



ACCREDITED
**Licensed Insolvency
Practitioners**

Statement of Insolvency Practice 9 (E&W)

Remuneration of Insolvency office holders England and Wales

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Version 5 (England and Wales)

Contents

1.	Introduction	3
2	The statutory provisions	4
2.2	Administration	4
2.3	Insolvent liquidations and bankruptcies	5
2.4	Members' voluntary liquidations.....	6
2.5	Voluntary arrangements.....	7
2.6	Receiverships.....	7
2.7	Other types of appointment.....	8
3	Provision of information when seeking fee approval.....	8
4.	Provision of information after fee approval	10
5.	Asset realisations.....	11
6.	Expenses and disbursements.....	11
7.	Payment in full	12
8.	Closure of cases	12
9.	Transitional provisions	12

1. Introduction

- 1.1 This Statement of Insolvency Practice (SIP) is one of a series 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 9 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 authorities 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 Trade and Industry)

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.

- 1.2 The purpose of this statement of insolvency practice is to:

- ensure that members are familiar with the statutory provisions relating to office holders' remuneration;
- set out required practice with regard to the observance of the statutory provisions;
- set out required practice with regard to the provision of information to those responsible for the approval of fees to enable them to exercise their rights under the insolvency legislation;
- set out required practice with regard to the disclosure and drawing of disbursements.

The statement has been produced in recognition of the principle that those with a direct financial interest in the level of office holders' fees should feel confident

that the rules relating to the charging of remuneration have been properly complied with, and that those charged with responsibility for approval of fees have access to sufficient information about the basis of fees to be able to make an informed judgement about the level of remuneration in any particular case. The statement applies to England and Wales only.

1.3 Members should be aware that the drawing of remuneration otherwise than in accordance with the relevant statutory provisions will render them in breach of the law.

1.4 The statement is divided into the following sections:

- The statutory provisions
- Provision of information when seeking fee approval
- Provision of information after fee approval
- Asset realisations
- Expenses and disbursements
- Payment in full
- Closure of cases

2 The statutory provisions

2.1 The statutory provisions relating to the remuneration of office holders are set out in The Insolvency Rules 1986 ('the Rules') as amended. There are also disclosure requirements in the Insolvency Regulations 1994, as amended. The relevant rules and regulation are set out in full in Appendix A. The main provisions relating to the most common types of insolvency appointment are summarised in the following paragraphs.

2.2 Administration

2.2.1 The rules applicable in administration depend on whether the proceedings are based on a petition presented before 15 September 2003. If they are, then the rules as they stood before the changes introduced by the Enterprise Act 2002 and its associated legislation continue to apply. In all other cases the rules substituted by the Insolvency (Amendment) Rules 2003 will apply. As far as remuneration is concerned the two sets of rules are in identical terms, with the exception of the qualification regarding creditors' resolutions noted in paragraph 2.1.5 below.

2.2.2 The basis for fixing the administrator's remuneration is set out in old rule 2.47 for cases where the petition was presented before 15 September 2003, and new rule 2.106 for all other cases. The rules state that it shall be fixed either:

- as a percentage of the value of the property which the administrator has to deal with, or
- by reference to the time properly given by the administrator and his staff in attending to matters arising in the administration.

2.2.3 It is for the creditors' committee (if there is one) to determine on which of these bases the remuneration is to be fixed, and if as a percentage to determine what

percentage is to be applied. In arriving at its determination the committee shall have regard to:

- the complexity (or otherwise) of the case;
- any responsibility of an exceptional kind or degree which falls on the administrator;
- the effectiveness with which the administrator appears to be carrying out, or to have carried out, his duties;
- the value and nature of the property which the administrator has to deal with.

2.2.4 If there is no creditors' committee, or the committee does not make the requisite determination, the administrator's remuneration may be fixed by a resolution of a meeting of creditors using the same criteria as would apply if fixed by the committee. If the remuneration is not fixed in any of these ways, it will be fixed by the court on application by the administrator.

2.2.5 If the administrator has stated in his proposals that the company has insufficient property to enable a distribution to be made to unsecured creditors except out of the reserved fund set aside out of floating charge assets, then the remuneration may be fixed by the approval of –

- each secured creditor of the company; or
- if the administrator has made or intends to make a distribution to preferential creditors –
 - each secured creditor of the company; and
 - preferential creditors whose debts amount to more than 50% of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold approval,

using the same criteria as would apply if fixed by the committee.

2.2.6 In cases where the application is made or the appointment made on or after 15 September 2003 a resolution of creditors may be taken by correspondence.

2.2.7 It should be noted that both rules 2.47 and 2.106 stipulate that the administrator's remuneration shall be fixed *either* on a percentage basis *or* on a time cost basis. Any resolutions purporting to allow the administrator to be remunerated on whichever basis he chooses or whichever yields the higher remuneration will not be in accordance with the rule.

2.3 Insolvent liquidations and bankruptcies

2.3.1 The basis for fixing the remuneration is broadly the same for both insolvent liquidations and bankruptcies. The relevant provisions are Rules 4.127 – 4.131 for liquidations and Rules 6.138 – 6.142 for bankruptcies. The rules state that the remuneration shall be fixed either:

- as a percentage of the value of the assets which are realised or distributed or both, or
- by reference to the time properly given by the office holder and his staff in attending to matters arising in the insolvency.

2.3.2 It is for the liquidation or creditors' committee (if there is one) to determine on which of these bases the remuneration is to be fixed, and if as a percentage to determine what percentage is to be applied. In arriving at its determination the committee shall have regard to:

- the complexity (or otherwise) of the case;
- any responsibility of an exceptional kind or degree which falls on the office holder in connection with the insolvency;
- the effectiveness with which the office holder appears to be carrying out, or to have carried out, his duties;
- the value and nature of the assets which the office holder has to deal with.

2.3.3 If there is no committee, or the committee does not make the requisite determination, the remuneration may be fixed by a resolution of a meeting of creditors using the same criteria as would apply if fixed by the committee. A resolution specifying the terms on which the office holder is to be remunerated may be taken at the section 98 meeting (rule 4.53) or at the first meeting of creditors in compulsory liquidations and bankruptcies (rule 4.52 for compulsory liquidation; rule 6.80 for bankruptcy). As in the case of administrations, the rules require the percentage and time cost bases to be treated as mutually exclusive and not supplementary, and any resolution purporting to allow the office holder to choose which basis to apply will be in breach of the rules.

2.3.4 If the remuneration is not fixed as above, it will be in accordance with the relevant statutory scale. In cases where the company goes into liquidation, or the bankruptcy order is made, on or after 1 April 2004, the scale will be that set out in Schedule 6 to the Rules. In other cases it will be the scale laid down for official receivers in Schedule 2 to the Insolvency Regulations 1994, which is deemed still to apply in such cases. Both scales are the same, and are reproduced in Appendix B. Fees should not be drawn on the scale without first attempting to obtain the agreement of the committee or the creditors to a basis for the fixing of the remuneration, nor as an interim measure pending the agreement of the committee or creditors. This does not, however, preclude the fixing of fees by the committee or the creditors on the basis of the scale.

2.4 Members' voluntary liquidations

2.4.1 The basis for fixing the liquidator's remuneration in a member's voluntary liquidation is set out in rules 4.148A and 4.148B. The basis is the same as for insolvent liquidations, except that it is to be determined by the members of the company in general meeting and not by the creditors. In determining the basis of the liquidator's remuneration the members must have regard to the same factors as the creditors do in an insolvent liquidation.

2.4.2 If the remuneration is not fixed in this way, it will be in accordance with the relevant statutory scale. In cases where the company goes into liquidation on or after 1 April 2004, the scale will be that set out in Schedule 6 to the Rules. In other cases it will be the scale laid down for official receivers in Schedule 2 to the Insolvency Regulations 1994, which is deemed still to apply in such cases. The same observations apply to the application of percentage or time costs as set out in paragraph 2.3.3 above in relation to insolvent liquidations. Remuneration should not be drawn on the scale without first attempting to

obtain the agreement of the members to a basis for fixing the remuneration, nor as an interim measure pending the agreement of the members.

2.5 Voluntary arrangements

2.5.1 The fees, costs, charges and expenses which may be incurred for any of the purposes of a voluntary arrangement are set out in the Rules (rule 1.28 for company voluntary arrangements and rule 5.33 (previously rule 5.28) for individual voluntary arrangements). They are:

- any disbursements made by the nominee prior to the arrangement coming into effect, and any remuneration for his services as such agreed between himself and the company (or the administrator or liquidator, as the case may be) or the debtor (or the official receiver or trustee, as the case may be);
- any fees, costs, charges or expenses which
 - are sanctioned by the terms of the arrangement, or
 - would be payable, or correspond to those which would be payable, in an administration, winding up or bankruptcy (as the case may be).

The Rules also require the following matters to be stated or otherwise dealt with in the proposal (rule 1.3 for company voluntary arrangements; rule 5.3 for individual voluntary arrangements):

- the amount proposed to be paid to the nominee (as such) by way of remuneration and expenses, and
- the manner in which it is proposed that the supervisor of the arrangement should be remunerated and his expenses defrayed.

2.5.2 It is for the creditors' meeting to decide whether to agree these terms along with the other provisions of the proposal. The creditors' meeting has the power to modify any of the terms of the proposal (with the consent of the debtor in the case of an individual voluntary arrangement), including those relating to the fixing of remuneration. The nominee should be prepared to disclose the basis of his fees to the meeting if called upon to do so. Although there are no further statutory provisions relating to the fixing of remuneration in voluntary arrangements, the terms of the proposal may provide for the establishment of a committee of creditors and may include among its functions the fixing of the supervisor's remuneration, provided such terms have been agreed by the creditors' meeting. Where a committee set up under the terms of a voluntary arrangement is given the power to fix remuneration, it should be provided with the same information as if it were fixing remuneration in an administration.

2.6 Receiverships

Generally speaking the remuneration of a receiver appointed over property under powers contained in a document of charge will be a matter for agreement between the receiver and the holder of the charge under which he is appointed. In the case of a receiver appointed over the property of a company, there is provision under section 36 of the Insolvency Act 1986 for the court to fix the remuneration of the receiver on application by the liquidator. Such power is only to be exercised where the receiver's remuneration is excessive and not as a routine way of taxing receivers' costs (*Re Potters Oils (No. 2)*, [1986]1WLR 201;

(1985) 1 BCC 99,593). Once such an order has been made, an application may be made to the court by either the liquidator or receiver to vary or amend it. There is no equivalent provision for receivers appointed over the property of an individual or a partnership.

2.7 Other types of appointment

Other appointments which may be encountered include receivers, special managers and provisional liquidators appointed by the court. In these cases the remuneration of the office holder is fixed by the court. When fixing the remuneration of a provisional liquidator the court will take into account the matters set out in rule 4.30, which is reproduced in Appendix A.

3 Provision of information when seeking fee approval

- 3.1 Members should be mindful at all times of the rights accorded to creditors in relation to fees under insolvency legislation, and when acting in an advisory capacity or as office holder should ensure that adequate steps are taken to bring those rights to their attention. Appendix C contains the text of a set of explanatory notes on the bases on which office holders' remuneration is fixed in a format suitable for making creditors aware of the relevant provisions. Members are required to ensure that information on how to access the explanatory note appropriate to the type of insolvency proceedings concerned or the equivalent information in some other suitable format, is made available to creditors before any resolution is passed to fix or approve the office holder's remuneration.
- 3.2 The particular nature of an insolvency office holder's position renders it of primary importance that all payments made to his own firm out of funds under his control should be disclosed and explained to those who are charged with the responsibility for approving his remuneration. When seeking agreement to his fees, the office holder should provide sufficient supporting information to enable those responsible for approving his remuneration ('the approving body') to form a judgement as to whether the proposed fee is reasonable having regard to all the circumstances of the case. The nature and extent of the supporting information which should be provided will depend on:
- the nature of the approval being sought;
 - the stage during the administration of the case at which it is being sought; and
 - the size and complexity of the case.
- 3.3 Where, at any creditors' or committee meeting, agreement is sought to the terms on which the office holder is to be remunerated, he should provide the meeting with details of the charge-out rates of all grades of staff, including principals, which are likely to be involved on the case.
- 3.4 Where agreement is sought to fees during the course of the assignment, an up to date receipts and payments account should always be provided. Where the proposed fee is based on time costs the office holder should disclose to the

approving body the time spent and the charge-out value in the particular case, together with, where appropriate, such additional information as may reasonably be required having regard to the size and complexity of the case. The additional information should comprise a sufficient explanation of what the office holder has achieved and how it was achieved to enable the value of the exercise to be assessed (whilst recognising that the office holder must fulfil certain statutory obligations that might be seen to bring no added value for creditors) and to establish that the time spent has been properly given. That assessment will need to be made having regard to the time spent and the rates at which that time was charged, bearing in mind the factors set out in paragraphs 2.2.2 and 2.3.2 above. Appendix D sets out a suggested format, with explanatory notes, for producing the information required to enable this assessment to be carried out. It provides for a degree of analysis of time by activity and grade of staff and sets out suggested categories for the purposes of this analysis. Whilst the approach embodied in Appendix D is potentially applicable to all types and sizes of case, the degree of analysis and form of presentation should be proportionate to the size and complexity of the case, and not all categories of activity will always be relevant.

- 3.5 New Regulation 36A requires insolvency office holders to provide certain information about time spent on a case, free of charge, upon request by specified persons. The persons entitled to ask for this information are –
- any creditor in the case;
 - where the case relates to a company, any director or contributory of that company; and
 - where the case relates to an individual, that individual.

The information which must be provided is –

- the total number of hours spent on the case by the practitioner or staff assigned to the case;
- for each grade of staff, the average hourly rate at which they are charged out;
- the number of hours spent by each grade of staff in the relevant period.

The period for which the information must be provided is the period from appointment to the end of the most recent period of six months reckoned from the date of the practitioner's appointment, or where he has vacated office, the date that he vacated office. The information must be provided within 28 days of receipt of the request by the insolvency practitioner, and requests must be made within two years from vacation of office.

This provision applies in any case where the insolvency practitioner is appointed on or after 1 April 2005.

- 3.6 The case records required to be maintained and retained under the Insolvency Practitioners Regulations 2005 include records of the amount of time spent on the case by the office holder and any persons assigned to assist in the administration of the case. This applies in any case where the insolvency practitioner is appointed on or after 1 April 2005.
- 3.7 Where the fee is charged on a percentage basis the office holder should provide the approving body with details of any work which has been or is

intended to be sub-contracted out which would normally be carried out by office holders themselves.

- 3.8 A receiver appointed in relation to a company should on request provide the information specified in paragraphs 3.4 and 3.6 to the company's liquidator.
- 3.9 When notices are sent out convening meetings under section 98 of the Insolvency Act 1986 they should include a statement to the effect that the resolutions to be taken at the meeting may include a resolution specifying the terms on which the liquidator is to be remunerated, and that the meeting may receive information about, or be called upon to approve, the costs of preparing the statement of affairs and convening the meeting. Members should advise directors when convening section 98 meetings that the notices despatched to creditors should include such a statement and contain the information on how to access the appropriate explanatory note referred to in paragraph 3.1. If that advice is given orally and not accepted by the directors it should be confirmed in writing.

4. Provision of information after fee approval

- 4.1 Where a resolution fixing the basis of fees is passed at any creditors' meeting held before he has substantially completed his functions the office holder should notify the creditors of the details of the resolution in his next report or circular to them. In all subsequent reports to creditors the office holder should specify the amount of remuneration he has drawn in accordance with the resolution. Where the fee is based on time costs he also should provide details of the time spent and charge-out value to date and any material changes in the rates charged for the various grades since the resolution was first passed. He should also provide such additional information as may be required in accordance with the principles set out in paragraph 3.4. Where the fee is charged on a percentage basis the office holder should provide the details set out in paragraph 3.6 above regarding work which has been sub-contracted out. The requirements of this paragraph also apply where the basis of the remuneration of a supervisor in a voluntary arrangement as set out in the proposal does not require any further approvals by the creditors or any creditors' committee established under the proposal.
- 4.2 Where, in a liquidation or bankruptcy, a resolution specifying the terms on which the office holder is to be remunerated is passed at a creditors' meeting, there is no statutory requirement for further creditor approval for the drawing of remuneration. It should be borne in mind, however, that in such cases creditors have the right to requisition a meeting or to apply to the court if they consider the office holder's remuneration to be excessive. The office holder should provide creditors with sufficient information to enable them to decide whether to exercise those rights. The information provided in accordance with paragraph 3.4 should normally be sufficient for this purpose. Where, however, creditors make a reasonable request for further information, it should be provided.
- 4.3 In a liquidation or a bankruptcy, where the office holder realises an asset on behalf of a secured creditor and receives remuneration out of the proceeds, he should disclose the amount of that remuneration to the committee (if there is

one), to any meeting of creditors convened for the purposes of determining his fees, and in his reports to creditors.

5. Asset realisations

Practitioners are reminded that any monies received by a trustee in bankruptcy in relation to the sale of the bankrupt's interest in his matrimonial home, as in the case of any other property, represent realisations which must be paid into the Insolvency Services Account. Any fees in relation to the realisation must be approved in the usual way.

6. Expenses and disbursements

- 6.1 Approval is not required for the drawing of necessary disbursements. However, not all costs properly charged in connection with insolvency assignments may necessarily be regarded as disbursements. The precise demarcation line between disbursements and remuneration is not defined by statute and has not been specifically determined by the courts. Particular difficulties arise in connection with charges that involve calculations of shared and overhead costs, as these may include an element of remuneration.
- 6.2 In the absence of a clear statutory definition best practice is that only those costs that clearly meet the definition of disbursements, where there is specific expenditure relating to the administration of the insolvent's affairs and referable to payment to an independent third party, are treated as disbursements recoverable without approval. In this statement these are referred to as 'category 1 disbursements' (approval not required). Category 1 disbursements will generally comprise external supplies of incidental services specifically identifiable to the case, typically for items such as identifiable telephone calls, postage, case advertising, invoiced travel and properly reimbursed expenses incurred by personnel in connection with the case. Also included will be services specific to the case where these cannot practically be provided internally such as printing, room hire and document storage. Members should be prepared to disclose information about specific category 1 disbursements where reasonably requested.
- 6.3 Where it is proposed to recover costs which, whilst being in the nature of expenses or disbursements, include elements of shared or allocated costs, they should be identified and subject to approval by those responsible for approving remuneration. If the office holder wishes to make a separate charge for expenses in this second category, he may do so provided that:
- such expenses are of an incidental nature and are directly incurred on the case, and there is a reasonable method of calculation and allocation; it will be persuasive evidence of reasonableness, if the resultant charge to creditors is in line with the cost of external provision; and
 - the basis of the proposed charge is disclosed and is authorised by those responsible for approving his remuneration.

These are defined as category 2 disbursements (approval required). Category 2 disbursements will comprise cost allocations which may arise on some of the

category 1 expense where supplied internally: typically, items such as room hire and document storage. Also typically included will be routine or more specialist copying and printing, and allocated communication costs provided by the practitioner or his firm.

- 6.4 A charge for disbursements calculated as a percentage of the amount charged for remuneration is not permissible.
- 6.5 Basic non-incidental costs, including such items as time costs, office and equipment rental, depreciation, standing charges, finance charges, accounting and administration costs, may not be the subject of separate charges.
- 6.6 Payments to outside parties in which the office holder or his firm or any associate (as defined by section 435 of the Insolvency Act 1986) has an interest should be treated as category 2 disbursements.
- 6.7 Where, in a liquidation or a bankruptcy, remuneration is being taken on the statutory scale and there is no committee and it has not been possible to obtain a resolution of the creditors, category 2 disbursements may only be recovered if authorised by the creditors.
- 6.8 Members are reminded that it is the office holder's obligation to satisfy himself of the appropriateness of disbursements.

7. Payment in full

In a bankruptcy, voluntary arrangement, administration or initially insolvent liquidation where realisations are sufficient for payment of creditors in full with interest, it should be remembered that, notwithstanding the right of the creditors or the committee to fix the office holder's remuneration, it will be the debtor or the members, as the case may be, who will have the principal financial interest in the level of fees. The office holder should therefore on request provide them with information, in accordance with the principles set out in this Statement of Insolvency Practice, about how the remuneration, expenses and disbursements have been calculated.

8. Closure of cases

On the closure of a liquidation or bankruptcy there will frequently be a small residual balance of funds in hand, due to the unavoidable difficulty of calculating the final outcome with absolute precision. Such monies should be paid into the Insolvency Services Account as undistributed assets in accordance with regulations 18 and 31 of the Insolvency Regulations 1994. Where the funds are already held in the Insolvency Services Account IP Banking Unit should be notified by letter that they represent undistributed assets.

9. Transitional provisions

- 9.1 Version 2 of Statement of Insolvency Practice 9, which was the first to require a degree of analysis of time by activity and grade of staff, came into effect on 31 December 2002 and should be complied with in all cases beginning on or

after that date. As regards cases commenced previously, any reports issued or resolutions taken after that date should comply with the new SIP. However, where any analysis or disclosure required for such a report or resolution relates to a period prior to 31 December 2002, it should comply with the new SIP as far as the available records reasonably allow.

- 9.2 The present version (version 3) of the SIP has been revised to take account of legislative changes relating to remuneration introduced since that time, and will apply in all cases to which the new legislative provisions apply.

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