad debts.

A Statement of Insolvency Practice (SIP16) was introduced in January 2009 in order to increase the transparency of, and confidence in, the pre-pack procedure. The Insolvency Service has been monitoring insolvency practitioners' compliance with SIP16 since it was introduced. Our monitoring has shown that despite the issuance of further guidance as to how insolvency practitioners should comply with SIP16, overall compliance rates did not improve during 2009. Our second report published in March 2010 (<http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/sip16/Report%20on%20the%20Operation%20of%20Statement%20of%20Insolvency%20Practice%2016,%20July%20-%20December%202009.pdf>) shows that for the final six months of 2009 more than a third of SIP16 disclosure statements issued by insolvency practitioners were not fully compliant.

Views are now being invited on whether to strengthen the regulatory regime surrounding the use of pre-packs.

Detail

SIP16 is a professional standard that has been approved by the Joint Insolvency Committee and adopted by each of the authorising bodies. The purpose of SIPs is to set out basic principles and essential procedures with which insolvency practitioners are required to comply. Departure from the

standards set out in a SIP is a matter that may be considered by an insolvency practitioner's authorising body for the purposes of possible disciplinary or regulatory action. A copy of SIP16 is at Annex A.

SIP16 requires administrators in pre-packs to provide creditors with a detailed explanation and justification of why a pre-packaged sale was undertaken, so that creditors can be satisfied that the administrator has acted with due regard for their interests. The SIP provides guidance as to the information which should be disclosed in order to achieve this objective.

Although pre-packs occur most often in administration, they can, and have, been used in other insolvency procedures, most notably in administrative receiverships and liquidations.

In order to examine whether legislative or further regulatory change is required, **we invite your views on the need for further measures to be introduced.**

Question 1: Do you believe that the current framework governing the operation of pre-pack sales in administration provides a sufficient level of confidence that pre-packs are only being used in appropriate circumstances and with an appropriate degree of transparency?

Question 2: If not, what are your main concerns with the way pre-packs are currently executed?

Question 3: Do you believe that pre-packs are presently subject to abuse? If so, how? Please indicate whether you believe it is the actions of directors, insolvency practitioners, secured lenders or any other parties that are contributing to any perceived or actual abuse and to what extent you believe this is a problem.

Question 4: Some of the following options would require a distinction to be drawn between pre-packs and 'conventional' administrations. What do you think should be included in a statutory definition as to what constitutes a pre-pack transaction?

Options for improvement

Option 1 – No change

Any proposal for change should be compared against the alternative of making no new provision. However, it should be noted that some changes are about to come into force.

Amendments to the Insolvency Rules 1986, coming into force on 6th April 2010, will allow insolvency practitioners to recover their pre-appointment costs from the insolvent estate, subject to the approval of creditors, including 50%

of preferential creditors (e.g. employees) if preferential debts were not paid in full. In order to obtain that approval, insolvency practitioners will have to justify why that pre-appointment work has assisted in achieving the objective of the administration.

In parallel with the current requirements of SIP16, this should incentivise insolvency practitioners to provide fuller details of their pre-appointment work and arrangement of the pre-pack sale. The facility for insolvency practitioners to formally recover pre-appointment costs from the insolvent estate, which they are not currently able to do, would also allow one insolvency practitioner to act in an advisory capacity to a company in financial difficulty and another to take the formal appointment. Both insolvency practitioners would therefore be able to recover their costs from the insolvency estate in the appropriate circumstances.

It should also be noted that the Joint Insolvency Committee has invited views on SIP16 (please see: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/SIP16Consult.htm> for details).

Question 5: Do you believe that the new pre-appointment cost recovery mechanism will have a significant effect on transparency and confidence?

Option 2: Giving statutory force to the disclosure requirements currently in Statement of Insolvency Practice 16 (Pre-packaged sales in administrations), and providing penalties for non-compliance

This option could be achieved by incorporating the current disclosure requirements of SIP16 into legislation. This would enable greater penalties to be provided, which would be in line with existing penalties for comparable matters in the Insolvency Rules. It is envisaged that similar reporting requirements to those contained within SIP 16 be incorporated into the Insolvency Rules by virtue of the powers in the Insolvency Act 1986.

This would include a requirement to file the information at Companies House, which would result in details of the pre-pack being placed in the public domain. This would enable businesses (e.g. suppliers to the purchasing company) other than creditors, customers, researchers and academics to access the information.

If there were concerns about commercial confidentiality issues in exceptional cases it would be possible to make provision for these.

It would retain the use of the pre-pack procedure in circumstances where speed is essential to preserve value for creditors, although it would not offer any greater protection to creditors to challenge the sale before it takes place.

Question 6: Do you believe that by giving statutory force to the SIP 16 disclosure requirements creditors would be given better information about the reasons and justification for the pre-pack?

Question 7: Do you believe that such a requirement will increase costs and reduce the returns available to (a) secured creditors, and (b) unsecured creditors? If possible, please provide an estimate of the impact on each.

Question 8: Do you believe that it would be appropriate for details of the pre-pack to be filed at Companies House? If not, why not?

Question 9: Do you believe that it would be appropriate for a statutory offence to be created in circumstances where the pre-pack disclosure requirements are not adequately met?

Option 3: Following a pre-pack administration, restrict exit to compulsory liquidation, so as to achieve automatic scrutiny of the directors' and administrators' actions by the Official Receiver.

This option would restrict the exit from administration, for all companies subject to a pre-pack, so that the only available exit route would be through compulsory liquidation. In circumstances where substantially the whole of a company's business had been sold through a pre-pack deal, the company would not be able to exit administration via voluntary liquidation, or company voluntary arrangement or move straight to dissolution. The option would require changes to both primary and secondary legislation.

This option in itself makes no changes to the current disclosure requirements or the process of the pre-pack. Such a restriction on exit from administration would require a statutory definition of a pre-pack.

In all such cases, this would involve the Official Receiver (OR) becoming liquidator in the first instance, unless the administrator or another insolvency practitioner is appointed as liquidator by the court.

The obligation on the administrator to petition the court for compulsory liquidation could take effect after a set period of time, or the timing of the application could be decided by the administrator depending on the particular circumstances of the administration. Until the appointment of the liquidator, the administrator would be able to deal with assets in the usual way. Any assets that had not been realised by the administrator would be realised by the liquidator, including any deferred consideration that had not been collected in prior to the liquidator's appointment.

When a company is wound up by the court in England and Wales the OR has a statutory duty under insolvency legislation to investigate the causes of the company's failure and the promotion, formation, business, dealings and affairs of the company. The OR is independent of insolvency practitioners, being an

officer of the court and a public official. As part of their investigation the OR would be able to scrutinise the pre-pack deal and, where appropriate to do so, utilise statutory powers to pursue recovery actions, e.g. if assets were sold at an undervalue. This should provide comfort that the insolvency practitioner's actions would be properly reviewed.

The OR also has a statutory duty to report on the conduct of the directors. While this duty also extends to insolvency practitioners, the independence of the OR from the pre-pack negotiations may provide greater confidence in their opinion of the directors' conduct.

This option may have some impact on the costs of the administration, as funds would have to be reserved for the costs of putting the company into compulsory liquidation; and assets within the liquidation would be subject to a fee charged by the Secretary of State (a requirement in compulsory liquidations).

Question 10: Do you believe that confidence in pre-packs would be improved by requiring companies whose business and assets had been sold through a pre-pack to exit administration via compulsory liquidation? What would be the possible costs and benefits?

Option 4: Require different insolvency practitioners to undertake pre- and post- administration appointment work.

A concern expressed by some creditors and stakeholders is the perception that there is a conflict of interest in an insolvency practitioner advising on the use of a pre-pack administration and subsequently being appointed as the administrator. A restriction on an advising insolvency practitioner accepting formal appointment as administrator would require primary and secondary legislative change and identification as to what pre appointment advisory involvement would preclude taking formal appointment.

It has been represented that the insolvency practitioner has a vested interest in advising the company to enter into administration, as they stand to benefit in fee income from the appointment. There are concerns that the insolvency practitioner could be persuaded by the prospect of greater fee income for their firm by giving such advice. While insolvency practitioners provide advice in a variety of cases, and may subsequently become an office holder in other insolvency procedures, this is a particular concern in pre-packs, where the majority of the work of the office holder is concentrated in a relatively brief period of time prior to formal appointment in agreeing the sale.

Authorised insolvency practitioners are regulated professionals who are qualified to give advice to companies and individuals about insolvency procedures. All insolvency practitioners are required to have regard to the common Ethical Code for Insolvency Practitioners which was substantially revised on 1st January 2009. That code sets out, amongst other matters, the

proper procedure for dealing with potential conflicts of interest. Compliance with the code is mandatory.

At present, there are no provisions for an insolvency practitioner to claim unpaid costs for their pre-appointment involvement with a company as an expense of the administration, unless approved by the court. Amendments to the Insolvency Rules 1986 coming into force on 6th April 2010 will enable insolvency practitioners to claim their unpaid pre-appointment costs, as an expense, subject to the agreement of creditors. These changes would facilitate the potential involvement of different insolvency practitioners pre and post appointment – as both will be able to recover their unpaid pre-appointment costs from the estate when approved by creditors.

The rationale would be that a different insolvency practitioner accepting formal appointment would scrutinise the pre-pack deal to ensure that it was the best available for creditors, thus addressing the concern that a single insolvency practitioner conducting both pre and post appointment work is implicitly conflicted. The initial insolvency practitioner would advise the company/qualifying floating charge-holder and assist in the preparation of the pre-pack where it was considered to be the most appropriate option. The subsequent insolvency practitioner would then take the formal appointment as administrator and complete the sale, if satisfied that it was in the best interests of creditors.

It is envisaged that any insolvency practitioner providing advice to a company prior to it entering administration where it enters administration with a view to substantially the whole of the business being sold through a pre-pack sale be restricted from taking the formal appointment as administrator.

This proposal would introduce a further layer of scrutiny into the proposed deal and so reassure creditors that the deal had not been engineered in any way.

However, the use of separate insolvency practitioners may reduce dividends to creditors, as the estate would have to bear two sets of costs. As a result of the separation of pre appointment and post appointment work, with the second insolvency practitioner having to review the work of his/her predecessor, there may be some duplication of effort. It is also possible that the use of separate insolvency practitioners would introduce a delay to the procedure that may reduce the value of asset realisations.

Question 11: Do you believe that an insolvency practitioner providing advice to a company on the potential for a pre-pack has an inherent conflict of interest when accepting a formal appointment as administrator with a view to subsequently executing a pre-pack sale?

Question 12: If so, do you believe that such a conflict extends to circumstances where the insolvency practitioner has had an ongoing prior relationship with the company in the context of undertaking review work for a secured lender?

Question 13: Do you believe that a requirement for a different insolvency practitioner to accept appointment as administrator would improve confidence that pre-packs are only used in appropriate circumstances?

Question 14: Do you believe the requirement to use two separate insolvency practitioners would increase costs and delay therefore reducing the returns available to (a) secured creditors, and (b) unsecured creditors? If so, please provide an estimate of the impact on each.

Question 15: Do you believe the requirement to use two separate insolvency practitioners would reduce the number of business sales effected through a pre-pack sale? If so, please provide an estimation of the impact.

Option 5: Require the approval of the court or creditors, or both, for the approval for all pre-pack business sales to connected parties.

This option would seek to address an important concern surrounding pre-packs – that such sales may be contrived at an undervalue for the personal benefit of the directors whilst allowing them to continue trading through a new company which is free of debt. It would prevent the sale of substantially the whole of a business to connected parties or to a company controlled or owned by connected parties without the prior approval of creditors or the court. This would apply only to pre-packaged sales to connected parties. We propose that pre-pack business sales to unconnected parties would be unaffected. This option would require significant changes to both primary and secondary legislation.

One way of achieving this would be to require the administrator, on appointment, to obtain the approval of a proportion of the unsecured creditors or the court before executing the pre-pack sale to a connected party.

Alternatively, provision could be made to require court approval to enter administration in circumstances where it is intended to execute a pre-pack sale of substantially the whole of a business to a connected party. As a part of the court application process prospective administrators could be required to seek the approval of unsecured creditors.

One of the weaknesses of this option is that many insolvencies result in a shortfall to secured creditors and so unsecured creditors rarely receive any dividend. It may therefore be considered to be inequitable for unsecured creditors, if they have no direct financial interest in the outcome of the sale, to be able to influence the process. In addition, the virtue of pre-packaged sales is the enhanced realisable value of the assets in their being sold at a going concern value. Providing advance notice to creditors of the impending sale in order to obtain their approval may result in a diminution of value in the

business and assets, particularly goodwill, and could leave the company unable to trade, resulting in loss of employment and reduced asset values.

Courts can and do respond to urgent applications, where necessary, this might be needed so as to avoid widespread publicity of the insolvency and the subsequent decline in value. However, there would clearly be associated costs.

Clearly, the application to court and attendance at the hearing would cause an increase in time costs of the insolvency practitioner and also disbursements for legal fees and court costs. However, there is the possibility that the desire to avoid such delay and costs could increase the degree of marketing undertaken to identify an offer from an unconnected party.

It must be stressed that a sale to a connected party is not inherently wrong: indeed, it may be the best and in many cases the only option available. One major concern regarding this option is that introducing a delay may adversely affect the rescue of otherwise viable entities. However, it must be ensured that whilst our insolvency law is able to facilitate the rescue of viable businesses, it does not encourage the rescue at all costs of fundamentally unviable businesses to the detriment of the wider economy.

This option could be supplemented by provisions in the Insolvency Act 1986 and the Rules whereby connected parties could be made personally liable for the debts of the purchaser in instances where sales were executed without the requisite approval. Alternatively any sale executed without the requisite approval could be rendered void so that the purchaser would not get good title to the assets.

Question 16: Is it desirable that unsecured creditors, who may not stand to receive any dividend from the proceedings, be given an opportunity to influence the proposed pre-pack sale where the business is being purchased by a connected party? If so, why?

Question 17: Should approval for such a sale initially be sought from unsecured creditors with a recourse to the court, or from the court in the first instance? If you believe unsecured creditors should be given the opportunity to approve in the first instance, what percentage in value of their claims should be required for approval to be obtained?

Question 18: Would the prior approval of the court or creditors for the proposed sale improve confidence that pre-packs are only used in appropriate circumstances?

Question 19: Do you believe the requirement to obtain court or creditor approval would increase costs and delay therefore reducing the returns available to (a) secured creditors, and (b) unsecured creditors? If so, please provide an estimate of the impact on each.

Question 20: Do you believe the requirement to obtain court or creditor approval would reduce the number of business sales effected through a pre-pack sale? If so, please provide an estimation of the impact.

Question 21: Do you believe that any provision requiring the prior approval of the court or creditors for business sales to connected parties should be extended to apply to such sales out of all formal insolvency procedures (i.e. not restricted solely to administration)? If so, why?

Question 22: Do you believe that a requirement to obtain court or creditor approval for a pre-pack business sale to a connected party should be combined with the attachment of personal liability to directors and connected parties who purchase a business without obtaining the requisite approval?

Question 23: Do you believe that it would be appropriate for pre-pack business sales to connected parties executed without the requisite approval to be rendered void?

Further questions to inform Impact Assessment

In order to assist in the formulation of an Impact Assessment of the various options considered, consultees are asked to give consideration to the likely wider economic impact of introducing measures that may restrict the number of business sales facilitated by way of a pre-pack sale.

Question 24: To what extent do you believe that pre-packs provide a positive contribution to the wider economy by allowing economically viable parts of insolvent companies to continue trading? How would you quantify such a contribution? Please provide any evidence you may have to support your comments.

Question 25: To what extent do you believe that pre-packs create market distortions by allowing companies to 'dump debts' and continue trading to the detriment of competitors? How would you quantify this? Please provide any evidence you may have to support your comments.

Question 26: To what extent do you believe that pre-packs create job losses 'upstream' by allowing companies to 'dump debts' and continue trading to the detriment of suppliers who then experience knock-on financial difficulties? How would you quantify this? Please provide any evidence you may have to support your comments.

Question 27: To what extent do you believe that any economic value preserved by a pre-pack sale (e.g. employees, customers, suppliers) would otherwise transfer to alternative ventures (e.g. competitors) if a pre-pack sale was not undertaken? Please provide any evidence you may have to support your comments.

Question 28: Do you believe that any of the options identified would have a significant impact on the behaviour of secured lenders? If so, what do you think this is likely to be? If possible, please provide an estimation of the impact.

Conclusion

Question 29: Which of the five proposed options would be your preferred solution(s), and why?

Question 30: Are there any alternative measures that you believe ought to be considered?

Question 31: Please provide an indication (if not obvious) as to the nature of your involvement in, or exposure to, pre-pack transactions and the approximate incidence of that involvement or exposure if relevant.

We would welcome hearing your comments and would be grateful for your views on any consequences not already identified, which could result from the proposals put forward in this document. If you are aware of anyone else who you think may have an interest, please feel free to pass on a copy of this document as appropriate.

All views should be send to the Insolvency Service, Insolvency Practitioner Policy Section at ippolicy.section@insolvency.gsi.gov.uk or by post to The Insolvency Service, Zone B, 3rd Floor, 21 Bloomsbury Street, London, WC1B 3QW by 24th June 2010.

ANNEX A – SIP 16

STATEMENT OF INSOLVENCY PRACTICE 16 (E & W) PRE-PACKAGED SALES IN ADMINISTRATIONS INTRODUCTION

This Statement of Insolvency Practice (SIP) is one of a series of guidance notes issued to licensed insolvency practitioners with a view to maintaining standards by setting out required practice and harmonising practitioners' approach to particular aspects of insolvency.

SIP 16 is issued under procedures agreed between the insolvency regulatory authorities acting through the Joint Insolvency Committee (JIC). It was commissioned by the JIC, produced by the Association of Business Recovery Professionals, and has been approved by the JIC and adopted by each of the regulatory bodies listed below:

Recognised Professional Bodies:

- The Association of Chartered Certified Accountants
- The Insolvency Practitioners Association
- The Institute of Chartered Accountants in England and Wales
- The Institute of Chartered Accountants in Ireland
- The Institute of Chartered Accountants of Scotland
- The Law Society
- The Law Society of Scotland

Competent Authority:

The Insolvency Service (for the Secretary of State for Business, Enterprise and Regulatory Reform)

The purpose of SIPs is to set out basic principles and essential procedures with which insolvency practitioners are required to comply. Departure from the standard(s) set out in the SIP(s) is a matter that may be considered by a practitioner's regulatory authority for the purposes of possible disciplinary or regulatory action. SIPs should not be relied upon as definitive statements of the law. No liability attaches to any body or person involved in the preparation or promulgation of SIPs.

STATEMENT OF INSOLVENCY PRACTICE

1. In this Statement of Insolvency Practice the term 'pre-packaged sale' (or 'prepack') refers to an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator, and the administrator effects the sale immediately on, or shortly after, his appointment.

2. Practitioners who are party to a pre-packaged sale, whether as adviser to the company before the appointment, as the appointed administrator, or both, should bear in mind the duties which they, and those who act on their advice, owe to parties who might be affected by the arrangement, and should have regard to the associated risks. They should keep a detailed record of the reasoning behind the decision to undertake a pre-packaged sale, and should be able to explain and justify why such a course of action was considered appropriate.

The legal authority for pre-packaged sales

3. In a series of cases¹ the courts have held that, where the circumstances of the case warrant it, an administrator has the power to sell assets without the prior approval of the creditors or the permission of the court. However, it should be borne in mind that reliance on such authority does not protect administrators from potential challenges to their conduct under paragraph 74, or claims for misfeasance under paragraph 75, of Schedule B1 to the Insolvency Act 1986. In order to avoid the risk of such exposure, care should be taken to ensure that such power is only exercised in genuine furtherance of the purpose of administration.

Preparatory work

4. The preparation for a pre-packaged sale highlights a number of issues which arise in other contexts, but which are thrown into sharper focus in the particular circumstances of a pre-pack.

5. Practitioners should be clear about the nature and extent of their role and their relationship with the directors in the pre-appointment period. Where they are instructed to advise the company, they should make it clear that their role is to advise the company and not to advise the directors on their personal position. The directors should be encouraged to take independent advice. This is particularly important if there is a possibility of the directors acquiring an interest in the assets in the prepackaged sale.

6. Practitioners should bear in mind the duties and obligations which are owed to creditors in the pre-appointment period. They should be mindful of the potential liability which may attach to any person who is party to a decision that causes a company to incur credit and who knows that there is no good reason to believe it will be repaid. Such liability is not restricted to the directors.

7. When considering the manner of disposal of the business or assets, administrators should bear in mind the requirements of paragraphs 3(2) and 3(4) of Schedule B1 to the Insolvency Act 1986. These provide that:

the administrator must perform his functions in the interests of the company's creditors as a whole, and

where the objective is to realise property in order to make a distribution to secured or preferential creditors, the administrator has a duty to avoid unnecessarily harming the interests of the creditors as a whole.

Administrators engaged in a pre-packaged sale should therefore be able to demonstrate that they have considered the above.

Disclosure

8. It is in the nature of a pre-packaged sale in an administration that unsecured creditors are not given the opportunity to consider the sale of the business or assets before it takes place. It is important, therefore, that they are provided with a detailed explanation and justification of why a pre-packaged sale was undertaken, so that
¹ *T&D Industries Plc* [2001] 1 WLR 646; *Transbus International Ltd* [2004] EWHC 932 (Ch), [2004] All ER 911; *DKLL Solicitors* [2007] EWHC 2067 (Ch)
they can be satisfied that the administrator has acted with due regard for their interests.

9. The following information should be disclosed to creditors in all cases where there is a pre-packaged sale, as far as the administrator is aware after making appropriate enquiries:

- The source of the administrator's initial introduction
- The extent of the administrator's involvement prior to appointment
- Any marketing activities conducted by the company and/or the administrator
- Any valuations obtained of the business or the underlying assets
- The alternative courses of action that were considered by the administrator, with an explanation of possible financial outcomes
- Why it was not appropriate to trade the business, and offer it for sale as a going concern, during the administration
- Details of requests made to potential funders to fund working capital requirements
- Whether efforts were made to consult with major creditors
- The date of the transaction
- Details of the assets involved and the nature of the transaction
- The consideration for the transaction, terms of payment, and any condition of the contract that could materially affect the consideration
- If the sale is part of a wider transaction, a description of the other aspects of the transaction
- The identity of the purchaser
- Any connection between the purchaser and the directors, shareholders or secured creditors of the company
- The names of any directors, or former directors, of the company who are involved in the management or ownership of the purchaser, or of any other entity into which any of the assets are transferred
- Whether any directors had given guarantees for amounts due from the company to a prior financier, and whether that financier is financing the new business
- Any options, buy-back arrangements or similar conditions attached to the contract of sale

10. This information should be provided in all cases unless there are exceptional circumstances, and if this is the case, the reason why the information is not provided should be stated. If the sale is to a connected party it is unlikely that considerations of commercial confidentiality would outweigh the need for creditors to be provided with this information.

11. Unless it is impracticable to do so, this information should be provided with the first notification to creditors. In any case where a pre-packaged sale has been undertaken, the administrator should hold the initial creditors' meeting as soon as possible after his appointment. Where no initial creditors' meeting is to be held and it is impracticable to provide the information in the first notification to creditors it should be provided in the statement of proposals of the administrator which should be sent as soon as practicable after his appointment.

12. The Insolvency Act 1986 permits an administrator not to disclose information in certain limited circumstances. This Statement of Insolvency Practice will not restrict the effect of those statutory provisions.

Effective from 1 January 2009