

STATEMENT OF INSOLVENCY PRACTICE

**APPOINTMENT AS EXAMINER UNDER THE COMPANIES
(AMENDMENT) ACT, 1990**

Contents

	<i>Paragraphs</i>
Introduction	1 - 4
Statutory basis	5 - 9
Independent accountant's report	10 - 18
Work of the examiner	
Timing	19 - 25
Communication	26 - 29
Administration	30
Role of the examiner	31 - 35
Powers and duties of directors	36 - 37

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S19B

Appointment as Examiner under the Companies (Amendment) Act, 1990

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INTRODUCTION

1. The 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.
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. This Statement addresses
 - The statutory basis for appointment of an examiner
 - The independent accountant's report
 - Timing, communication and administration in the examination process
 - Role of the examiner
 - Powers and duties of directors of the company.
4. Remuneration of the examiner is dealt with in the Statement of Insolvency Practice "Remuneration of Insolvency Officeholders – Republic of Ireland" – S 9B.

STATUTORY BASIS

5. The statutory framework governing the appointment of an examiner, the work to be carried out, reports required, and the timeframe for the process are contained in the Companies (Amendment) Act, 1990 ("the Act").

S19B

Appointment as Examiner under the Companies (Amendment) Act, 1990

6. Specific requirements governing the examination process are set out in Orders 75A and 75B, Rules of the Superior Courts. These Orders were promulgated by Statutory Instrument – S.I. 147 and 278 of 1991. Additionally, insolvency practitioners will have regard to the impact of Court decisions on developing practice.
7. In considering a petition for appointment of an examiner the Court must first form the view:
 - (i) The company is, or is likely to be, unable to pay its debts;
 - (ii) There is no resolution for the winding-up of the company; and
 - (iii) No order has been made for the winding-up of the company.

Following that initial consideration, the Court will only make an order appointing the examiner

“...where it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern”.

8. Section 3(6) of the Act specifies that the Court will not hear a petition for appointment of an examiner if a receiver has been appointed to the company at least 3 days prior to the presentation of the petition.
9. The petition for appointment of an examiner must be accompanied by:
 - (i) A consent signed by the person nominated to be examiner;
 - (ii) A copy of a compromise or scheme of arrangement in relation to the company’s affairs (if already prepared); and
 - (iii) A report in relation to the company by an independent accountant.

S19B

*Appointment as Examiner under
the Companies (Amendment) Act, 1990*

INDEPENDENT ACCOUNTANT'S REPORT

10. Section 3(3B) of the Act specifies the detailed contents of the independent accountant's report. The more significant requirements are the independent accountant's opinion as to whether:
 - (i) The company, and the whole or any part of its undertaking, would have a reasonable prospect of survival as a going concern (with a statement of the conditions which he/she considers are essential to ensure such survival).
 - (ii) The formulation, acceptance and confirmation of proposals for a compromise or scheme of arrangement would offer a reasonable prospect of the survival of the company, and the whole or any part of its undertaking, as a going concern.
 - (iii) An attempt to continue the whole or any part of the undertaking would be likely to be more advantageous to the members as a whole and the creditors as a whole than a winding-up of the company.

11. Addressing the obligation on the Court to be "...satisfied that there is a reasonable prospect of the survival..." of the company as a going concern, Judge McCracken in *Re. Tuskar Resources plc.* stated

"If the Court is "satisfied", it must be satisfied on the evidence before it, which is in the first instance the evidence of the petitioner. If that evidence does not satisfy the Court, the order cannot be made, and in my view that is tantamount to saying there is an onus of proof on the petitioner at the initial stage to satisfy the Court that there is a reasonable prospect of survival."

*Appointment as Examiner under the
Companies (Amendment) Act, 1990*

12. Preparation of the independent accountant's report constitutes an assurance engagement as defined by the International Auditing and Assurance Standards Board – IAASB. The IAASB definition of an assurance engagement is one

“...in which the practitioner expresses a conclusion designed to enhance the degree of confidence of the intended users other than the responsible party about the outcome of the evaluation or measurement of a subject matter against criteria.”
13. The “responsible party” in the context of this report is the company. The directors draw comfort from the report in preparing the petition for appointment of an examiner. The Court relies thereon in determining whether “...there is a reasonable prospect of survival.”
14. In the context of Section 3 of the Act, the outcome of the evaluation is the opinion that the company, and the whole or any part of its undertaking, would have a reasonable prospect of survival.
15. The relevant framework guidance for assurance engagements is contained in the International Standard on Assurance Engagements “Assurance Engagements other than Audits or Reviews of Historical Financial Information.” – ISAE 3000. Copies of ISAE 3000 can be obtained @ www.IFAC.org/IAASB.
16. Section 3C of the 1990 Act requires the independent accountant to supply a copy of the report to “...any interested party on written application being made to him...”.
17. Given the significance of the independent accountant's report, together with the obligatory and evidential nature of the report as supporting evidence to the petition for appointment of an examiner, the accountant will be conscious of practical matters which may preclude him/her from accepting the assignment or being able to form the opinion that the company and the whole or any part of its undertaking would have a reasonable prospect of survival as a going concern.

S19B

Appointment as Examiner under the Companies (Amendment) Act, 1990

18. Examples of circumstances that could constrain the accountant include:
- (i) Time constraints where a petition is made within 3 days of a receiver's appointment.
 - (ii) Lack of information and/or satisfactory evidence to support the directors' "belief" that appointment of an examiner would save some or all of the company's business.
 - (iii) The cumulative impact of significant caveats and/or uncertainties referred to within the report where that report expresses the opinion the appointment of an examiner would be more advantageous than liquidation.

WORK OF THE EXAMINER

Timing

19. The period in which the company is deemed to be under the protection of the Court is limited to 70 days. However the Court may, if the criteria in Section 18(3) are satisfied, grant a 30 day extension to that protection period.
20. An initial consideration of the company's corporate governance will inform the examiner's consideration of whether an application should be made under Section 9 of the Act for a Court order that all, or any, of the functions or powers of the directors should be exercised solely by the examiner.

S19B

Appointment as Examiner under the Companies (Amendment) Act, 1990

21. Circumstances may arise, the significance of which are such that they should be brought to the attention of the Court without delay to enable it to give directions or make such orders as it sees fit. Examples of such circumstances include:
 - The examiner forms the opinion that it will not be possible to agree the proposed scheme of arrangement or compromise.
 - Information obtained by the examiner indicates that offences under Section 297, Companies Act, 1963, may have occurred.
 - There is no longer a “reasonable prospect” of the continuance of all or a significant part of the company’s business.
22. The examiner will consider the decision of the independent reporting accountant regarding establishment of a Committee of Inspection.
23. The examiner is required by Section 18 (2) of the Act to “.....convene and preside at such meetings of members and creditors as he thinks proper...” to consider proposals for a compromise or scheme of arrangement.
24. Unless the Court grants a longer period, the examiner is required to report to the Court regarding the proposals and on the outcome of the “Section 18 meetings” within 35 days of appointment.
25. After the relevant creditors’ meetings have been held and the examiner presents the proposed scheme of arrangement to the Court for approval, the Court may extend the period during which the company is under Court protection – where the Court considers it appropriate to do so in the particular circumstances of that company.

Communication

26. As noted in Paragraph 36 below, generally, the powers and duties of the directors are unaltered following the appointment of the examiner including the power to purchase goods and services on the company’s behalf.

S19B

Appointment as Examiner under the Companies (Amendment) Act, 1990

27. The examiner should arrange for the company to write to all its creditors informing them that an examiner has been appointed to the company, confirming that the directors continue to operate the business, providing contact details for the examiner and inviting them to submit claims for the amounts owed to them.
28. Section 12(4) of the Act requires

“... every invoice, order for goods or business letter issued by or on behalf of the company, being a document on or in which the name of the company appears, shall immediately after the mention of that name, include the words “in examination (under the Companies (Amendment) Act, 1990).”
29. The company’s directors remain responsible for its operations following the examiner’s appointment. Accordingly, if contacted directly by the company’s creditors, the examiner will emphasise that the fact that the company is “in examination” and “under the protection of the Court” does not constitute a guarantee that liabilities incurred during the examiner’s term of appointment will be paid.

Administration

30. As noted in Paragraph 23, the examiner must “...convene and preside...” at meetings of members and creditors. The detailed requirements, specified in Rule 18, Order 75A, Rules of the Superior Courts, include:
 - Notice to be sent by post at least 3 days before the meeting date.
 - A quorum of at least 3 creditors (or 2 members, if a meeting of members) must be present or represented at the meeting.
 - A list of those present must be kept and signed by the examiner.
 - The examiner must arrange for minutes of the meeting to be taken, entered into a minutes book and signed by him.

S19B

Appointment as Examiner under the Companies (Amendment) Act, 1990

ROLE OF THE EXAMINER

31. The role of the examiner is to oversee the formulation, acceptance and confirmation of proposals for a compromise or scheme of arrangement to facilitate the survival of the company.
32. Accordingly, he/she acts independently of the company, its Board of Directors, shareholders, creditors, or prospective investors.
33. The role of the examiner varies during the assignment, occasionally being analogous to that of a chairman overseeing the development of proposals, at other times to that of an investment banker seeking new investors for the company, and sometimes to that of an executive director negotiating the proposals.
34. In discharging the function of examiner, professional judgment is exercised to ensure that all stakeholders in the process are dealt with in a manner which takes account of the commercial and legal issues arising in the development of the compromise or scheme of arrangement. This assists the examiner to form the opinion that he/she has achieved the best possible outcome for all stakeholders in the process.
35. If the examination is to come to a successful conclusion, the examiner must be able to recommend the proposed compromise or scheme of arrangement to each class of creditor. When chairing the meetings of each class of creditor, the examiner needs to explain to each class of creditor why the proposed compromise or scheme of arrangement offers a better outcome to that class than would a liquidation.

POWERS AND DUTIES OF DIRECTORS

36. The powers and duties of directors under the Companies Acts, 1963 to 2006, are, generally, unaltered following the appointment of an examiner to the company. In particular, the directors' obligation to maintain the company's statutory records, including its books of account, remain unaltered.

S19B

*Appointment as Examiner under
the Companies (Amendment) Act, 1990*

37. Additional obligations imposed on directors include to:
- Produce to the examiner all books and documents of, or relating to, the company which are in their custody or power.
 - Provide assistance to the examiner in connection with his/her functions.
 - Meet with the examiner when required to do so.
 - Provide the examiner with reasonable notice of all meetings of the Board of Directors and all general meetings of the company.