

**A RECEIVER'S RESPONSIBILITY  
FOR THE COMPANY'S RECORDS**

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**Revised February 2005**

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## *A receiver's responsibility for the company's records*

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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.
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 summarises required practice in circumstances where receivers are approached by liquidators or directors seeking access to, or custody of, a company's books or records. The Statement addresses circumstances of required practice both with regard to the company's records maintained prior to the appointment of a receiver and with regard to those records prepared after the receiver's appointment. Where a receiver is appointed under a fixed charge his or her powers are restricted to the records relating to the charged property.

### **COMPANY RECORDS MAINTAINED PRIOR TO THE APPOINTMENT OF A RECEIVER**

4. The records which a company maintains prior to the appointment of a receiver may be classified under two main headings:
  - (i) The first comprises the non-accounting records which the directors are required to maintain by the provisions of the Companies Act, 1963, as amended by the Companies (Amendment) Act, 1983, and the Companies Act, 1990. These consist of the various registers (charges, debentures and members), and minute books.
  - (ii) The second category of records maintained by a company prior to the appointment of a receiver include accounting records required by statute and all other non-statutory records of the company.

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#### **STATUTORY NON-ACCOUNTING RECORDS**

5. The company's statutory records should be kept at its registered office having regard to the provisions of the Companies Acts (Registers of directors, members, and charges, as well as minute books).
6. Directors' powers to cause entries to be made in the statutory records do not cease on the appointment of a receiver. Indeed, the directors' statutory duties to maintain them are unaffected by the appointment of the receiver.
7. The receiver has the power to inspect the statutory records as part of his or her right to take possession of, collect and get in the property of the company. The receiver is not, however, placed under an obligation to maintain those records after appointment and should not normally do so.
8. The Company Seal can only be used by the company and it is therefore considered appropriate for the receiver to take possession of it.
9. On appointment, a receiver has two possible options:
  - (i) To leave the statutory records in the custody of the directors so that they are in a position to continue to carry out their statutory duties to maintain them.
  - (ii) To take possession of statutory records for safekeeping. In such circumstances the receiver should remind the directors of their statutory responsibilities to maintain the records and allow them free access for this purpose.

If removing statutory records from the company's premises, it would be advisable to prepare a detailed schedule of all such records.

10. The receiver may, in particular circumstances, consider it desirable to arrange to have changed the company's registered office to that of the receiver's own firm. Where this is done the statutory records should also be transferred to the new registered office and the procedure outlined above followed.
11. Any statutory records (including any seals) taken into a receiver's possession should be returned to the directors (or liquidator) on the receiver ceasing to act.

#### **STATUTORY ACCOUNTING RECORDS AND NON-STATUTORY RECORDS**

12. All such records as are necessary for the purpose of a receivership should be taken into the receiver's possession/control. Records which the receiver will definitely not

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require may be left with the directors. If the receiver encounters any difficulty in obtaining possession of the records, it may be necessary for the receiver to apply to the Court for an order requiring any party exercising control over the records to hand them to him.

13. A receiver is under no statutory duty to bring these records up to date to the date of appointment, although for practical purposes (for example, to give prospective purchasers some indications of the financial state of the business) it may be appropriate for the receiver to do so.
14. If a receiver does not take possession of all the records it would be advisable for the receiver to make a list of all of those not taken into his or her custody with a note of their whereabouts.
15. When making sales of certain assets (for example, book debts or plant and machinery) it is preferable for the receiver to retain the originals of company records (for example, debtors ledgers or plant registers) relating to those assets. Where, exceptionally, it is necessary for the receiver to hand over to the purchaser the originals of such company records, the receiver should ensure the relevant asset sale agreement specifies the need for those original records to be made available to the company on request. Although this will invariably be a matter of negotiation between the receiver and the purchaser, it would be preferable for the receiver to retain the originals of such records.
16. The receiver may make copies of the relevant records available to the purchaser or allow the purchaser to retain the originals for a short time for the purposes of making copies. Once again, appropriate provision should be made in the asset sale agreement as to the particular circumstances and as to who is to bear the cost.
17. Where, in exceptional circumstances, original company records are handed over to a purchaser of company assets the receiver will reserve the right to have access to those records for an agreed period of time after the transaction has been completed.
18. The categories of records covered by the Value Added Tax Act, 1972, are wide ranging. These include orders, delivery notes, purchase and sales records, annual records, value added tax accounts, credit and debit notes and bank statements.
19. If a receiver transfers the business of a company to a third party as a going concern, the provisions of the Value Added Tax Act, 1972, may place the obligation of preserving any records relating to the business upon the transferee. This is a wide ranging obligation imposed on the receiver in such circumstances.

**ENTITLEMENT OF LIQUIDATOR TO PRE-APPOINTMENT RECORDS**

20. A receiver has no statutory authority to destroy pre-appointment records and in due course these must be returned to the company's directors, or, if the company is in liquidation, to its liquidator.

**POST-APPOINTMENT RECORDS****Relating to the period prior to the appointment of a liquidator.**

21. The receiver should establish appropriate accounting records as and from the date of his appointment.
22. A receiver is obliged to keep records by Section 321, Companies Act, 1963, such that after the expiry of a period of 6 months from the date of appointment, after every subsequent period of 6 months, and within 1 month after ceasing to act as receiver, he or she can deliver to the Registrar of Companies an abstract in the prescribed form. This abstract will show the assets of the company of which the receiver has taken possession since appointment, together with their estimated value, where the directors have prepared the Statement of Affairs, as they are obliged to do under Section 320, Companies Act, 1963.
23. The abstract will show the proceeds of sale of any assets since the appointment of the receiver, both for the particular reporting period and on a cumulative basis from the date of appointment. The abstract also shows the receiver's receipts and payments during that period of six months, or, where he or she ceases to act as receiver during the period, from the end of the period to which the last preceding abstract related to the date of so ceasing, as well as the aggregate amounts of receipts and payments during all preceding periods since appointment of the receiver.
24. When a liquidator is appointed, the English case of *Engel .v. South Metropolitan Brewing & Bottling Company* (1892) 1CH 442 supports the view that a liquidator becomes entitled to all books and records relating to the management of the business, subject to a receiver's right of access on request. The receiver has no statutory authority to destroy such records and on ceasing to act must hand over these to the company's directors, or, if the company is in liquidation, to the liquidator. The relevant entitlements/responsibilities of liquidators and receivers should be considered in each set of circumstances.
25. The Director of Corporate Enforcement is entitled under Section 323A, Companies Act, 1963, "where he considers it necessary or appropriate", to request the receiver to provide him with the receiver's books of a particular receivership or of all

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receiverships undertaken by that person. The request can only be made in respect of books relating to a receivership that has concluded less than 6 years prior to the date of the Director's request.

#### **Relating to the period after the appointment of a liquidator**

26. As from the commencement of the liquidation, the receiver loses his or her status as agent of the company. The receiver's obligation to make returns, receipts and payments and to maintain the appropriate accounting records remains in force.

#### **OTHER RECORDS**

27. The remaining records, books and papers relating to a receivership may be subdivided between "company records", "chargeholder's records" and "receiver's personal records".

#### **Company records**

28. Company records will include as a minimum all those records which exist as a result of carrying on the company's business and dealing with its assets. These records fall into the same category as the non-statutory records mentioned above. They should be treated in the same way, being returned to the company's directors, or, if it is in liquidation, to its liquidator when the receiver ceases to act.
29. In the English case of *Gomba Holdings UK Limited v. Minorities Finance Limited* (1989) 5BCC 27 consideration was given to precisely which records fall within the definition of "company records". It was held that a receiver acts in several capacities during the course of a receivership. In addition to being agent of the company, the receiver owes fiduciary obligations to his or her appointer and to the company. It is only documents generated or received pursuant to the receiver's duty to manage the company's business, or dispose of its assets, which belong to the company. The receiver has the right to retain, for such period as is necessary, those records necessary to enforce the security under which he or she is appointed, subject to the right of access of directors and the liquidator thereto.

#### **Chargeholder's records**

30. In the *Gomba* case, referred to above, it was held that documents containing advice and information to the appointer, as well as notes, calculations and memoranda prepared to enable the receiver to discharge his or her professional duty to the appointer or to the company, belong either to the appointer (if he wishes to claim them) or to the receiver. They do not belong to the company.

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#### **Receiver's personal records**

31. A receiver's personal records are those prepared by the receiver for the purpose of better enabling him or her to discharge his or her other professional duties. They will include, for example, the statutory records which the receiver is required to maintain under Section 321, Companies Act, 1963. They should include the receiver's name, the appointer's name, and details of the progress of the receivership.

#### **BEST PRACTICE**

32. With the exception of the receiver's personal records and the appointer's records, it is considered best practice that all records mentioned above should be made available on request to the company acting by its directors, or, if in liquidation, its liquidator, unless the receiver is of the opinion that disclosure at that time would be contrary to the interests of the appointer, for example, because of prior negotiations for the sale of assets (see Gomba case referred to in paragraph 29 above). Subject to the interests of the appointer, it appears from this case that directors are entitled to such information as they need to enable them to exercise their residual powers and to perform the residual statutory duties, for example, maintaining the company's statutory records.
33. Disclosure of a receiver's personal records is a matter for his or her discretion. However, in any legal action brought against the receiver, it could be held that if such records have not been disclosed they may be held to be discoverable.
34. Where there is no liquidator and the directors cannot be traced, or the directors decline to accept responsibility for the company's records, or the receiver has reason to suppose that they are not reliable, the receiver will need to consider his or her position regarding the retention of records. A receiver has no statutory power to destroy company records even after the expiry of the statutory period for which the company would need to retain them (usually 6 years). If the receiver does so without the authority of the company or its liquidator, he or she does so at the risk of legal challenge from an affected party.

#### **EFFECTIVE DATE**

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

