GOVERNMENT NOTICE NO. 13

(No. 9 OF 2016)

INSOLVENCY (PRACTITIONERS) REGULATIONS, 2017

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IN EXERCISE of the powers conferred by section 351 of the Insolvency Act, I, JOSEPH MWANAMVEKHA, Minister of Industry, Trade and Tourism, make the following Regulations—

PART I—PRELIMINARY PROVISIONS

Citation

1. These Regulations may be cited as the Insolvency (Practitioners) Regulations, 2017.

Interpretation

2. In these Regulations, unless the context otherwise requires—

"business" includes the carrying on of any trade, profession or vocation and the discharge of the functions relating to any office or employment;

Act No. 9 of 2016
Cap 46:03

"insolvency legislation" includes the Insolvency Act and the Companies Act;

"insolvency practice" means the carrying on of the business of acting as an insolvency practitioner or in a corresponding capacity under the law of any country or territory outside Malawi, and for this purpose acting as an insolvency practitioner shall include acting as a trustee in sequestration or a judicial factor on the bankrupt estate of a deceased person, receiver, receiver and manager, administrator or liquidator;

"insolvency work experience" means engagement in work related to the administration of the estates of persons in respect of which an office-holder has been appointed;

"office-holder" means a person who acts or has acted as an insolvency practitioner, receiver, a trustee in bankruptcy, provisional liquidator, or liquidator, supervisor on an individual voluntary arrangement, a nominee, an administrator of a company reorganization or in a corresponding capacity under the law of any country outside Malawi;

"professional legislation" means any enactment governing any profession recognised in terms of the Act and these Regulations;

"register" means the register of insolvency practitioners referred to in section 8 of the Act;

"recognized professional body" means a professional body declared as such by the Minister in accordance with section 311 of the Act; and

"relevant time" in relation to an individual making an application, means the time of making the application.

PART II—REGISTRATION OF INSOLVENCY PRACTITIONERS

Matters to consider in determining whether an applicant is a fit and proper person

3.—(1) A person shall not be allowed to act as an insolvency practitioner, unless he—

(*a*) is a member of a recognized professional body;

(*b*) meets the education, practical training and experience requirements as set out under these Regulations; and

(*c*) is a fit and proper person to so act in terms of the Act and these Regulations.

(2) Notwithstanding sub-regulation (1) (*a*) and (*b*), a person shall be deemed qualified under section 311 (1) (*a*) of the Act, if he has been admitted to the practice of insolvency in any jurisdiction that regulates such practice, to at least the standards obtaining in Malawi.

(3) The matters to be taken into account in determining whether an applicant is a fit and proper person to act as an insolvency practitioner shall include—

(*a*) whether the applicant has been convicted of any offence involving fraud, dishonesty or violence;

(*b*) whether the applicant has contravened any insolvency legislation, professional legislation or any other written law in Malawi or of any country outside Malawi, which corresponds to such pieces of legislation;

(*c*) whether the applicant has ever been suspended or removed from the practice of a recognized professional body in Malawi or by a comparable professional body outside Malawi;

(*d*) whether the applicant has engaged in any practices in the course of carrying on business appearing to be deceitful or oppressive or otherwise unfair or improper, whether unlawful or not, or which otherwise cast doubt upon his probity or competence for discharging the duties of an insolvency practitioner;

(*e*) whether, in respect of any insolvency practice carried on by the applicant at the date of, or at any time prior to, the making of the application, there were established adequate systems of control of the practice and adequate records relating to the practice, including accounting records, and whether such systems of control and records have been or were maintained on an adequate basis;

(*f*) whether the insolvency practice of the applicant is being carried on, or where the applicant is not yet carrying on such a practice, with the independence, integrity and the professional skills appropriate to the range and scale of the practice and the proper performance of the duties of an insolvency practitioner; or

(*g*) whether the applicant, in any case where he has acted as an insolvency practitioner, has failed to disclose fully to such persons as might reasonably be expected to be affected thereby circumstances where there is, or appears to be, a conflict of interest between his so acting and any interest of his own, whether personal, financial or otherwise.

(4) An insolvency practitioner who is suspended or removed from the practice of a recognized professional body in Malawi or by a comparable professional body outside, shall give notice of that fact to the Director, in the form specified in the *First Schedule*, within 7 days of the insolvency practitioner receiving notice of the suspension or removal from the practice.

First Schedule

Application to act as insolvency practitioner
First Schedule

4.—(1) For the purposes of the Act, every person who intends to practice as an insolvency practitioner shall submit an application to the Director or the Minister, as the case may be, in the form specified in the *First Schedule*, for the registration of his name to be entered in the register pursuant to the Act.

Second Schedule

(2) An application for registration to practice as an insolvency practitioner shall be accompanied by prescribed fees, as set out in the *Second Schedule*.

(3) Fees paid under sub-regulation (2) shall not be refundable regardless of the outcome of the application.

Second Schedule

(4) On issuance of a certificate of registration to practice as an insolvency practitioner, an applicant shall pay fees as set out in the *Second Schedule*.

(5) The Director shall inform an applicant of the outcome of the application within 28 days of his receipt of a complete application and the application fee.

(6) An application that is required to be made to the Minister under section 312 of the Act, shall be channeled to the Minister through the Director.

(7) For the purposes of section 312 (2) (*a*) of the Act, the competent authority shall be the Director.

Registration of insolvency practitioners

5. For the purpose of an application for registration as an insolvency practitioner, the Director or the Minister, as the case may be—

(*a*) may register a person subject to such conditions, not inconsistent with Act and these Rules, as he may deem expedient; and

(*b*) shall inform a person in writing of his registration in such manner as he may determine.

Refusal to register

6.—(1) The Director or the Minister, as the case may be, may refuse to register a person as an insolvency practitioner where the person does not satisfy the requirements of the Act or these Regulations.

(2) Where the Director or the Minister, as the case may be, refuses to register a person as an insolvency practitioner, he shall inform the person, in writing, of the refusal, including the reasons for the refusal, within 28 days of receipt of the application and any documents in support of that application by the Director or the Minister, as the case may be.

Duties of recognized professional bodies

7.—(1) A recognized professional body shall provide to its members who wish to register under the Act, such training and examinations relating to the law and practice of insolvency as the Director may, in writing, determine.

(2) Within 3 years after commencement of the Act, an application for registration as an insolvency practitioner shall be accepted, if the applicant can demonstrate to the Director, in writing, his experience in the practice of insolvency without the need to undergo such training and examinations as may be required by sub-regulation (1).

(3) On every renewal of registration under the Act, an insolvency practitioner shall provide evidence of any continuing professional education related to the practice of insolvency provided or recognized by a recognized professional body undertaken during the two years immediately preceding the application for renewal of registration.

(4) The Director may exempt any person from the examination requirement under these Regulations if the person has pursued, successfully, a course in insolvency at an accredited institution in the country of qualification at tertiary level.

Qualifications obtained outside Malawi, language, etc

8.—(1) The Director may accept for registration an insolvency practitioner who is qualified to act in any jurisdiction outside Malawi, where such jurisdiction regulates its insolvency practice to at least the standards obtaining in Malawi.

(2) Where the insolvency practitioner is not from an English speaking country or background, he shall provide evidence of his ability to speak and write in English language, as the Director may determine.

(3) Language requirements in sub-regulation (2) shall not apply in cases of cross border insolvency, except that the applicant for registration in a case of cross border insolvency shall provide translations of documents in accordance with the Authentication of Documents Act, that would entitle the applicant to practice as an insolvency practitioner to the Director.

Cap 4:06

(4) On ceasing to practice, an insolvency practitioner shall complete Form 2 in the *First Schedule* and submit it to the Director.

First Schedule

Ethics

9. In addition to any rules of ethics to which an insolvency practitioner may be subject to in his recognized professional body, he shall also be subject to the ethical guidelines as provided in the *Third Schedule* hereto.

Third Schedule

PART III—REMUNERATION

Remuneration: principles

10.—(1) An administrator of a company reorganization, a receiver, a liquidator, including in a members' voluntary winding-up, or a trustee in bankruptcy is entitled to receive remuneration for services as an office-holder.

(2) The basis of remuneration shall be fixed—

(*a*) not to exceed 5 percentage of the value of—

(i) the property with which the administrator of a company reorganization has to deal with; or

(ii) the assets which are realised, distributed or both realised and distributed by the liquidator or trustee; and

(*b*) by reference to the time properly given by the office-holder and the office-holder's staff in attending to matters arising in the company reorganization, winding-up or bankruptcy, as a set amount or any combination of them and different bases may be fixed in respect of different things done by the office-holder.

(3) Where the basis of remuneration is fixed as in sub-regulation (2) (ii), different percentages may be fixed in respect of different things done by the office-holder not exceeding the aforesaid 5 percent.

(4) In arriving at a determination, regard shall be had to the following matters—

(*a*) the complexity or otherwise, of the case;

(*b*) any respects in which, in connection with the company's or bankrupt's affairs, there falls on the office-holder, any responsibility of an exceptional kind or degree;

(*c*) the effectiveness with which the office-holder appears to be carrying out, or to have carried out, the office-holder's duties as such; and

(*d*) the value and nature of the property with which the office-holder has to deal.

(5) Where the office-holder is a legal practitioner and employs his firm, or any partner in it, to act on behalf of the company, profit costs shall not be paid to his firm, unless expressly authorised in the determination by the creditors' committee or, where one is not available, the Court.

Remuneration: procedure for initial determination

11.—(1) Except in a shareholders' voluntary winding-up, the creditors' committee shall, subject to sub-regulation (4), determine the basis of remuneration.

(2) Where there is no committee, or the committee does not make the requisite determination, and—

(*a*) in a company reorganization, the case does not fall within sub-regulation (3); or

(*b*) in a creditors' voluntary winding-up or a winding-up by the Court, subject to sub-regulation (4),

the basis of remuneration may be fixed by a resolution of a meeting of the creditors.

(3) Where the administrator has made a statement under section 35 (5) (*b*) of the Act and there is no creditors' committee, or the committee does not make the requisite determination, the basis of the administrator's remuneration may be fixed by the approval of—

(*a*) each secured creditor of the company; or

(*b*) preferential creditors whose debts amount to more than 50 percent of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold the approval.

(4) In a shareholders' voluntary winding-up, the company in a general meeting shall determine the basis of the remuneration.

(5) Where the basis of the administrator's remuneration or liquidator's remuneration in a voluntary winding-up, including a shareholders' voluntary winding-up, is not fixed as provided in sub-regulation (1), (2), (3) or (4), it

shall, on application by the administrator or liquidator, be fixed by the Court.

(6) An application under sub-regulation (5) may not be made by the administrator or liquidator without having first sought fixing of the basis in accordance with sub-regulation (1), (2), (3) or (4), as the case may be, and in any event may not be made more than 18 months after the date of the administrator's or liquidator's appointment.

(7) In a shareholders' voluntary winding-up, the liquidator shall deliver at least 14 days' notice of an application under sub-regulation (6) to the company's contributories, or such one or more of them as the Court may direct, and the contributories may nominate one or more of their number to appear, or be represented, and to be heard on the application.

(8) Where, in a winding-up by the Court or bankruptcy, the basis of remuneration is not fixed as above after the liquidator or trustee has requested the creditors to fix the basis in accordance with sub-regulation (2), or in any event within 18 months after the date of the liquidator's or trustee's appointment, the liquidator or trustee is entitled to such sum as is arrived at after taking into account all matters referred to in this regulation.

(9) That part of the trustee's remuneration calculated under sub-regulation (8) by reference to the Court shall not exceed 5 per cent of the bankruptcy estate.

(10) Where a number of persons are appointed as administrators or joint liquidators or trustees, they shall agree between themselves as to how the remuneration payable should be apportioned, and any dispute arising between them may be referred to—

(*a*) the Court, for settlement by order; or

(*b*) the creditors' committee, a meeting of creditors or in a members' voluntary winding-up, the company in general meeting, for settlement by resolution.

(11) For the purposes of this regulation, a joint appointment shall be regarded as one insolvency practitioner.

Remuneration: recourse to administrator, liquidator or trustee to creditor

12.—(1) Where the basis of—

(*a*) the administrator's or trustee's remuneration has been fixed by the creditors' committee;

(*b*) the liquidator's remuneration has been fixed by the creditors' committee;

(*c*) the liquidator's remuneration had been fixed by the creditors' committee in a preceding company reorganization and the administrator had not subsequently requested an increase under this rule; or

(*d*) the remuneration fixed is considered inappropriate or the amount fixed is considered insufficient by an office-holder,

the office-holder may request that the amount be increased or the basis changed by resolution of the creditors.

(2) Where—

(*a*) the administrator has made a statement under section 35 (5) (*b*) of the Act;

(*b*) the basis of the administrator's remuneration has been fixed by the creditors' committee; and

(*c*) the administrator considers an amount fixedto be insufficient or the basis fixed to be inappropriate,the administrator may request that the amount be increased or the basis changed by the approval of—

(i) each secured creditor of the company;

(ii) if the administrator has made or intends to make a distribution to preferential creditors; and

(iii) preferential creditors whose debts amount to more than 50 percent of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold approval.

Remuneration: recourse by administrator, liquidator or trustee to the Court

13.—(1) Where the basis of—

(*a*) the administrator's remuneration has been fixed—

(i) by the creditors' committee, and the administrator has requested that the amount be increased or the basis changed by resolution of the creditors, but the creditors have not changed it; or

(ii) by resolution of the creditors;

(*b*) the liquidator's remuneration has been fixed—

(i) by the creditors' committee, and the liquidator has requested that the amount be increased or the basis changed by resolution of the creditors, but the creditors have not changed it; or

(ii) by resolution of the creditors, in a members' voluntary winding-up, by the company in general meeting; or

(*c*) the trustee's remuneration has been fixed—

(i) by the creditors' committee, and the trustee has requested that the amount be increased or the basis changed by resolution of the creditors, but the creditors have not changed it; or

(ii) by resolution of the creditors, or and the office-holder considers an amount fixed to be insufficient or basis fixed to be inappropriate,

the office-holder may apply to the Court for an order increasing the amount or changing the basis.

(2) Where the administrator has made a statement under section 35 (5) (*b*) of the Act, that the basis of the administrator's remuneration has been fixed by the approval of creditors in accordance with these Regulations and the administrator considers an amount fixed to be insufficient or basis fixed to be inappropriate, the administrator may apply to the Court for an order increasing the amount or changing the basis.

(3) Where an application is made under sub-regulation (2), the administrator shall deliver notice to each of the creditors whose approval was sought.

(4) The administrator, liquidator, except in a members' voluntary winding-up, or trustee shall deliver at least 14 days' notice of the application to the members of the creditors' committee and the committee may nominate one or more members to appear, or be represented, and to be heard on the application.

(5) Where there is no creditors' committee, the office-holder's notice of the application shall, except in a members' voluntary winding-up, be delivered to such one or more of the company's creditors as the Court may direct, and those creditors may nominate one or more of their number to appear or be represented.

(6) In a members' voluntary winding-up, the liquidator shall deliver at least 14 days' notice of the application to the company's contributories, or such one or more of them, as the Court may direct and the contributories may nominate one or more of their number to appear, or be represented, and to be heard on the application.

(7) The Court may, if it appears to be a proper case, including in a members' voluntary winding-up, order the costs of the office-holder's application, including the costs of any member of the creditors' committee appearing or being represented on it, or of any creditor or contributory so appearing or being represented, to be paid as an expense of the administration or liquidation or out of the bankruptcy estate.

Remuneration: review at request of administrator, liquidator or trustee

14.—(1) Where, after the basis of the office-holder's remuneration has been fixed, there is a material or substantial change in the circumstances which were taken into account in fixing it, the office-holder may request that it be changed.

(2) The request shall be made—

(*a*) where the creditors' committee fixed the basis, to the committee;

(*b*) where the creditors fixed the basis, to the creditors;

(*c*) where the Court fixed the basis, by application to the Court; or

(*d*) where, in a winding-up or bankruptcy, the remuneration was determined by the liquidator or creditors' committee if there is one and otherwise, to the creditors,

and regulations 11, 12, 13 and 14 shall also apply, as the case may be.

(3) Any change in the basis for remuneration applies from the date of the request under sub-regulation (2) and not for any earlier period.

Remuneration: new administrator, liquidator or trustee

15. Where a new administrator, liquidator, including in a members' voluntary winding-up, or trustee is appointed in place of another, any determination, resolution or Court order in effect under regulations 11, 12, 13 and 14, immediately before the former office-holder ceased to hold office, continues to apply in relation to the remuneration of the new office-holder until a further determination, resolution or Court order is made in accordance with regulations 11, 12, 13 and 14.

Remuneration: apportionment of set aside fees

16.—(1) In a case, including in a members' voluntary winding-up, in which the basis of the office-holder's remuneration is a set amount and the former office-holder ceases, for whatever reason, to hold office before the

time has elapsed or the work has been completed in respect of which the amount was set, application may be made for determination of what portion of the amount should be paid to the former office-holder or the former office-holder's personal representative in respect of the time which has actually elapsed or the work which has actually been done.

(2) An application may be made by—

(*a*) the former office-holder or the former office-holder's personal representative within the period of 90 days beginning with the date upon which the former office-holder ceased to hold office; or

(*b*) the office-holder for the time being in office if the former office-holder or the former office-holder's personal representative has not applied by the end of that period.

(3) An application shall be made—

(*a*) where the creditors' committee fixed the basis, to the committee;

(*b*) where the creditors fixed the basis, to the creditors for a resolution determining the portion;

(*c*) where the company in general meeting fixed the basis, to the company for a resolution determining the portion; or

(*d*) where the Court fixed the basis, to the Court for an order determining the portion.

(4) The applicant shall deliver a copy of the application to the office-holder for the time being or to the former office-holder or the former office-holder's personal representative, as the case may be ('the recipient').

(5) The recipient may, within 28 days of receipt of the copy of the application, deliver a notice of intent to–

(*a*) make representations to—

(i) the creditors' committee;

(ii) the creditors; or

(iii) the company in general meeting; or

(*b*) appear or be represented before the Court, as the case may be.

(6) A determination may not be made upon the application until expiry of the 21 days referred to in sub-regulation (5), or if the recipient does deliver a notice of intent in accordance with sub-regulation (5), until the recipient has been afforded the opportunity to make representations or to appear or be represented, as the case may be.

(7) Where the former office-holder or the former office-holder's personal representative, whether or not the original applicant, considers that the portion determined upon application to the creditors' or committee or the creditors is insufficient, that person may apply—

(*a*) in the case of a determination by the committee, to the creditors for a resolution increasing the portion; and

(*b*) in the case of a resolution of—

(i) the creditors, whether under sub-regulation (3) (*b*) or under paragraph (*a*); or

(ii) the company in general meeting,

to the Court for an order increasing the portion, and sub-regulations (4), 5 and (6) shall apply, as appropriate.

Creditors', contributories' or bankrupt's claim that remuneration is, or other expenses are, excessive

17.—(1) The following persons may apply to the Court for one or more of the orders provided in sub-regulation (11)—

(*a*) a secured creditor;

(*b*) an unsecured creditor with either—

(i) the concurrence of at least 10 percent in value of the unsecured creditors, including that creditor; or

(ii) the permission of the Court;

(*c*) in a shareholders' voluntary winding-up—

(i) members of the company with at least 10 per cent of the members having the right to vote at general meetings of the company; or

(ii) a member of the company with the permission of the Court; or

(*d*) the bankrupt.

(2) An application may be made on the grounds that—

(*a*) the remuneration charged by the office-holder;

(*b*) the basis fixed for the office-holder's remuneration under these Regulations; or

(*c*) expenses incurred by the office-holder,

is or are, in all the circumstances, excessive or, in the case of an application under paragraph (*b*), inappropriate.

(3) The application by a creditor or member shall be made no later than four weeks after receipt by the applicant of the progress report, or the final report, which first reports are the basis of the charging of the remuneration or the incurring of the expenses in question ("the relevant report").

(4) An application by the bankrupt may be made only on one or both of the grounds in sub-regulation (2) (*a*) and (*c*) and no later than—

(*a*) four weeks after receipt by the bankrupt of thereport under these Regulations; or

(*b*) in all other cases, four weeks after receipt by the bankrupt of notice.

(5) Where the Court considers that no sufficient cause is shown for a reduction, it shall deliver to the applicant notice to that effect, and—

(*a*) if, within five business days of delivery of the notice, the applicant applies to the Court to fix time and venue for a hearing, without notice to any other party, as to whether sufficient cause is shown,

the Court shall do so; and

(*b*) if the applicant does not deliver notice in accordance with paragraph (*a*), the Court may dismiss the application without a hearing.

(6) The bankrupt may only make an application, under this regulation, with the permission of the Court.

(7) Without prejudice to the generality of the matters which the Court may take into account, permission shall not be given, unless the bankrupt shows that—

(*a*) there is, or would be; or

(*b*) it is likely that there shall be, or would be,

but for the remuneration or expenses in question, a surplus of assets to which the bankrupt would be entitled.

(8) The Court shall fix the date, time and venue for the application to be heard and deliver notice to the applicant if—

(*a*) the application is not dismissed;

(*b*) after a hearing under sub-regulation (5) (*a*);

(*c*) without a hearing in accordance with sub-regulation (5) (*b*); or

(*d*) the bankrupt is given permission under sub-regulation (6).

(9) The time fixed under sub-regulation (8) shall be not less than 28 days, after delivery to the applicant of the notice under sub-regulation (7).

(10) The applicant shall, at least 14 days before the hearing, deliver to the office-holder a notice stating the date, time and venue, and accompanied by a copy of the application and of any evidence which the applicant intends to provide in support of it.

(11) Where the Court considers the application to be well-founded, it shall make one or more of the following orders—

(*a*) an order reducing the amount of remuneration which the office-holder is entitled to charge;

(*b*) an order reducing any fixed amount;

(*c*) an order changing the basis of remuneration;

(*d*) an order that some or all of the remuneration or expenses in question be treated as not being expenses of the administration or winding-up or bankruptcy expenses;

(*e*) an order that—

(i) the administrator or liquidator or the administrator's or liquidator's personal representative pay to the insolvent debtor, the amount of the excess of remuneration or expenses or such part of the excess as the Court may specify; or

(ii) the trustee or the trustee's personal representative pay to such person as the Court may specify as property comprised in the bankrupt's estate; or

(*f*) any other order that it considers just.

(12) An order under sub-regulation 11 (*b*) or (*c*) may be made only in respect of periods after the period covered by the relevant report.

(13) Unless the Court orders otherwise under sub-regulation (11), the costs of the application shall be paid by the applicant, and are not payable as an expense of the administration or as winding-up or bankruptcy expenses.

(14) The Court may order that the costs may be payable by the applicant, the respondent or as an expense.

Voting on remuneration

18.—Where a resolution is proposed in an insolvent or compulsory winding-up or bankruptcy which affects a person in relation to that person's remuneration or conduct as liquidator or trustee, actual, proposed or former, the person and the associates of the person shall not vote on it, whether as creditor, contributory, proxy-holder or corporate representative, except so far as permitted by these Regulations.

Fees for Official Receiver

19. The provisions of this Part in relation to fees shall apply to the Official Receiver.

PART IV—THE REGISTER OF INSOLVENCY PRACTITIONERS

Operation and access to register

20.—(1) In accordance with section 8 of the Act, the Director shall keep and maintain a register of insolvency practitioners, in an electronic form or in any other manner as he may determine.

(2) Subject to sub-regulation (3), the register shall be available for access and searching by members of the public at all times.

(3) The Director may refuse access to the Register or suspend its operation, in whole or in part, if the Director determines that it is not practical to provide access to the Register.

Purposes of the register

21. The purposes of the register shall be to—

(*a*) enable members of the public to—

(i) determine whether a person is a registered insolvency practitioner;

(ii) choose an insolvency practitioner from a list of registered insolvency practitioners; and

(iii) have access to contact details of their preferred insolvency practitioner; and

(*b*) assist any person in the exercise of the person's powers, or the performance of the person's functions, under the Act or any other written law.

Contents of the register

22. The Register shall contain the following information about each registered insolvency practitioner—

(*a*) the person's full name;

(*b*) the person's business address, both physical and postal;

(*c*) the name and contact details of any recognized professional

bodies of which the person is a member; and

(*d*) any other information or documents prescribed by the Act or these Regulations.

Director may amend, omit, remove or restrict access to information in the register

23. The Director may make any amendment to the register that is necessary to—

(*a*) reflect any changes in the information that is contained in the register;

(*b*) correct a mistake caused by any error or omission on the part of the Director; or

(*c*) comply with a Court order.

PART V—MISCELLANEOUS PROVISIONS

Insolvency practitioners in cross border cases

24. Where an insolvency practitioner is appointed in a cross-border insolvency under regulation 9, he shall only be appointed jointly with an insolvency practitioner resident in Malawi.

Professional indemnity

25. An insolvency practitioner shall not be appointed by the Court, in any case, if he is not in possession of professional indemnity insurance applicable to the negligent performance or non-performance of his duties as an insolvency practitioner generally, or as the Court may determine in accordance with the insolvency rules governing such appointments.

Prohibition period

26. For the purposes of section 180 of the Act, the prescribed period shall be 5 years.

Revocation

27. The Companies (Liquidator's Fees) Regulations are hereby revoked.

FIRST SCHEDULE

Reg 4 (1)

FORM 1

APPLICATION FOR REGISTRATION AS AN INSOLVENCY PRACTITIONER

PART I

PERSONAL DETAILS

Name: .....

Date of birth: .....

Nationality: .....

Form of Identification and Number.....

Cellphone number.....

Office address .....

Residential address .....

Details of Residence (for the last 5 years if not Malawi) .....

.....

PART II

PROFESSIONAL EXPERIENCE

Qualifications held .....

Name of institution .....

Country of institution.....

Date of qualification .....

Membership of professional body .....

..... None ..... Accountancy..... Law..... Neither (Tick as appropriate)

Other professional qualifications and/or membership of international insolvency associations

.....

.....

Experience as an insolvency practitioner (include dates, names of firms and roles)

.....

.....

.....

Enclosures to attach to this form

(1) Certified copies of professional qualifications (insert names of certificates)

.....

(2) Certified copies of professional body memberships (insert names of professional bodies)

.....

(3) Schedule of cases in which you acted as an insolvency practitioner and the values of assets involved (insert extra pages as necessary) .....

On signing this form I declare that—

(*a*) The particulars given in this form are true, accurate and complete to the best of my knowledge and belief and I will provide such further information as the Director of Insolvency may request.

(*b*) I am a fit and proper person and I am not under any suspension.

(*c*) I have taken out professional indemnity insurance of at least K20,000,000 for at least two years coterminous with any registration that may be granted.

(*d*) I undertake to abide by the provisions of the Insolvency Act and related pieces of legislation.

(*e*) I understand that a false declaration will invalidate this application or any registration granted and that I may be liable to prosecution.

(*f*) I authorize the Director to use, verify and make any inquiries relating to the information provided on this form and in relation to any other matter concerning this application.

(*g*) I undertake to notify the Director in the event of any change in the above.

Signature ..... Date .....

Before me:

.....
Commissioner of Oaths

FORM 2

Regs. 3 (4) and 8 (4)

NOTICE OF CEASING TO HOLD OFFICE AS AN INSOLVENCY PRACTITIONER

TO: The Director of Insolvency

TAKE NOTICE that I have ceased to hold office as an insolvency practitioner for a period of 6 months.

Full name of insolvency practitioner.....

[*surname first, in block letters*]

Date of ceasing to hold any office as an insolvency practitioner .....

State the nature of the office the insolvency practitioner last held and has now ceased to hold

.....

.....

(State whether liquidator, trustee of a bankrupt estate, supervisor on an individual voluntary arrangement, receiver or administrator in a company reorganization)

Dated this ..... day of ..... 20....

.....
Signature of Insolvency Practitioner

SECOND SCHEDULE

Reg 4(2) and 4(4)

FEES

Matter	*Amount* K t
1. Application fees for registration to practice as an insolvency practitioner	20, 000 00
2. On issuance of certificate of registration	500, 000 00

THIRD SCHEDULE

(Reg. 9)

INSOLVENCY PRACTITIONER'S ETHICAL GUIDELINES

GENERAL APPLICATION OF THE GUIDELINES

PART A

Introduction

1. These guidelines are intended to assist insolvency practitioners meet the obligations expected of them by providing professional and ethical guidance. Unless otherwise stated, the following definitions shall apply—

   "authorising body" means a professional body to which the insolvency practitioner belongs;

   "close or immediate family" means a spouse or equivalent, dependant, parent, brother, sister, child or sibling;

   "entity" means a body corporate;

   "individual within the practice" means the insolvency practitioner, any principals in the practice or any employees within the practice;

   "insolvency practitioner" means the receivers or receiver and manager, liquidator, including provisional liquidator, or trustee in bankruptcy under the Insolvency Act;

   "insolvency practitioner's team" means any person under the control of the insolvency practitioner, whether as a partner, employee, consultant or associate;

   "practice" means the organisation in which the insolvency practitioner practices;

   "Insolvency practitioner appointment" means a formal appointment under the terms of a charge, secured debenture, or the Insolvency Act; and

   "principal" means in respect of a partnership, a partner, in respect of a sole practitioner, or that person or any person who is held out as being a partner.

2. These guidelines shall apply to all insolvency practitioners. Insolvency practitioners should take steps to ensure that the guidelines are applied in all professional work relating to an insolvency practitioner appointment and to any professional work that may lead to such an appointment. While an insolvency practitioner appointment will be of the insolvency practitioner personally, the insolvency practitioner should ensure that the standards set out in these guidelines are applied by all members of the insolvency practitioner's team.

3. It is these guidelines and the spirit that underlies it, that shall govern the conduct of insolvency practitioners. Failure to observe these guidelines may not, of itself, constitute professional misconduct, but will be taken into account in assessing the conduct of an insolvency practitioner.

PART B

FUNDAMENTAL PRINCIPLES

4. An insolvency practitioner is required to comply with the following fundamental principles:

(*a*) Integrity—

An insolvency practitioner should be straightforward and honest in all professional and business relationships.

(*b*) Objectivity—

An insolvency practitioner should not allow bias, conflict of interest or undue influence of others to override professional or business judgment.

(*c*) Professional competence and due care—

An insolvency practitioner has a continuing duty to maintain professional knowledge and skill at the level required to ensure that every assignment receives competent professional service based on current developments in practice, legislation and techniques, including international best practices. An insolvency practitioner should act diligently and in accordance with applicable technical and professional standards when providing professional services.

(*d*) Confidentiality—

An insolvency practitioner should respect the confidentiality of information acquired as a result of professional and business relationships and should not disclose any such information to third parties without proper and specific authority, unless there is a legal or professional right or duty to disclose. Confidential information acquired as a result of professional and business relationships should not be used for the personal advantage of the insolvency practitioner or third parties.

(*e*) Professional behaviour—

An insolvency practitioner should comply with relevant laws and regulations and should avoid any action that discredits the profession. Insolvency practitioners should conduct themselves with courtesy and consideration towards all with whom they come into contact when performing their work.

PART C

FRAMEWORK APPROACH

5. The framework approach is a method which insolvency practitioners can use to identify actual or potential threats to the fundamental principles and determine whether there are any safeguards that might be available to offset them. The framework approach requires an insolvency practitioner to—

(*a*) take reasonable steps to identify any threats to compliance with the fundamental principles;

(*b*) evaluate any such threats; and

(*c*) respond in an appropriate manner to those threats.

Throughout these guidelines, there are examples of threats and possible safeguards. These examples are illustrative and should not be considered as exhaustive lists of all relevant threats or safeguards. It is impossible to define every situation that creates a threat to compliance with the fundamental principles or to specify the safeguards that may be available.

Identification of threats to the fundamental principles

6. An insolvency practitioner should take reasonable steps to identify the existence of any threats to compliance with the fundamental principles which arise during the course of his professional work.

7. An insolvency practitioner should take particular care to identify the existence of threats which exist prior to, or at the time of, taking an insolvency practitioner appointment or which, at that stage, it may reasonably be expected might arise during the course of such an insolvency practitioner appointment. The insolvency practitioner should take these threats into account when deciding whether to accept an insolvency practitioner appointment.

8. In identifying the existence of any threats, an insolvency practitioner should have regard to relationships whereby the practice is held out as being part of a national or an international association. Many threats fall into one or more of five categories—

   (*a*) Self-interest threats: which may occur as a result of the financial or other interests of a practice or an insolvency practitioner or of a close or immediate family member of an individual within the practice;

   (*b*) Self-review threats: which may occur when a previous judgment made by an individual within the practice needs to be re-evaluated by the insolvency practitioner;

   (*c*) Advocacy threats: which may occur when an individual within the practice promotes a position or opinion to the point that subsequent objectivity may be compromised;

   (*d*) Familiarity threats: which may occur when, because of a close relationship, an individual within the practice becomes too sympathetic or antagonistic to the interests of others; and

   (*e*) Intimidation threats: which may occur when an insolvency practitioner may be deterred from acting objectively by threats, actual or perceived.

Self interest threats

9. The following paragraphs give examples of the possible threats that an insolvency practitioner may face. Examples of circumstances that may create self-interest threats for an insolvency practitioner include—

   (*a*) an individual within the practice having an interest in a creditor or potential creditor with a claim which requires subjective adjudication;

   (*b*) concern about the possibility of damaging a business relationship; or

   (*c*) concerns about potential future employment.

Self-review threats

10. Examples of circumstances that may create self-review threats include—

   (*a*) the acceptance of an insolvency practitioner appointment in respect of an entity where an individual within the practice has recently been employed by, or seconded to, that entity; or

   (*b*) an insolvency practitioner or the practice has carried out professional work of any description, including sequential insolvency practitioner appointments for that entity.

Such self-review threats may diminish over the passage of time.

Advocacy Threats

11. Examples of circumstances that may create advocacy threats include—

(*a*) acting in an advisory capacity for a creditor of an entity; or

(*b*) acting as an advocate for a client in litigation or dispute with an entity.

Familiarity Threats

12. Examples of circumstances that may create familiarity threats include—

(*a*) an individual within the practice having a close relationship with any individual having a financial interest in the insolvent entity; or

(*b*) an individual within the practice having a close relationship with a potential purchaser of an insolvent's assets and/or business.

In this regard a close relationship includes both a close professional relationship and a close personal relationship.

Intimidation Threats

13. Examples of circumstances that may create intimidation threats include—

(*a*) the threat of dismissal or replacement being used to—

(i) apply pressure not to follow regulations, these guidelines, any other applicable guidelines, technical or professional standards; or

(ii) exert influence over an insolvency practitioner appointment where the insolvency practitioner is an employee rather than a principal of the practice;

(*b*) being threatened with litigation; or

(*c*) the threat of a complaint being made to the insolvency practitioner's authorising body.

Evaluation of threats

14. An insolvency practitioner should take reasonable steps to evaluate any threats to compliance with the fundamental principles that he has identified.

15. In particular, an insolvency practitioner should consider what a reasonable and informed third party, having knowledge of all relevant information, including the significance of the threat, would conclude to be acceptable.

Possible safeguards

16. Having identified and evaluated a threat to the fundamental principles an insolvency practitioner should consider whether there are any safeguards that may be available to reduce the threat to an acceptable level.

17. The relevant safeguards will vary depending on the circumstances. Generally safeguards fall into two broad categories—

(*a*) firstly, safeguards created by the profession, legislation or regulation; and

(*b*) secondly, safeguards in the work environment. In the insolvency context, safeguards in the work environment can include safeguards specific to an insolvency practitioner appointment. These safeguards seek to create a work

environment in which threats are identified and the introduction of appropriate safeguards is encouraged.

18. Some examples include—

(*a*) leadership that stresses the importance of compliance with the fundamental principles;

(*b*) policies and procedures to implement and monitor quality control of engagements;

(*c*) documented policies regarding the identification of threats to compliance with the fundamental principles, the evaluation of the significance of these threats and the identification and the application of safeguards to eliminate or reduce the threats, other than those that are trivial, to an acceptable level;

(*d*) documented internal policies and procedures requiring compliance with the fundamental principles;

(*e*) policies and procedures to consider the fundamental principles of these guidelines before the acceptance of an insolvency practitioner appointment;

(*f*) policies and procedures regarding the identification of interests or relationships between individuals within the practice and third parties;

(*g*) policies and procedures to prohibit individuals who are not members of the insolvency practitioner's team from inappropriately influencing the outcome of an insolvency practitioner appointment;

(*h*) timely communication of a practice's policies and procedures, including any changes to them, to all individuals within the practice, and appropriate training and education on such policies and procedures;

(*i*) designating a member of the senior management to be responsible for overseeing the adequate functioning of the safeguarding system;

(*j*) a disciplinary mechanism to promote compliance with policies and procedures; and

(*k*) published policies and procedures to encourage and empower individuals within the practice to communicate to senior levels within the practice or the insolvency practitioner any issue relating to compliance with the fundamental principles that concern them.

PART D

SPECIFIC APPLICATION OF THE GUIDELINES

Insolvency practitioner appointments

19. The practice of insolvency is principally governed by primary and subsidiary legislation and in many cases is subject ultimately to the control of the Court. Where circumstances are dealt with by primary or secondary legislation, an insolvency practitioner must comply with such provisions. An insolvency practitioner must also comply with any relevant authority relating to his conduct such as the Official Receiver and the Director and any directions given by the Court.

20. An insolvency practitioner should act in a manner appropriate to his position as an officer of the Court, where applicable, and in accordance with any quasi-judicial, fiduciary or other duties that he may be under.

21. Before agreeing to accept any insolvency practitioner appointment, including a joint

appointment, an insolvency practitioner should consider whether acceptance would create any threats to compliance with the fundamental principles. of particular importance will be any threats to the fundamental principle of objectivity created by conflicts of interest or by any significant professional or personal relationships.

22. In considering whether objectivity or integrity may be threatened, an insolvency practitioner should identify and evaluate any professional or personal relationship which may affect compliance with the fundamental principles. The appropriate response to the threats arising from any such relationships should then be considered, together with the introduction of any possible safeguards. Generally, it will be inappropriate for an insolvency practitioner to accept an insolvency practitioner appointment where a threat to the fundamental principles exists or may reasonably be expected to arise during the course of the insolvency practitioner appointment unless—

(*a*) disclosure is made, prior to the insolvency practitioner appointment, of the existence of such a threat to the Court or to the creditors, on whose behalf the insolvency practitioner would be appointed to act and no objection is made to the insolvency practitioner being appointed; and

(*b*) safeguards are or will be available to eliminate or reduce that threat to an acceptable level. Where the threat is other than trivial, safeguards should be considered and applied as necessary to reduce them to an acceptable level, where possible.

23. The following safeguards may be considered—

(*a*) involving or consulting another insolvency practitioner from within the practice to review the work done;

(*b*) consulting an independent third party, such as a committee of creditors, an authorising body or another insolvency practitioner;

(*c*) involving another insolvency practitioner to perform part of the work, which may include another insolvency practitioner taking a joint appointment where the conflict arises during the course of the insolvency practitioner appointment;

(*d*) obtaining legal advice from a legal practitioner with appropriate experience and expertise;

(*e*) changing the members of the insolvency practitioner's team;

(*f*) using separate insolvency practitioners or staff;

(*g*) procedures to prevent access to information by the use of information barriers, for instance, strict physical separation of such teams, confidential and secure data filing;

(*h*) clear guidelines for individuals within the practice on issues of security and confidentiality;

(i) using confidentiality agreements signed by individuals within the practice;

(*j*) regular reviewing of the application of safeguards by a senior individual within the practice not involved with the insolvency practitioner appointment;

(*k*) terminating the financial or business relationship that gives rise to the threat; and

(*l*) seeking directions from the Court.

24. As regards joint appointments, where an insolvency practitioner is specifically precluded by these guidelines from accepting an insolvency practitioner appointment

as an individual, a joint appointment will not be an appropriate safeguard and will not make accepting the insolvency practitioner appointment appropriate.

25. In deciding whether to take an insolvency practitioner appointment in circumstances where a threat to the fundamental principles has been identified, the insolvency practitioner should consider, whether the interests of those on whose behalf he would be appointed to act would best be served, by the appointment of another insolvency practitioner who did not face the same threat and, if so, whether any such appropriately qualified and experienced other insolvency practitioner is likely to be available to be appointed.

26. An insolvency practitioner will encounter situations where no safeguards can reduce a threat to an acceptable level. Where this is the case, an insolvency practitioner should conclude that it is not appropriate to accept an insolvency practitioner appointment.

27. Following acceptance, any threats should continue to be kept under appropriate review and an insolvency practitioner should be mindful that other threats may come to light or arise. There may be occasions when the insolvency practitioner is no longer in compliance with these guidelines because of changed circumstances or something which has been inadvertently overlooked. This would generally not be an issue provided the insolvency practitioner has appropriate quality control policies and procedures in place to deal with such matters and, once discovered, the matter is corrected promptly and any necessary safeguards are applied. In deciding whether to continue an insolvency practitioner appointment, the insolvency practitioner may take into account the wishes of the creditors, who after full disclosure has been made have the right to retain or replace the insolvency practitioner.

28. In all cases an insolvency practitioner will need to exercise his judgment to determine how best to deal with an identified threat. In exercising his judgment, an insolvency practitioner should consider what a reasonable and informed third party, having knowledge of all relevant information, including the significance of the threat and the safeguards applied, would conclude to be acceptable. This consideration will be affected by matters such as the significance of the threat, the nature of the work and the structure of the practice.

Conflicts of interest

29. An insolvency practitioner should take reasonable steps to identify circumstances that could pose a conflict of interest. Such circumstances may give rise to threats to compliance with the fundamental principles.

30. Examples of where a conflict of interest may arise are where—

(*a*) an insolvency practitioner has to deal with claims between the separate and conflicting interests of entities over whom he is appointed;

(*b*) there is a succession of, or sequential, insolvency practitioner appointments; or

(*c*) a significant relationship has existed with the entity or someone connected with the entity.

31. Where a conflict of interest arises, the preservation of confidentiality will be of paramount importance, therefore, the safeguards used should generally include the use of effective information barriers.

Practice mergers

32. Where practices merge, they should subsequently be treated as one for the purposes of assessing threats to the fundamental principles. At the time of the merger, existing insolvency practitioner appointments should be reviewed and any threats identified. Principals and employees of the merged practice become subject to common ethical constraints in relation to accepting new insolvency practitioner appointments to clients of either of the former practices. However, existing insolvency practitioner appointments which are rendered in apparent breach of the guidelines by such a merger need not be determined automatically, provided that a considered review of the situation by the practice discloses no obvious and immediate ethical conflict.

33. Where an individual within the practice has, in any former practice, undertaken work upon the affairs of an entity in a capacity that is incompatible with an insolvency practitioner appointment of the new practice, the individual should not work or be employed on that assignment.

Transparency

34. Both before and during an insolvency practitioner appointment, an insolvency practitioner may acquire personal information that is not directly relevant to the insolvency or confidential commercial information relating to the affairs of third parties. The information may be such that others might expect that confidentiality would be maintained.

35. Nevertheless, an insolvency practitioner in the role as office holder, has a professional duty to report openly to those with an interest in the outcome of the insolvency. An insolvency practitioner should always report on his acts and dealings as fully as possible given the circumstances of the case, in a way that is transparent and understandable. An insolvency practitioner should bear in mind the expectations of others and what a reasonable and informed third party would consider appropriate.

Professional competence and due care

36. Prior to accepting an insolvency practitioner appointment, an insolvency practitioner should ensure that he is satisfied that the following matters have been considered—

    (*a*) obtaining knowledge and understanding of the entity, its owners, managers and those responsible for its governance and business activities;

    (*b*) acquiring an appropriate understanding of the nature of the entity's business, the complexity of its operations, the specific requirements of the engagement and the purpose, nature and scope of the work to be performed;

    (*c*) acquiring knowledge of relevant industries or subject matters;

    (*d*) possessing or obtaining experience with relevant regulatory or reporting requirements;

    (*e*) assigning sufficient staff with the necessary competencies;

    (*f*) using experts where necessary; and

    (*g*) complying with quality control policies and procedures designed to provide reasonable assurance that specific engagements are accepted only when they can be performed competently.

37. The fundamental principle of professional competence and due care requires that an insolvency practitioner should only accept an insolvency practitioner appointment when the insolvency practitioner has sufficient expertise. For example, a self interest threat to the fundamental principle of professional competence and due care is created, if the insolvency practitioner or the insolvency practitioner's team does not possess or cannot acquire the competencies necessary to carry out the insolvency practitioner appointment. Expertise will include appropriate training, technical knowledge, knowledge of the entity and the business with which the entity is concerned.

38. Maintaining and acquiring professional competence requires a continuing awareness and understanding of relevant technical and professional developments, including—

(*a*) developments in insolvency legislation;

(*b*) the regulations of their professional body, including any continuing professional development requirements;

(*c*) guidance issued by their professional body or any other relevant authority; and

(*d*) technical issues being discussed within the profession, locally and internationally.

Professional and personal relationships

39. The environment in which insolvency practitioners work and the relationships formed in their professional and personal lives can lead to threats to the fundamental principle of objectivity.

Identifying relationships

40. In particular, the principle of objectivity may be threatened if any individual within the practice, or the close or immediate family of an individual within the practice or the practice itself, has, or has had, a professional or personal relationship which relates to the insolvency practitioner appointment being considered.

41. Professional or personal relationships may include, but are not restricted to, relationships with—

(*a*) the entity;

(*b*) any director or shadow director or former director or shadow director of the entity;

(*c*) shareholders of the entity;

(*d*) any principal or employee of the entity;

(*e*) business partners of the entity;

(*f*) companies or entities controlled by the entity;

(*g*) companies which are under common control;

(*h*) creditors, including debenture holders, of the entity;

(*i*) debtors of the entity;

(*j*) close or immediate family of the officers of the entity; or

(*k*) others with commercial relationships with the practice.

Safeguards within the practice should include policies and procedures to identify relationships between individuals within the practice and third parties in a way that is proportionate and reasonable in relation to the insolvency practitioner appointment being considered.

Is the relationship significant to the conduct of the insolvency practitioner appointment?

42. Where a professional or personal relationship of the type described in paragraph 41 has been identified, the insolvency practitioner should evaluate the impact of the relationship in the context of the insolvency practitioner appointment being sought or considered. Issues to consider in evaluating whether a relationship creates a threat to the fundamental principles may include the following—

    (*a*) the nature of the previous duties undertaken by a practice during an earlier relationship with the entity;

    (*b*) the impact of the work conducted by the practice on the financial state and/or the financial stability of the entity in respect of which the insolvency practitioner appointment is being considered;

    (*c*) whether the fee received for the work by the practice is, or was, significant to the practice itself or is, or was, substantial;

    (*d*) how recently any professional work was carried out? It is likely that greater threats will arise, or may be seen to arise, where work has been carried out within the previous three years. However, there may still be instances where, in respect of non-audit work, any threat is at an acceptable level. Conversely, there may be situations whereby the nature of the work carried out was such that a considerably longer period should elapse before any threat can be reduced to an acceptable level;

    (*e*) whether the insolvency practitioner appointment being considered involves consideration of any work previously undertaken by the practice for that entity;

    (*f*) the nature of any personal relationship and the proximity of the insolvency practitioner to the individual with whom the relationship exists and, where appropriate, the proximity of that individual to the entity in relation to which the insolvency practitioner appointment relates;

    (*g*) whether any reporting obligations will arise in respect of the relevant individual with whom the relationship exists, for instance, an obligation to report on the conduct of directors and shadow directors of a company to which the insolvency practitioner appointment relates;

    (*h*) the nature of any previous duties undertaken by an individual within the practice during any earlier relationship with the entity; and

    (*i*) the extent of the insolvency practitioner and his team team's familiarity with the individuals connected with the entity.

    Having identified and evaluated a relationship that may create a threat to the fundamental principles, the insolvency practitioner should consider his response including the introduction of any possible safeguards to reduce the threat to an acceptable level.

43. Some of the safeguards which may be considered to reduce the threat created by a professional or personal relationship to an acceptable level are considered above in paragraph 41. Other safeguards may include—

    (*a*) withdrawing from the insolvency practitioner's team;

    (*b*) terminating, where possible, the financial or business relationship giving rise to the threat; and

    (*c*) disclosure of the relationship and any financial benefit received by the practice,

whether directly or indirectly, to the entity or to those on whose behalf the insolvency practitioner would be appointed to act.

44. An insolvency practitioner may encounter situations where no, or no reasonable, safeguards can be introduced to eliminate a threat arising from a professional or personal relationship, or to reduce it to an acceptable level. In such situations, the relationship in question will constitute a significant professional relationship ("significant professional relationship") or a significant personal relationship ("significant personal relationship"). Where this is the case, the insolvency practitioner should conclude that it is not appropriate to take the insolvency practitioner appointment.

    Consideration should always be given to the perception of others when deciding whether to accept an insolvency practitioner appointment. Whilst an insolvency practitioner may regard a relationship as not being significant to the insolvency practitioner appointment, the perception of others may differ and this may in some circumstances be sufficient to make the relationship significant.

Dealing with the assets of an entity

45. Actual or perceived threats, for example self interest threats, to the fundamental principles may arise when during an insolvency practitioner appointment, an insolvency practitioner realises assets.

46. Save in circumstances which clearly do not impair the insolvency practitioner's objectivity, insolvency practitioners appointed to any insolvency practitioner appointment in relation to an entity, should not themselves acquire, directly or indirectly, any of the assets of an entity, nor knowingly permit any individual within the practice, or any close or immediate family member of the insolvency practitioner or of an individual within the practice, directly or indirectly, to do so.

47. Where the assets and business of an insolvent company are sold by an insolvency practitioner shortly after appointment on pre-agreed terms, this could lead to an actual or perceived threat to objectivity. The sale may also be seen as a threat to objectivity by creditors or others not involved in the prior agreement. The threat to objectivity may be eliminated or reduced to an acceptable level by safeguards such as obtaining an independent valuation of the assets or business being sold, or the consideration of other potential purchasers.

48. It is also particularly important for an insolvency practitioner to take care to ensure that, where doing so will not conflict with any legal or professional obligation, his decision-making processes are transparent, understandable and readily identifiable to all third parties who may be affected by the sale or proposed sale.

Obtaining specialist advice and services

49. When an insolvency practitioner intends to rely on the advice or work of another, the insolvency practitioner should evaluate whether such reliance is warranted. The insolvency practitioner should consider factors such as reputation, expertise, and resources available and applicable professional and ethical standards. Any payment to the third party should reflect the value of the work undertaken.

    Threats to the fundamental principles, for example familiarity threats and self-interest

threats, can arise if services are provided by a regular source independent of the practice.

50. Safeguards should be introduced to reduce such threats to an acceptable level. These safeguards should ensure that a proper business relationship is maintained between the parties and that such relationships are reviewed periodically to ensure that best value and service is being obtained in relation to each insolvency practitioner appointment. Additional safeguards may include clear guidelines and policies within the practice on such relationships. An insolvency practitioner should also consider disclosure of the existence of such business relationships to the general body of creditors or the creditor's committee, if one exists.

51. Threats to the fundamental principles can also arise where services are provided from within the practice or by a party with whom the practice, or an individual within the practice, has a business or personal relationship. An insolvency practitioner should take particular care in such circumstances to ensure that the best value and service is being provided.

Fees and other types of remuneration

52. The following applies prior to accepting an insolvency practitioner appointment—

(*a*) where an engagement may lead to an insolvency practitioner appointment, an insolvency practitioner should make any party to the work aware of the terms of the work and, in particular, the basis on which any fees are charged and which services are covered by those fees;

(*b*) where an engagement may lead to an insolvency practitioner appointment, insolvency practitioners should not accept referral fees or commissions, unless they have established safeguards to reduce the threats created by such fees or commissions to an acceptable level; and

(*c*) safeguards may include disclosure in advance of any arrangements. If after receiving any such payments, an insolvency practitioner accepts an insolvency practitioner appointment, the amount and source of any fees or commissions received should be disclosed to creditors.

53. The following applies after accepting an insolvency practitioner appointment—

(*a*) during an insolvency practitioner appointment, accepting referral fees or commissions represents a significant threat to objectivity. Such fees or commissions should not therefore be accepted other than where to do so is for the benefit of the insolvent estate;

(*b*) if such fees or commissions are accepted they should only be accepted for the benefit of the estate; not for the benefit of the insolvency practitioner or the practice; and

(*c*) further, where such fees or commissions are accepted an insolvency practitioner should consider making disclosure to creditors.

Obtaining insolvency practitioner appointments

54. The special nature of insolvency practitioner appointments makes the payment or offer of any commission for, or the furnishing of, any valuable consideration towards the introduction of insolvency practitioner appointments inappropriate. This does not,

however, preclude an arrangement between an insolvency practitioner and an employee whereby the employee's remuneration is based in whole or in part on introductions obtained for the insolvency practitioner through the efforts of the employee.

55. When an insolvency practitioner seeks an insolvency practitioner appointment or work that may lead to an insolvency practitioner appointment through advertising or other forms of marketing, there may be threats to compliance with the fundamental principles.

56. When considering whether to accept an insolvency practitioner appointment, an insolvency practitioner should satisfy himself that any advertising or other form of marketing pursuant to which the insolvency practitioner appointment may have been obtained is, or has been—

    (*a*) fair and not misleading;

    (*b*) substantiated and avoids disparaging statements; and

    (*c*) compliant with relevant guidelines of practice and guidance in relation to advertising.

57. Advertisements and other forms of marketing should be clearly distinguishable as such and be legal, decent, honest and truthful.

58. Where reference is made in advertisements or other forms of marketing to fees or to the cost of the services to be provided, the basis of calculation and the range of services that the reference is intended to cover should be provided. Care should be taken to ensure that such references do not mislead as to the precise range of services and the time commitment that the reference is intended to cover.

59. An insolvency practitioner should never promote or seek to promote his services, or the services of another insolvency practitioner, in such a way, or to such an extent as to amount to harassment.

60. Where an insolvency practitioner or the practice advertises for work via a third party, the insolvency practitioner is responsible for ensuring that the third party follows the above guidance.

Gifts and hospitality

61. An insolvency practitioner, or a close or immediate family member, may be offered gifts and hospitality. In relation to an insolvency practitioner appointment, such an offer will give rise to threats to compliance with the fundamental principles. For example, self-interest threats may arise if a gift is accepted and intimidation threats may arise from the possibility of such offers being made public.

62. The significance of such threats will depend on the nature, value and intent behind the offer. In deciding whether to accept any offer of a gift or hospitality, the insolvency practitioner should have regard to what a reasonable and informed third party having knowledge of all relevant information would consider to be appropriate. Where such a reasonable and informed third party would consider the gift to be made in the normal course of business without the specific intent to influence decision-making or obtain information, the insolvency practitioner may generally conclude that there is no significant threat to compliance with the fundamental principles.

63. Where appropriate, safeguards should be considered and applied as necessary to eliminate any threats to the fundamental principles or reduce them to an acceptable level. Where an insolvency practitioner encounters a situation in which no, or no reasonable, safeguards can be introduced to reduce a threat arising from offers of gifts or hospitality to an acceptable level, he should conclude that it is not appropriate to accept the offer.

64. An insolvency practitioner should also not offer or provide gifts or hospitality where this would give rise to an unacceptable threat to compliance with the fundamental principles.

Record keeping

65. It will always be for the insolvency practitioner to justify his actions. An insolvency practitioner will be expected to be able to demonstrate the steps that he took and the conclusions that he reached in identifying, evaluating and responding to any threats, both leading up to, and during, an insolvency practitioner appointment, by reference to written contemporaneous records.

66. The records which an insolvency practitioner maintains, in relation to the steps that he took and the conclusions that he reached, should be sufficient to enable a reasonable and informed third party to reach a view on the appropriateness of his actions.

Timeliness

67. Administrations which are conducted in a timely manner will generally be more efficient and effective. In the interests of minimizing costs, administrations should be conducted in a timely manner. To ensure that statutory requirements are met, insolvency practitioners should use and maintain a checklist or other systems which alert them to critical dates such as—

    (*a*) statutory obligations and notifications;

    (*b*) meetings; and

    (*c*) reporting.

68. Where an extension of time is required, the insolvency practitioner will need to—

    (*a*) apply to the Court or other approving body; and

    (*b*) give reasons for the need for additional time, for instance, in cases where the issue being addressed is complex.

69. An insolvency practitioner may claim remuneration and costs of applying for an extension of time from the administration, subject to any order from the Court. An insolvency practitioner may not claim remuneration and costs for applying for an extension of time, if the reason for the failure to meet the deadline was attributable to his poor conduct, such as—

    (*a*) inattention to the passage of time;

    (*b*) lack of knowledge of the time limits;

    (*c*) poor processes; or

    (*d*) inadequately trained or supervised staff.

70. Insolvency practitioners must ensure that stakeholders are clearly advised of time limits that impact on them and the consequences of not meeting those time limits.

PART E

THE APPLICATION OF THE FRAMEWORK TO SPECIFIC SITUATIONS

Introduction

71. The following examples describe specific circumstances and relationships that will create threats to compliance with the fundamental principles. The examples may assist an insolvency practitioner and the members of the insolvency practitioner's team to assess the implications of similar, but different, circumstances and relationships.

    The examples are divided into two parts. Part 1 contains examples which do not relate to a previous or existing insolvency practitioner appointment. Part 2 contains examples that do relate to a previous or existing insolvency practitioner appointment. The examples are not intended to be exhaustive.

Examples that do not relate to a previous or existing insolvency practitioner appointment

72. The following situations involve a professional relationship which does not consist of a previous insolvency practitioner appointment:

A. Insolvency practitioner appointment following audit related work

Relationship: The practice or an individual within the practice has previously carried out audit related work within the previous 3 years.

Response: A significant professional relationship will arise; an insolvency practitioner should conclude that it is not appropriate to take the insolvency practitioner appointment.

Where audit related work was carried out more than three years before the proposed date of the appointment of the insolvency practitioner, a threat to compliance with the fundamental principles may still arise. The insolvency practitioner should evaluate any such threat and consider whether the threat can be eliminated or reduced to an acceptable level by the existence or introduction of safeguards.

This restriction does not apply where the insolvency practitioner appointment is in a members' voluntary liquidation. An insolvency practitioner may normally take such an appointment as insolvency practitioner. However, the insolvency practitioner should consider whether there are any other circumstances that give rise to an unacceptable threat to compliance with the fundamental principles. Further, the insolvency practitioner should satisfy himself that the directors' declaration of solvency is likely to be substantiated by events.

B. Appointment as investigating accountant at the instigation of a creditor

Previous relationship: The practice or an individual within the practice was instructed by, or at the instigation of, a creditor or other party having a financial interest in an entity to investigate, monitor or advise on its affairs.

Response: A significant professional relationship would not normally arise in these circumstances, provided that—

(*a*) there has not been a direct involvement by an individual within the practice in the management of the entity;

(*b*) the practice had its principal client relationship with the creditor or other party, rather than with the company or proprietor of the business; and

(*c*) the entity was aware of this.

An insolvency practitioner should, however, consider all the circumstances before accepting an insolvency practitioner appointment, including the effect of any discussions or lack of discussions about the financial affairs of the company with its directors, and whether such circumstances give rise to an unacceptable threat to compliance with the fundamental principles.

Where such an investigation was conducted at the request, or at the instigation, of a secured creditor, who then requests an insolvency practitioner to accept an insolvency practitioner appointment as an administrator, receiver or receiver and manager, the insolvency practitioner should satisfy himself that the company, acting by its board of directors, does not object to him taking such an insolvency practitioner appointment. If the secured creditor does not give prior warning of the insolvency practitioner's appointment to the company or if such warning is given and the company objects, but the secured creditor still wishes to appoint the insolvency practitioner, he should consider whether the circumstances give rise to an unacceptable threat to compliance with the fundamental principles.

Examples relating to previous or existing insolvency practitioner appointments

73. The following situations involve a prior professional relationship that involves a previous or existing insolvency practitioner appointment—

A. Insolvency practitioner appointment following an appointment as receiver or receiver and manager

Previous appointment: An individual within the practice has been a receiver or receiver and manager.

Proposed appointment: Any insolvency practitioner appointment.

Response: An insolvency practitioner should not accept any insolvency practitioner appointment.

This restriction does not, however, apply where the individual within the practice was appointed a receiver by the Court. In such circumstances, the insolvency practitioner should however consider whether any other circumstances which give rise to an unacceptable threat to compliance with the fundamental principles.

B. Conversion of members' voluntary liquation into creditors' voluntary liquidation

Previous appointment: An individual within the practice has been the insolvency practitioner of a company in a members' voluntary liquidation.

Proposed appointment: Insolvency practitioner in a creditors' voluntary liquidation, where it has been necessary to convene a creditors' meeting.

Response: Where there has been a significant professional relationship, an insolvency practitioner may continue or accept an appointment, subject to creditors' approval, only if he concludes that the company will eventually be able to pay its debts in full, together with interest.

However, the insolvency practitioner should consider whether there are any other circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

Made this 21st day of February, 2017.

JOSEPH MWANAMVEKHA
Minister of Industry, Trade and Tourism

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