

**ACQUISITION OF ASSETS OF INSOLVENT  
COMPANIES BY DIRECTORS**

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### INTRODUCTION

1. This Statement of Insolvency Practice is one of a series issued by the Institute of Chartered Accountants in Ireland to insolvency practitioners with a view to maintaining standards by setting out required practice and harmonising members' approach to particular aspects of insolvency practice.
2. The purpose of Statements of Insolvency Practice is to set out basic principles and essential procedures with which insolvency practitioners are required to comply. Departure from the standards set out in the Statements of Insolvency Practice is a matter that may be considered by the Institute for the purposes of possible disciplinary or regulatory action.
3. The purpose of this Statement is to:
  - ensure that members are familiar with the legal obligations of directors and shadow directors (together in this Statement referred to as "directors") in relation to the acquisition of assets of companies by them or persons connected with the directors (as defined by Sections 26 and 27 of the Companies Act 1990) and the statutory provisions relating to such acquisitions;
  - ensure that members are aware of their legal obligations as insolvency officeholders in relation to the disposal of assets to directors and of relevant statutory provisions;
  - set out required practice with regard to the disposal of assets to, and their acquisition by, directors;
  - set out required practice with regard to the disclosure of such transactions.
4. This Statement has been produced in recognition of the fact that the acquisition of assets of insolvent and prospectively insolvent businesses by directors may give rise to concerns that assets may have been disposed of at less than market value and that those who have been prejudiced by the insolvency of the disposing company may be exposed to further risk through continued trading by those who have or may have had responsibility for the insolvency of the disposing company.

It recognises that connected party transactions may be in the best interests of creditors, but requires such transactions to be conducted with the greatest degree of propriety and with disclosure to those interested as soon as reasonably practicable.

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#### **SCOPE**

5. This Statement covers the following:
  - obligations of members acting as:
    - professional adviser to the directors
    - professional adviser assisting the directors in the convening of meetings of members and creditors in connection with the winding up of the company as a creditors' voluntary liquidation;
  - obligations of members acting as:
    - examiner;
    - receiver;
    - provisional liquidator;
    - liquidator in a winding up by the Court or in a creditors' voluntary liquidation
6. In this Statement the word "directors" includes directors by whatever name called and shadow directors, and the word "assets" includes all tangible and intangible assets including the goodwill and the right to use any trading name.

#### **THE LEGAL OBLIGATIONS OF DIRECTORS AND STATUTORY PROVISIONS**

7. The following are the principal legal obligations and some of the statutory provisions of particular relevance to directors of a company which is or is prospectively insolvent.
8. The overriding obligation of directors of a company is to act in the best interests of the company, its creditors and its members. Failure to do so exposes directors to claims for misfeasance or breach of duty.
9. At any time when the directors knew or ought to have known that insolvent liquidation is unavoidable they have an obligation to take such action as is appropriate to protect the interests of creditors. Failure to do so renders them liable to claims under Sections 297 and 297A of the Companies Act, 1963.
10. In the period preceding formal insolvency the acquisition of assets of a company by directors or parties connected with them may require approval by the members of the company by resolution (Section 29, Companies Act, 1990). It is the duty of directors to ensure that when it is required such approval is obtained before any relevant transaction is undertaken. Any transaction requiring approval but

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18. The member will have the assets of the company under his or her legal control. It is the member's duty to ensure that all transactions between the company of which he or she is acting as officeholder and directors and connected parties are conducted on a fully arms length basis and, as regards the value of any assets which are the subject of any such transaction, on the basis of a professional appraisal of those assets. When such appraisal is not conducted by an independent valuer the officeholder should ensure that he or she has conducted all due enquiries as to the value of the assets and retain appropriate documentation thereof. Where assets are sold without professional valuation the officeholder should consider seeking the views of the Committee of Inspection, if there is one.
19. The duty is to ensure that the value of the assets is maximised, but this does not require the member to obtain the maximum value for each individual asset if disposal of a parcel of assets or the assets as a whole will, in aggregate, maximise total realisations. Since the allocation of the consideration between the constituent assets affects the interest of creditors it should be made on a basis which can be justified objectively.
20. Where a member is acting as provisional liquidator and it is proposed that assets of the company should be acquired by directors the sanction of the Court should be obtained.
21. Where a member is acting as nominee or supervisor in relation to a voluntary arrangement the member should ensure that any connected party transactions are in the best interest of the company, its members and creditors, and are only undertaken in accordance with the terms of the arrangement as approved by the members and creditors. When a connected party transaction is proposed as part of an arrangement, or has taken place in the year prior to the date of appointment as nominee, the member should ensure that it is included in the proposals on a full disclosure basis.

### **DISCLOSURE TO CREDITORS OF CONNECTED PARTY TRANSACTIONS**

22. The disclosure should provide creditors with sufficient information to have a full appreciation of the nature of the transaction, and should normally include the following information:
  - the date of the transaction;
  - details of the assets involved and the nature of the transaction;
  - the consideration for the transaction and when it will be paid;
  - the name of the counterparty;

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- the nature of the counterparty's connected party relationship with the vendor;  
and
- where, in a liquidation, the disclosure is to creditors, whether the Committee of Inspection (if there is one) has been consulted and the outcome of such consultation.

#### **EFFECTIVE DATE**

23. This Statement is effective from 1st May 2005.

