THE INSOLVENCY SERVICE

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DEAR INSOLVENCY PRACTITIONER
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Message from Stephen Leinster
Director of Policy – Technical, Legislative
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Dear Insolvency Practitioner

Attached is a special edition of Dear IP which provides guidance on SIP16 (Pre-packaged sales in administrations).

The guidance, produced in consultation with the Recognised Professional Bodies, has been framed in the light of The Service's experience of reviewing SIP 16 disclosure information during the course of 2009. I hope that you find the guidance useful in ensuring that your SIP16 disclosure statements to creditors provides them with a detailed explanation and justification of why pre-packaged sales are undertaken.

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14. Statement of Insolvency Practice 16 – Guidance for Insolvency Practitioners

The following guidance has been produced in consultation with the Recognised Professional Bodies (RPBs) and has been issued to all insolvency practitioners by the Insolvency Service. The guidance has been framed in the light of The Service's experience of reviewing SIP 16 disclosure information during the course of 2009. The purpose of the guidance is to assist practitioners in complying with the disclosure requirements of Statement of Insolvency Practice (SIP) 16 when undertaking pre-packaged sales in administrations. The RPBs have seen this guidance and have agreed to have regard to it when considering possible failures to comply with SIP 16 by practitioners licensed by them.

INTRODUCTION

Practitioners are reminded that the key principle of SIP 16 is contained in Paragraph 8 of the SIP:

> **It is important that [creditors] are provided with a detailed explanation and justification of why a pre-packaged sale was undertaken, so that they can be satisfied that the administrator has acted with due regard for their interests.**

Practitioners should note that the experience of the Insolvency Service in reviewing SIP 16 statements submitted shows that giving a short response to the bullet point disclosure requirements listed in paragraph 9 of the SIP alone is unlikely to provide the detailed explanation and justification required by paragraph 8.

Practitioners should aim to provide sufficient information to ensure that creditors do not need to ask further questions of the practitioner about the justification for the pre-packaged sale and details of it.

Practitioners should satisfy themselves that the information disclosed provides the detailed explanation and justification required. It should be remembered that not all creditors will be familiar with the trading activities of the company and they may be unaware that the company has been experiencing financial difficulties. Sufficient background information should be provided for creditors to be able to ascertain the context in which the practitioner has been appointed, including following:

- What the company did
- What financial pressures the company was under and the primary cause of the company's insolvency
- In the case of a qualifying floating charge appointment how the company was in default and in all other cases why the company was insolvent

- Where relevant, why the pre-packaged sale has been used as a vehicle for some form of corporate restructuring (e.g. debt/equity swaps etc.)

- Any issues which have necessitated a speedy sale of the assets / business.

In some situations practitioners may consider it undesirable to disclose certain information (e.g. because it might hamper further realisations and thus not be in the interests of creditors). Specific provision is made for this in paragraphs 10 and 12 of the SIP; however, where information is being withheld the reason for this should be disclosed in all but the most exceptional of situations.

TIMING

Paragraph 11 of the SIP provides that unless it is impracticable to do so the relevant information should be sent with the first notification to creditors.

One of the fundamental purposes of the SIP is to make it clear to creditors at an early stage why a pre-packaged sale has been carried out, shortly following appointment, and that the practitioner has acted with regard to their interests. This purpose would be defeated if the SIP 16 disclosure was simply to be included in the administration proposals several weeks after appointment.

It is expected that in the majority of cases SIP 16 information should be sent to creditors within a few days of the practitioner's appointment or upon completion of the sale. ***In all but the most exceptional of cases SIP 16 information should be sent to creditors within 14 days of the completion of the sale.*** If practitioners have been unable to meet this requirement they should explain the reasons for the delay in their disclosure.

The convenience of the practitioner should not be a factor in considering what may be impracticable and a failure to have collated the information or undertaken adequate preparatory work will not justify late disclosure.

It is envisaged that practitioners will be collating the requisite information from the moment the decision to execute a pre-packaged sale is taken to enable them to provide the information to creditors in accordance with the timescale above.

GUIDANCE ON SPECIFIC DISCLOSURE REQUIREMENTS

The following three requirements of paragraph 9 of the SIP relate to how the practitioner became involved in the negotiations and the marketing activities undertaken, which led to the pre-packaged sale. The information provided should be sufficient to enable the creditors to readily understand the extent of the work undertaken by the practitioner before their appointment as administrator and the process that led to the decision to sell to the eventual purchaser.

The source of the practitioner's initial introduction

The name of any introducer and their relationship to the company and/or the directors, and the circumstances leading to the referral, form an integral aspect of the detailed explanation required for creditors to understand the circumstances leading to the pre-packaged sale and the context in which the practitioner became involved. These details should, therefore, be disclosed under this heading.

Practitioners should also disclose the date of their formal engagement by the company when detailing their involvement.

The extent of the practitioner's involvement prior to appointment

Sufficient information should be provided by practitioners to identify any previous relationship between the practitioner (which should include the practitioner's firm) and the company and/or directors.

Many creditors will have only a limited understanding of formal insolvency proceedings and an explanation that the practitioner, not the directors, has undertaken the sale negotiations with the prospective appointment of an administrator in mind, may help to avoid misunderstandings.

Any marketing activities conducted by the company and/or the practitioner

In order for creditors to understand the circumstances leading to the pre-packaged sale, the practitioner should disclose details of the process that led to the decision to sell to the eventual purchaser. It is recognised that the degree of marketing will vary on a case by case basis and that practitioners will have considered many factors in reaching the decision to conduct any marketing exercise or, in some cases, not to market the business.

Details of the nature of any marketing activities that were carried out by the company and/or practitioner should be provided or alternatively an explanation provided as to why it was decided not to undertake any marketing. If the business was marketed, and a number of expressions of interest and/or offers were received, it is important that summary information about the outcome of the marketing (such as the number of offers received, the range of consideration offered and the fact that the best offer was accepted) are disclosed, so that the outcome of the marketing exercise is clear.

INFORMATION REGARDING ASSETS

The following three requirements of paragraph 9 of the SIP relate to the description, valuation and sale of the assets of the company. This information should be disclosed showing the various categories of assets of the company in a comprehensible format, so as to allow the creditors to readily understand the values of the assets within the company and how these have been sold.

Any valuations obtained of the business or the underlying assets

Practitioners will be aware of the importance of ensuring that independent valuations are carried out wherever possible. The level of detail that practitioners will be able to provide will depend upon the type of valuation that has been carried out and nature of the assets, but generally:

- valuations should be disclosed with sufficient detail for creditors to understand the values placed upon the various categories of assets. Where it is otherwise unclear, information should be provided as to how any value attributed to goodwill has been determined.

- the basis upon which the business has been valued. This may include valuations on a going concern or break up basis, and any valuations of the underlying assets of the business, whether in-situ or ex-situ.

- the name of the valuer used should be included in all cases.

Where valuations have not been obtained by the practitioner an explanation should be provided as to why not. Alternatively information should be provided as to what reliance, if any, has been placed on valuations previously obtained by the company or its lender(s), such information being in the same format as above.

Details of the assets involved and the nature of the transaction

Practitioners should provide details of the assets by reference to categories as noted above and provide other related information regarding assets sold whose value is complex or not readily ascertainable (e.g. rights of action or a sale of shares in a subsidiary).

Details should also be provided of significant assets not included in the sale agreement.

The consideration for the transaction, terms of payment and any condition of the contract that could materially affect the consideration

Practitioners should ensure that disclosure of the sale consideration is broken down by asset category as noted above; asset categories should, wherever possible, correspond to the categories used to report any valuation obtained, allowing creditors to compare realisations with valuations. In the case of group companies, creditors should be able to understand how the consideration is being apportioned between companies within the group if it is relevant.
When there is a significant difference between the valuations and realisations practitioners should provide an explanation why that is the case.

In circumstances where an element of the consideration has been deferred, or where the level of consideration is dependent upon the future performance of the purchaser, however so defined (e.g. turnover, profits, the achievement of particular targets or the outcome of negotiations with third parties), the structure and timescale of any such payment should be made clear.

Details should be disclosed of any security obtained for deferred consideration, or alternatively confirmation should be provided that no security has been obtained.

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