The Insolvency Service

Company Directors Disqualification Act 1986

Guidance Notes for the Completion of Statutory Reports and Returns

A BIS SERVICE

These notes are important. Please read them before completing any report or return under section 7 of the Act.

Contents

1. Purpose of this guide

This guide is for practitioners who need to report under section 7 of the Company Directors Disqualification Act 1986 (CDDA). It updates the guidance published in December 1999. Disqualification of directors is a constantly evolving area, so this guide:

- sets out what The Insolvency Service (we/us, or The Service) sees as current best practice in reporting unfit conduct; and
- reflects required practice set out in SIP2 (Investigations by office-holders in administrations and insolvent liquidations) and the accompanying practical guidance note produced by the Association of Business Recovery Professionals (R3), and SIP4 (Disqualification of directors).

The guide does not have the force of law. Please do not regard it as a substitute for understanding the legislation itself. Remember you are responsible for using your independent judgement on the conduct of individual directors in individual cases. However, we hope the guide will be a useful reference for you and your managers and staff.

2. Introduction

2.1 The legislation and the reporting duties of practitioners

The CDDA came into force on 29 December 1986. It repealed and consolidated various disqualification provisions in both the Companies Act 1985 and the Insolvency Act 1985.

The guide deals with reporting requirements under section 7 of the CDDA. In England and Wales, these rules are detailed in The Insolvent Companies (Reports on Conduct of Directors) Rules 1996 as amended by The Insolvent Companies (Reports on Conduct of Directors) (Amendment) Rules 2001 (the reporting rules)[1], which came into force on 30 September 1996. The procedure for disqualification applications is laid down in The Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987 (as amended by The Insolvent Companies (Disqualification of Unfit Directors) Proceedings (Amendment) Rules 2007) (the proceedings rules) and with the Practice Direction on Directors Disqualification Proceedings.

The procedure for bringing proceedings in respect of Scottish companies is summarised in section 5.7.

[1] In Scotland, The Insolvent Companies (reports on Conduct of Directors) (Scotland) Rules 1996 as amended by The Insolvent Companies (reports on Conduct of Directors) (Scotland) (Amendment) Rules 2001.

Section 7(3) of the CDDA applies to:

- liquidators of companies that are being wound up voluntarily;
- the official receiver, in the case of a company that is being wound up by the court (in England and Wales);
- administrative receivers and administrators, and
- in Scotland to liquidators of companies that are placed in compulsory liquidation.

It requires you to send a report to the Secretary of State, represented by The Insolvency Service, **as soon as** you think that:

- a person is or has been a director of a company that became insolvent while they were a director or subsequently; and
- their conduct as a director of that company (considered either alone or along with their conduct as a director of another company) makes them unfit to be concerned in a company's management.

Each office-holder must report independently (but see section 5.6 concerning joint appointments). You must make a report or return within six months after your appointment (or sooner if you leave your post earlier than this), covering all persons mentioned in rule 4(2) of the reporting rules. Failure to submit a report or a return may lead to prosecution.

When reporting to us, you must do so in line with the reporting rules and Schedule 1 to the CDDA, which lists certain matters the court should consider in determining whether a director's conduct in the affairs of one or more companies makes that person unfit to be a director of companies generally. The schedule is for guidance and any misconduct you might identify which is not specifically referred to in the schedule should also be reported. The Secretary of State will target the matters for investigation if this appears to be in the public interest.

In reaching this decision, we consider reports of unfitness along with any matters reported previously and other relevant information available.

When deciding whether conduct is unfit, please do not be pedantic about isolated technical failures, for example an occasional lapse in filing annual returns, but do try to be objective about each director's conduct. Please also remember that you need only consider matters of conduct based on information you acquire in the course of your normal duties and by reference to the books and records available.

The bodies that authorise insolvency practitioners have issued Statements of Insolvency Practice (SIPs), two of which you should particularly consider when reporting under the CDDA. See Appendix 1 of this guide for a summary of the key points from SIP2 "Investigations by office-holders in administrations and insolvent liquidations" and the accompanying practical guidance note produced by the Association of Business Recovery Professionals (R3). You should also consider SIP4 "Disqualification of directors".

Section 7(4) of the CDDA says you have a duty to provide the Secretary of State or the official receiver with all the further information (including relevant books, papers and other records) that may reasonably be required, “for the purpose of determining whether to exercise, or of exercising, any function of his under this section”.

If proceedings begin, then ordinarily the Head of Investigations will act as deponent in proceedings and introduce the Secretary of State’s evidence by way of affirmation or affidavit. However, there may be matters specifically within your knowledge as office-holder, such as advice provided at pre-appointment meetings with the director, in which case you (or, if you prefer, a member of your staff with day-to-day responsibility for the insolvency) might be asked to make an affirmation or swear an affidavit, and to give evidence in court. In cases before the Scottish courts, you (or a member of your staff) may need to attend in person if the proceedings are challenged and you are required to give evidence.

2.2 The Service’s role in disqualification matters

In cases based on information from practitioners, the claimant for a disqualification order application is the Secretary of State for Business, Innovation and Skills. The Service acts as the administrative arm of the Secretary of State for applications under section 6 of the CDDA.

On receiving your report, we consider it carefully. We have to decide whether there appears to be sufficient unfit conduct for seeking disqualification to be in the public interest; and if so, from reading the report and any other information, whether adequate evidence appears to be available. From the information available, if Public Interest and evidential tests are met, we will target the case for investigation, grading it according to the level of Public Interest in taking enforcement action. Then, in consultation with you and your staff:

- The Insolvency Service’s Investigation Teams conduct an investigation into the facts of the case, prioritising matters on the basis of the Public Interest grading. This will usually involve an inspection of the company records held by your office, as well as your own files relating to the conduct of the insolvency, and extensive enquiries of third parties and the directors themselves. Alternatively, we may allocate the investigation to a solicitor, or the local official receiver, who carries out the same duties.
- Every report is considered on its own merits. The evidence must be sound and of substance. The courts regard disqualification as a severe restriction on the individual’s rights, so we must be satisfied there is a reasonable prospect of success. We cannot seek disqualification based on unsubstantiated assertions, presumptions or assumptions, or a general feeling of "unhappiness" about the director’s conduct, or the circumstances around the company’s failure.

- Following investigation, we may conclude the case on the basis that the allegations of unfitness cannot be proved, are insufficiently serious or there are other reasons why proceedings should not be brought in the Public Interest. Alternatively, we will prepare a draft affidavit/ affirmation (or draft report for Scottish companies) which is considered by the Secretary of State and who will, if appropriate, issue an authority for proceedings to be issued.
- Notify the Defendant(s) of the intention to issue proceedings and, through the Defendant Liaison Team, consider and administer voluntary disqualification undertakings (Section 1A CDDA 1986);
- If undertakings are not initially obtained from the Defendants, the Defendant Liaison Team will instruct solicitor agents to issue proceedings in court. Undertakings may still be accepted after the issue of proceedings, or alternatively the matter will progress to disposal at court either on an uncontested basis, or through full trial. Legal input is obtained from solicitors or Counsel as and when required.

2.3 Late reporting

The CDDA says the court may allow the Secretary of State to make applications outside the statutory two-year period. But several judicial decisions have made it clear that such leave would only be granted for a good reason. In such cases, the court will consider the length of delay, the reasons for it, the strength/ seriousness of the case and how far it would disadvantage the defendants.

Experience shows that delay in submitting an unfit conduct report will not itself be a good ground, so you **must** send your reports **as soon as** the information is available as required by section 7(3) of the CDDA and within the statutory period.

The two-year limit for issuing proceedings under section 6 of the CDDA runs from the date of the first insolvency event. If this happened some time ago, you should send your reports as soon as reasonably possible, or contact the Intelligence and Enforcement Directorate if there is likely to be any delay.

The investigation process described above requires the optimum amount of time available if it is to be completed with sufficient time to meet The Service's own pre-action protocols with regard to the commencement of action against the directors. Consequently, reports received late are at increasing risk of not being sufficiently in the public interest to take further.

3. Completing the report or return

3.1 Introduction

Your conduct report must be the D1 report or D2 return[2] in the schedule to the reporting rules, or in a form substantially similar to these but with any necessary variations.

- Send a D1 report if you have unfit conduct to report, and enclose supporting papers.
- Send a D2 return if you do not have unfit conduct to report.

Please note that any supplementary information provided with a D2, such as a covering letter highlighting areas of concern, may not be considered in terms of deciding whether a case should be targeted for investigation.

If you are not sure what kind of report to send, please contact us for advice and technical guidance. In exceptionally urgent circumstances, we may agree that an "outline" report is acceptable so that enquiries can begin as soon as possible.

For companies registered in Scotland, use forms D1 (SCOT) or D2 (SCOT) as appropriate, and send them to the Intelligence and Enforcement Directorate as you would for returns on English and Welsh companies.

Every office-holder must send a return or report (but see section 5.6 for joint appointments).

We monitor the submission of reports and returns. It is **your** responsibility to ensure deadlines are met and reports are submitted as soon as the information is available. **We may refer you to your recognised professional body if you fail to send reports/ returns on time or to respond to correspondence. You would then face appropriate action and could be considered for prosecution under rule 4(7) of the reporting rules.**

We enter the information in your report/ return into our computer database.

Please ensure that you complete the current version of this form:

'The Insolvent Companies (Reports on Conduct of Directors) (Amendment) Rules 2001' that is available on the HMSO website here.

'The Insolvent Companies (Reports on Conduct of Directors) (Scotland) (Amendment) Rules 2001' that is available on the HMSO website here.

[2] In Scotland Form D1 (Scot) or Form D2 (Scot)

You can also find these on our website at www.gov.uk/government/collections/insolvency-service-forms-disqualification-d-returns.

Please note that the address for The Insolvency Service on the statutory forms is obsolete as has been previously advised in Dear IP. All reports and returns should be sent to the address at the end of this guidance at 6.1.

3.2 The D2 return

As soon as you think there is no unfit conduct to report, please send a D2 return.

3.3 The D2 interim return

If you have not reported under section 7(3) on all the persons mentioned in rule 4(2) of the reporting rules and you cannot yet send a final return, for example, because you are still examining the company's affairs, then you must:

- send an interim return (also on form D2) within six months of the relevant date; and
- tell us when we can expect a report or final return.

However, please send interim reports in exceptional circumstances only. If you do file an interim report, please ensure you provide reasons for doing so, and a timescale by which you expect to file a report or final return. If the timescale given is deemed excessive, a request may be made by The Insolvency Service to file earlier.

If you are having other difficulties, please contact the Intelligence and Enforcement Directorate for advice on what to do.

3.4 Completing the D1 conduct report

The following notes aim to help you complete the D1 conduct report. You should send a D1 as soon as you think that:

- a person is or has been a director of a company that became insolvent while they were a director or at a later date; and
- their conduct as a director of that company (and, if applicable, as a director of any other company or companies) makes them unfit to be concerned in a company’s management.

General considerations

You should ask yourself three questions:

- What allegations of unfit conduct am I making?
- What evidence is available to support them?
- What were the directors' roles and their various levels of responsibility for the unfit conduct?

D1 Section 1:Office-holder

In addition to providing the name and address of office-holder(s) it would be useful if you could provide full contact details for the person who has day to day responsibility for the case. Please supply email addresses and direct dial numbers.

D1 Section 2: Company

Here it would also be useful if you could provide any former names of the company (using the same registered number). When the form asks 'When did the company commence to trade' it would also be useful to include the date that the company ceased to trade as this may help in our targeting decisions.

D1 Section 3: Directors' details

Here you should list all the directors, including shadow and de facto directors of the company, and any other person who appears to you to have been a director or shadow director in the three years before the relevant date in rule 4(4) of the reporting rules. A director includes corporate directors and other legal entities. In addition to the required information, it would assist us if you could include the following for each director;

- full name (including aliases);
- postal and email address;
- landline and mobile telephone numbers;
- where contact has not been successful, what attempts have been made to contact them*; and
- relationship (if any) to co-directors.

*If you think a director is no longer at the address provided, please say so and provide all the information available that will help in tracing the director. Even if a director is living abroad, we may still seek disqualification and you should still file a report. If we cannot trace a director, we may be unable to bring proceedings, but we often trace directors by using agents.

Shadow or de facto directors

In section 3 of the D1, please clearly list any people who acted as directors without being formally appointed. The term de facto director includes any person acting as director, even under a different title, without being formally appointed.

Proceedings against such persons often succeed only if there is very good evidence that they acted as directors. You should therefore try to supply full evidence of their role, preferably in the form of documentary information from third parties such as creditors, auditors, banks, employees and other directors. The Secretary of State will need to convince the court that the de facto director acted essentially at the same level as the duly appointed directors.

In relation to a company, shadow director means, "a person in accordance with whose directions or instructions the directors of the company are accustomed to act". However, a person is not treated as a shadow director merely because the directors act on advice that person gives in a professional capacity (section 22(5) CDDA).

Nominee directors

If one member of a board acts on the instructions of a third party, that does not necessarily mean the third party is a shadow director; the capacity to influence the whole board (or at least a majority) is the key issue. Whilst allowed to take into account the interests of his sponsor, the nominee generally has a duty to act in the best interests of the company. However, section173 of the Companies Act 2006 (hereinafter referred to as CA 2006) states that the duty to exercise independent judgment is not infringed if the director is acting in a way lawfully authorised by the company’s constitution.

The inactive director

The courts have looked at the position of directors who are not engaged full time in the company's day-to-day business. In one case, the court ruled that non-executive directors can be found unfit if they have failed properly to inform themselves of what is happening to a company and consequently failed to take appropriate action, particularly in financial matters. In another case, the court held that all directors have statutory and fiduciary duties. Unless special circumstances apply, even unpaid directors may make themselves unfit "by virtue of sheer inactivity over the period of their respective directorships".

D1 Section 4: Connected companies

Connected companies are companies that the director in question was involved with. This may include companies directed and/ or owned by an associate of the director or companies in which the directors or shareholders of the company of which you are the office holder, have also held directorships or shares. We need to know the name of each connected company; the relationship to the company reported on (subsidiary, parent, common directors, common shareholders, associate details); and in broad terms the scale and nature of inter-company transactions. If the connected company is in liquidation, administration or receivership, please provide any information you have.

D1 Section 5: Unfit conduct

Here, please give details of the conduct of each director you regard as unfit, with a summary of the supporting evidence. It would also be helpful if you provide;

- details of any professional or other advice that the director(s) received with regards to any allegation, stating when this advice was received;
- full contact details for those professional or other advisors, including telephone numbers and email addresses;
- details of any explanations obtained from the directors for their actions; and
- details of the personal benefits enjoyed/ liabilities incurred by the directors.

If you are providing conduct details in an appendix/ attachment, please list here the conduct that makes you think the director is unfit. Part 4 of this guide covers the more usual types of unfit conduct in detail and how you should report them.

Appendix 2 provides a more detailed checklist of what is required as supporting evidence. Copies of documents which support the allegation(s) can be provided, but we do not need copies of everything at this stage, especially if such are voluminous. Specific and relevant copy documents can be attached to the D1, which can be mentioned in Section 5. We will contact you to obtain copies of further documents, if needed, once an investigation commences, but if you can tell us what else you have as evidence, when outlining the misconduct at Section 5, that would be helpful.

D1 Section 6: Statement of Affairs, Accounts and Report to Creditors

Please always attach to the D1 a copy of any Statement of Affairs that has been submitted. If it has not been submitted, you should include all details of the known assets and liabilities, explain why the Statement of Affairs is not available, and say how you have tried to obtain it.

With the D1, you should also send a copy of your report to creditors and, where available:

- the last two sets of annual accounts;
- any management or draft accounts for periods thereafter; and
- any questionnaires completed by the directors at your request.

Please include the contact details for the accountant/ bookkeeper and auditor and please confirm whether you have obtained any passwords that are needed for electronic records and documents.

D1 Section 7: Other proceedings

If you have begun asset recovery proceedings, you should enclose copies of the Statement of Claim and any defence. Please also tell us of the present state of the action. If you have identified a cause for action but have not begun proceedings or have decided to abandon them, you should give the reasons. Please provide details of any settlements entered into and copies of any court orders.

If you have begun civil recovery proceedings or are considering them, you should not delay sending the D1; disqualification proceedings are separate from any recovery actions arising out of the insolvency.

It is particularly important to give details of civil recovery proceedings if your application is for fraudulent or wrongful trading. This is because section 10 of the CDDA allows a disqualification order to be made after the court has found fraudulent or wrongful trading. If you are considering proceedings for fraudulent or wrongful trading, please give brief details of the evidence that would support your application.

If you are aware that the police or any other prosecuting authority are taking criminal proceedings against the company or its director(s), or are investigating its affairs, you should give all known details. Where possible, please include a contact name, address and telephone number of the person dealing with the investigation so we can check the up-to-date position. Section 2 of the CDDA allows a disqualification order to be made after a conviction for an indictable offence in connection with a company. Please also inform us if any director is currently serving a prison sentence as this may also impact on the public interest decision.

Although section 218(4) only specifies that a liquidator need report criminality, reports from administrators and receivers are both encouraged and welcomed and will be treated in the same manner as those submitted by liquidators.

Criminality reports can either be submitted at the same time as the D return or before or after that return. If preferred, insolvency practitioners can highlight criminality within the body of a D1 report rather than submitting a separate report.

Further information regarding reporting of criminal allegations and the evidence required to support the different allegations can be found in Chapter 20 of Dear IP.

You should also report any other proceedings being taken against the director(s), for example by HM Revenue and Customs.

4. Unfit conduct

4.1 Introduction

This section discusses the types of unfit conduct described in Schedule 1 of the CDDA 1986 and states the types of evidence needed to support an allegation if put before the court. This evidence should be viewed in the context of the duties of all directors, which may be summarised as:

- a fiduciary duty to act honestly and for the company's benefit;
- a duty to act with such skill as may reasonably be expected, given the role occupied by the director, their knowledge and experience; and
- a duty to comply with statutory obligations imposed by the CA 2006 and other relevant legislation.

Most matters of unfit conduct fall within one of the following more general categories, which you may find helpful when identifying unfit conduct:

- taking unwarranted risks with creditors' or shareholders' money;
- misapplication/ misappropriation of company monies/ assets;
- taking unfair advantage of the position of director;
- serious failures to comply with statutory duties and company law.

We will need the following information, whatever the nature of the unfit conduct:

- Who was responsible?
- When did it happen?
- What are the sums involved?
- Details of any explanations provided.

Below we discuss the more frequently encountered matters laid down in Schedule 1 to the CDDA. They do not cover everything, and you must report any other matters of unfitness on the part of the directors.

However, you should always consider the materiality – the practical significance of matters of unfitness. In particular, you should ask:

- How much damage has been done to creditors', shareholders' or employees' interests?
- If you are considering an allegation of breach of a statutory duty then the financial materiality may be low, however the breach may be such that the conduct would still be considered unfit and disqualification to be in the public interest.

4.2 Schedule 1 CDDA – Matters for determining unfitness of directors

The CDDA provides guidance as to matters for determining the unfitness of directors in Schedule 1. The matters listed are not intended to be exhaustive and any unfit conduct you identify which is not specifically referred to in the schedule should still be reported to us. Part I of the schedule applies to all cases and Part II applies where the company has become insolvent. Please do not overly concern yourself at the reporting stage with defining the allegation by reference to Schedule 1, Part I or II; rather you should describe the transaction/ event/ behaviour and show how it has harmed the company or its creditors or both. Schedule 1, Parts I and II are included in this Guide for quick reference.

4.3 Schedule 1, Part I – Matters that apply in all cases

The Act

Part I states:

1. “Any misfeasance or breach of any fiduciary or other duty by the director in relation to the company [including in particular any breach by the director of a duty under Chapter 2 of Part 10 of the Companies Act 2006 (general duties of directors) owed to the company]

2. “Any misapplication or retention by the director of, or any conduct by the director giving rise to an obligation to account for, any money or other property of the company.

3. “The extent of the director's responsibility for the company entering into any transaction liable to be set aside under Part XVI of the Insolvency Act [1986] (provisions against debt avoidance).

4. “The extent of the director's responsibility for any failure by the company to comply with any of the following provisions of the Companies Act 2006 —

    (a) section 113 (register of members);
    (b) section 114 (register to be kept available for inspection);
    (c) section 162 (register of directors);
    (d) section 165 (register of directors' residential addresses);
    (e) section 167 (duty to notify registrar of changes: directors);
    (f) section 275 (register of secretaries);
    (g) section 276 (duty to notify registrar of changes: secretaries);

(h) section 386 (duty to keep accounting records);
(i) section 388 (where and for how long accounting records to be kept);
(j) section 854 (duty to make annual returns);
(k) section 860 (duty to register charges);
(l) section 878 (duty to register charges: companies registered in Scotland)

5. “The extent of the director's responsibility for any failure by the directors of the company to comply with the following provisions of the Companies Act 2006 —

(a) section 394 or 399 (duty to prepare annual accounts);
(b) section 414 or 450 (approval and signature of abbreviated accounts); or
(c) section 433 (name of signatory to be stated in published copy of accounts)”

If you have identified any of the above matters of misconduct and that misconduct is material then please quantify the loss (where appropriate), supply details of evidence available, and provide any explanations the director gives for their actions. If proceedings for recovery have been, or are to be, taken against the director(s), then you should give details in answer to question 21 at section 7 of the D1 (see Other proceedings in section 3.3).

Ratification

Practitioners will be aware that the CA 2006 contains provisions to enable the ratification of actions by the directors that might otherwise give rise to a liability. The practitioner will therefore need to satisfy himself that no valid ratification has occurred before an allegation can be made out.

For ratification to be valid it must have been bona fide and honest and have taken place at a time when the company was solvent and in circumstances in which the ratification was unlikely to jeopardise that solvency or cause loss to the creditors of the company. It is not possible for the company to ratify acts that are ultra vires the company, or where ratification is prohibited by the CA 2006.

Misfeasance or breach of any fiduciary or other duty

Misfeasance can be defined as the misuse of a lawful authority in order to achieve a desired result.

There is no statutory definition of fiduciary duty. Much of the misconduct that previously would have been considered by the courts to be breaches of fiduciary duties has now been incorporated into the CA 2006; in particular within the general duties of directors. These duties are:

- To act within powers (s171)

- To promote the success of the company (s172)
- To exercise independent judgment (s173)
- To exercise reasonable care skill and diligence (s174)
- To avoid conflicts of interest (s175)
- Not to accept benefits from third parties (s176)
- To declare an interest in a proposed transaction or arrangement with a company (s177).

Within the context of the disqualification regime, the most common types of allegation reporting a breach of fiduciary duty (although it might not be described as a breach of fiduciary duty in the allegation) include:

- Deliberate misapplication or misappropriation of company assets to the benefit of the director(s), their associates or group companies at the expense of creditors.
- Undue/ excessive remuneration.
- Loans (often unsecured) to the director, associates or group companies for no benefit to the company.
- Other payments/ transactions to the detriment of the company.
- Abrogation of duties (i.e. failed to act in the best interests of the company).

In addition to statutory (both under the CA 2006 and other legislation) and common law duties a director may also have duties specific to his particular company or his role within that company, arising from the company's articles of association (which may be more onerous than the statutory requirements), his contract of employment or service agreement, and he may also be bound by decisions that have been made by members, for example at an AGM.

Breach of duty can cover many matters of unfit conduct. Generally, any significant conduct that you consider was not in the company's proper interests or which generally worked to the detriment of creditors, employees or members should be reported. Please provide full details including periods, amounts involved and state which director(s) were responsible.

Misapplication or retention of company money or property

Has the director removed or used wrongly (or allowed others to do so) any money or other company property, resulting in:

- Failure to fulfil an obligation or pay a debt; or
- a trading, capital or other loss?

If so, please provide full details including periods, amounts involved and state which director(s) were responsible.

Transactions defrauding creditors

Transactions defrauding creditors, or leading to allegations of misfeasance, breach of duty, misapplication or retention of company money or property, could collectively be called breaches of commercial morality.

Matters to be considered under this heading include the following:

- Disposal of any of the company's property, assets or services by transfer, gift or at a significant undervalue for the purpose of making such assets unavailable for use by the company, its members or creditors. Please identify the director(s) responsible and provide full details including any explanation from them for their actions.
- Selling goods that are the property of third parties. Questions to consider include the following:
    - Who was responsible?
    - What was the value of goods disposed of? Is the original agreement available?
    - When were the goods sold and what happened to the sale proceeds? Is the sale recorded in the accounting records?
    - Has the owner of the assets complained? Is the owner pursuing a separate action for recovery?
    - Did the company continue to make lease or hire purchase payments after the disposal?

If you consider that there are relevant matters to report to us then please provide full details including periods, amounts involved and state which director(s) were responsible.

Failure to comply with the Companies Act 2006

Accounting records

Please state the whereabouts of the accounting records. Please confirm that you have formally required the directors of the company to deliver all accounting records to you, and state whether you believe you have all records that were kept. If not, please detail your attempts to obtain the records, state why others may still be holding them and explain why you believe that the records are incomplete. Please note that the courts will expect the office holder to have made every reasonable effort to secure accounting records which inevitably means requesting them on more than one occasion. If the accounting records are not produced or are inadequate, and the shortfall in the accounts cannot properly be explained (or can only be explained by a balancing trading losses figure), you should always ask the directors for explanations. For example:

- Which director(s) were responsible for ensuring that adequate records were maintained?
- Did the company keep adequate accounting records, regularly recording its transactions, dealings, assets and liabilities? (section 386 and 387 CA 2006)
- If no accounting records were kept, what was the director's responsibility for the default? What explanation has the director given? Was any accountant or bookkeeper employed?

If records were kept:

- What records are there? Please provide a list of physical and electronic records and confirm their location;
- Have you obtained full bank details/ VAT/ PAYE references? Please provide these to us.
- Were any accounts produced and, if so, did the auditors or accountants comment on the adequacy of the records?
- To what date were the accounting records written up?
- Are there any material omissions, bearing in mind the business' size and nature?
- Are any records with a third party? If so, what steps have been taken to recover them?

- Have the inadequacies hindered your administration, for example by causing problems or delays in collecting book debts, verifying creditors' claims, identifying company assets, or identifying benefits received by the directors? Did the lack of proper financial information leave the directors unable to find out the company's financial position or manage the company properly?
- Have the creditors potentially or actually lost money because of the inadequacies?

Where accounting records have been maintained in electronic form, you should ensure you recover the hard-copy printouts, the source documents the accounts were prepared from and the electronic version. Please ensure that you obtain and can provide to us passwords for electronic records and documents**.**

Preservation of accounting records

- For what period, and where, did the company keep its accounting records (sections 388 and 389 CA 2006)?
- Were accounting records kept outside Great Britain? If so, were accounts and returns prepared from them and were they regularly sent to Great Britain (section 388 CA 2006)?
- Can you identify any of the accounting records that are missing and give any information as to why?

Keeping of statutory registers

- Did the company keep the registers required by the CA 2006?
- If not, what was the director's responsibility for the failures or omissions? Take into account the size and nature of the company's business, especially if it is owner-managed.
- Has the lack of any of these records hindered the administration of the company's estate? If so, please give details.

Minute books

Although not specifically referred to in the schedule, the company's minute book can be an important source. Often it provides clear evidence of the information available to the directors and what action they took at various points. A company is required to keep a record of resolutions and meetings (CA 2006 sections 355 – 357).

- Has the minute book been kept and written up?
- Has it been delivered to you?

Annual returns

- Please provide details of any (material) omissions or deficiencies in the annual returns.
- What was the directors' responsibility for any default, omission or delay in the annual returns, and what explanation have they given?

Accounts

- To what date were statutory accounts last prepared?
- Were any other accounts prepared for any period after the date of those referred to above?
- Have the company's officers signed the balance sheets to the formal accounts referred to above, and were all required documents annexed to the sheets?
- If there was any default, omission or delay in preparing, signing or filing the statutory, or any other, accounts, what was the director's responsibility for this?
- Has any failure to file accounts disadvantaged creditors or third parties or both?
- Did the auditor qualify the accounts or raise a fundamental uncertainty and if so, what? Please supply copies and state how far the director was responsible for any of the deficiencies noted by the auditor, and what explanation the director has given.

4.4 Schedule 1, Part II - Applicable matters if the company has become insolvent

The Act

Schedule 1, Part II of the Act states that applicable matters are:

6. "The extent of the director's responsibility for the causes of the company becoming insolvent.

7. "The extent of the director's responsibility for any failure by the company to supply any goods or services which have been paid for (in whole or in part).

8. "The extent of the director's responsibility for the company entering into any transaction or giving any preference, being a transaction or preference —

    (a) liable to be set aside under section 127 or sections 238 to 240 of the Insolvency Act [1986], or
    (b) challengeable under section 242 or 243 of that Act or under any rule of law in Scotland.

9. “The extent of the director's responsibility for any failure by the directors of the company to comply with section 98 of the Insolvency Act [1986] (duty to call creditors' meeting in creditors' voluntary winding up).

10. “Any failure by the director to comply with any obligation imposed on him by or under any of the following provisions of the Insolvency Act [1986]—

    (a) [paragraph 47 of Schedule B1] (company's statement of affairs in administration);
    (b) section 47 (statement of affairs to administrative receiver);
    (c) section 66 (statement of affairs in Scottish receivership);
    (d) section 99 (directors' duty to attend meeting; statement of affairs in creditors' voluntary winding up);
    (e) section 131 (statement of affairs in winding up by the court);
    (f) section 234 (duty of any one with company property to deliver it up);
    (g) section 235 (duty to co-operate with liquidator, etc).”

Causes of failure and insolvency

Please report on how far the directors are responsible for the company becoming insolvent.

Types of conduct that can be put before the court under this heading include:

- trading without regard to the interests of creditors (and shareholders) through incompetence or negligence to a marked degree (often termed reckless trading); or
- trading without reasonable prospect of paying creditors' claims (often termed trading with knowledge of insolvency at risk and to the detriment of creditors).

These are both dealt with in detail below.

These categories partly overlap. The courts are reluctant to place responsibility on directors for events leading to a company's failure which could not be foreseen or whose effects could not be mitigated; and they are also unwilling to penalise directors for commercial misjudgement.

Trading without regard to the interests of creditors

- What events caused the company's insolvency?
- In promoting the company, did the directors assess its potential viability carefully enough?
- Was capital, other than credit from suppliers, available to finance the purchase of necessary plant and equipment and to see the company through its setting-up period?
- In accepting contracts, did the directors give proper consideration to the costs involved or did the customers effectively dictate the price? Were the directors aware whether prices charged covered costs?
- Given the company's size and nature and their own professional qualifications and experience, did the directors have available enough financial information, management accounts, feasibility studies or professional advice to make sound policy decisions?
- Were annual accounts prepared, and filed, by due dates?
- Was information provided to investors, providers of working capital and creditors? Did they rely on that information and was it accurate?

Please provide full details including periods, amounts involved and state which director(s) were responsible.

Trading without reasonable prospect of paying creditors' claims

You should also ask the following questions:

- When did the company first become insolvent, on a cash flow and/or balance sheet basis?
- Is that evidenced by accounting information (filed, draft or management), judgements/ claims, threatening letters, dishonoured cheques, distraints, execution or PAYE/ VAT arrears?
- Could the directors have had any valid reason to believe that the company's fortunes would change enough to regain solvency?
- Were they expecting any capital/ cash injection, and if so was that expectation reasonable? Would it have been adequate?
- Did the directors ever receive professional advice to continue trading? If so, what advice was given, when and by whom, and was it based on accurate information? Was that advice followed? If not, why not?
- How much did the company's deficiency or debts to various categories of creditors increase after the date it first became insolvent?
- How far was the company enabled to continue trading by withholding payments to a particular creditor e.g. HMRC, a Local Authority or a landlord? By postponing payments to a particular creditor, has that creditor lost more than the creditors generally? Over what period,

compared with others, have arrears to specific creditors been building up?

- Has the company traded to the specific detriment of a particular creditor (whether insolvent or not) for a period, and from a later date, traded to the detriment of all creditors?
- Since the company first became insolvent, what money have the directors paid in, directly or indirectly? If debts have been guaranteed, will those guarantees be honoured? What is the extent of collateral security?
- Did the directors change their remuneration/ benefits in the relevant period?
- Did the amounts drawn remain reasonable in all the circumstances? Did they increase?
- Is there any evidence (including assertions from creditors) that the directors continued to incur credit, or otherwise act to the detriment of the company, in the lead up to an insolvency procedure (e.g. pre pack administration) including following advice not to do so by an IP or professional adviser?

Please provide full details including periods, amounts involved and state which director(s) were responsible.

Crown debts

The courts have held that debts due to HMRC, for example unpaid VAT, PAYE or NIC, are not, of themselves, evidence of unfit conduct. But tax debt, like money owed to trade or other creditors, can provide evidence of a company's inability to pay its debts as and when due and thereby cash flow insolvency.
To make a specific allegation in relation to tax debts, it must be shown that:

- HMRC has been treated worse than the general body of creditors[3] for a material period of time and is a substantial creditor in the proceedings; or
- HMRC's forbearance has been abused when, for example, it has agreed to defer tax collection but the company has not complied with the arrangements.

Please explain what makes you believe that the Crown has been treated worse than the general body of creditors or the Crown's forbearance has been abused.

It is important to report failure to meet statutory obligations where, for a prolonged period, the company has failed to register for tax, not submitted tax returns or paid tax bills. Such failure may give rise to a separate allegation.

[3] For example, the Crown is owed substantially more than other creditors and its debt grew or remained the same whilst others were paid.

HMRC is an involuntary creditor – it has a duty to collect tax and the company has a duty to pay. It relies on compliance to enable it to assess what is due. If it agrees not to press for immediate payment, this does not lessen the company's obligation to pay.

It is important, where possible, that you distinguish between quantified and estimated claims. You should send copies of any claims you receive, when relevant and indicate which director was responsible.

Phoenix companies

You should consider how far the company was the successor to an earlier failed company. Listed below are some of the more important facts we would like to see.

- Time elapsed between two (or more) failures.
- Whether the same people were responsible for managing each company. Who was responsible?
- What assets were acquired from a previous company or business and in what circumstances? How much was paid (if anything) and what was the source of the money used?
- How similar is the new business to the previous one? For instance, did the successor company continue the same contracts, produce identical products or deal with similar customers? Was the workforce substantially unchanged?
- Was any new form of finance introduced to address previous cash flow issues e.g. a factoring arrangement?
- Did the successor company use the same or similar trading style (section 216 Insolvency Act 1986), advertising material etc?

In summary, the central question is how far the new company's directors could reasonably expect it to be viable. In this context, the critical points are the continuation of the same, or substantially the same, business between the two failures without any substantial change in the method of operation.

Please also provide details of any 'new' business being managed by the directors in apparent breach of section 216 of The Insolvency Act 1986.

Consumer prepayments/ deposits

Unfit conduct is not simply taking customer deposits and then failing to deliver goods or services, or taking the deposits while the company is insolvent.

To allege unfit conduct, there must be some evidence that the failure was not excusable. These are some of the relevant factors:

- Was the company using deposits for its general trading purposes at a time when it was not meeting orders on time, so it was jeopardising deposits without realistic prospect of delivering the goods or services, or being able to repay the deposits?
- If you can show that a company could not and did not intend to deliver the goods or services, then taking deposits would amount to unfit conduct even if the company were fully solvent at the time the deposit was taken.
- If the company breached the express terms of a contract or a statutory provision by the way it treated deposit money, the receipt and handling of such deposits may amount to unfit conduct, even without fraud or insolvency.

When reporting, you are also asked to answer these questions:

- What is the number and aggregate amount of deposits?
- Over what period were the deposits received?
- Were any misleading statements made to customers and, if so, when and by whom?
- To what extent have depositors been reimbursed under any kind of compensation scheme, or by a credit card issuer? (We need this information to establish the profile of the losers.)
- Have you received complaints? (Please forward examples.)
- Did the company ever maintain a separate bank account into which deposits were, or should have been, paid?
- What, if any, explanation have the directors offered for the failure to supply goods or services, or to give refunds?
- Which director(s) were responsible and can you provide supporting evidence?

Transactions at an undervalue, preferences[4] and dispositions of property (transactions to the detriment of creditors)

You may use as evidence the grounds on which you have applied, or could reasonably apply, for a court order to set aside the transaction under sections 127 or 238 to 240 (in Scotland, section 242 or 243) of the Insolvency Act 1986. If you cannot apply the full tests set out in those sections, you may still be able to make out a transaction to the detriment of creditor(s) allegation. You should highlight any benefit to the director or connected persons from a transaction that took place at a time when the company was insolvent or that exacerbated the company's failure.

Preference/ transaction at an undervalue

We would like to see the following information:

- When did the transaction take place and who has benefited from it?
- What was the company's financial position at the time i.e. evidence of insolvency?
- How much was the benefit and what was the full value of the asset transferred?
- Is the transaction recorded in the accounting records?
- Did the last set of accounts show an asset or a liability that now seems to have disappeared to a director or connected person or company?
- What action or decision has been taken over recovery?
- Which director(s) were responsible?

NB: It is important to remember that just because a transaction falls within the statutory definition of a preference or undervalue transaction this is not necessarily sufficient in itself to evidence misfeasance or a breach of duty. We will need to show that there was a decision to apply the company's funds for personal benefit and to the detriment of the company/ its creditors at a time when the director(s) knew or ought to have known that the company was insolvent .i.e. there was a misapplication of the company's assets, or that a particular transaction was inappropriate in the circumstances.

[4] In Scotland Gratuitous Alienations.

Duty to assist the practitioner and to deliver property

Could you please consider the following questions?

- Has any director failed to deliver to you, when required, any company property, books, papers or records (section 234 Insolvency Act 1986)? If so, please give details.
- Has any director failed to co-operate with you in providing information about the company's affairs (section 235 Insolvency Act 1986)? If so, provide brief details, including any proceedings taken.
- What explanations have been provided for these defaults?
- What steps have you taken to enforce compliance? Have you verified that the director is at the address you used when requesting information?
- What problems have these defaults caused in administering the company's affairs? Can you say they have caused an actual or potential loss to the creditors?

Showing that the company was insolvent

Under Part II of the schedule, and in connection with many of the allegations raised against directors, it is also necessary to show that the company was insolvent at the time of the events under consideration. In these cases you must provide evidence that the directors ought to have been aware of the insolvency.

"Balance sheet" insolvency or short term trading losses by an otherwise solvent company are not necessarily enough (although material cash flow insolvency may be a key factor in showing the company was insolvent). Similarly, a company may be balance sheet solvent on the basis of a director’s loan, which he is unable to repay, or insolvent on the basis of an inter-company debt which is not being called upon. To prove such allegations, you must show that the directors were aware, or should have been aware, that they faced insolvency (for example, by creditor pressure or warnings from advisers); that they did nothing, or insufficient, to remedy the situation; and that continued trading was, or transactions were, detrimental to creditors and others.

You should also consider whether there is any evidence, particularly in any records delivered up, to justify the company continuing to trade, even if the directors were aware of the insolvent position. For example, there may have been potential investors or evidence that the company was currently trading profitably. However, even if the directors had taken professional advice to carry on, you may still be able to allege unfitness. Much depends on the assumptions on which that advice was based, and whether it was fully acted upon.

5. Other matters

5.1 Disclosure of information/ material to The Insolvency Service

Under section 7(4) of the CDDA, The Insolvency Service as the Secretary of State's representative is legally entitled to request and receive from you any relevant information and documents you have obtained (including by the use of the powers under section 235 and 236 of the Insolvency Act 1986) that he "may reasonably require for the purpose of determining whether to exercise, or of exercising, any function of his under this section". You are granted these powers to help you administer the insolvent company's affairs. One of the responsibilities of the office holder, and one of the reasons you obtain the material, is to fulfil your duty to report information to the Secretary of State under section 7 of the CDDA.

We are entitled under section 7(4) to inspect a practitioner's files, but only those that are relevant to any person's conduct as a director. This "relevance" test should not be used as justification for being selective in what the practitioner provides access to. If a practitioner does fail to provide relevant information or permit access to relevant records then it is open to us to enforce section 7(4) by making an application under Rule 6 of the Reporting Rules.

Please bear in mind that the investigator is often working to tight deadlines and in the absence of the information requested from you it may not be possible to evidence the case sufficiently to justify disqualification proceedings. In the event that a practitioner's failure to respond within a reasonable period to legitimate requests for information leads to the discontinuance of an otherwise viable case then we may consider reporting the failure to the practitioner's authorising body.

The public interest requires appropriate disclosure and use of such material, so you should disclose it to the Secretary of State. This obligation overrides any duty of confidence you may owe to the company. However, nothing in the Act is taken to require any person to disclose any information that they are entitled to refuse to disclose on the grounds of legal professional privilege (LPP) (in Scotland, confidentiality of communications). It is a matter for the LPP holder (e.g. a liquidator) to decide whether to waive the right to LPP. If this is done, then we can access and use the material.

This is why you should not give any undertaking to any person providing information or documents that implicitly or explicitly stops you disclosing them to us. If you did so, you might not be able to properly discharge your statutory duties, and might be taken to court to enforce your co-operation. Similarly, please bear in mind your duties of disclosure under section 7 of the CDDA, and point them out to the court if it considers restricting you from disclosing any information relevant to court cases during the administration.

Part 31.8(2)(c) of the Civil Procedure Rules 1998 confirms that we must disclose to defendants the documents that we have (or have had) as they

have a legal right to inspect or copy such documents. Therefore, we have a duty to disclose any documents we are entitled to see under section 7 of the CDDA. If we cannot provide the documents requested, then a third-party disclosure application could be made against you.

It is for the person entrusted with the investigation of directors' conduct (the Secretary of State) to take a view on what information and documentation is relevant to the conduct of that investigation. The Secretary of State will exercise his powers reasonably but that does not mean that he is obliged to require the production of only such information or documentation as is currently in the possession of the insolvency practitioner. A request for information to which the insolvency practitioner has access and that would assist in the investigation is within the scope of section 7(4). Any disclosure of personal data by the insolvency practitioner to the Secretary of State in response to a section 7(4) requirement is a "disclosure required by law" and therefore benefits from an exemption from the non disclosure provisions of the Data Protection Act 1998.

5.2 Legal professional privilege (LPP)

LPP grants protection from disclosing evidence to a third party or the court. LPP relates to legal advice between a lawyer and his client or to associated communications between a client or his lawyer and a third party. The underlying purpose of privilege is to allow free access to lawyers' professional skill and judgment. LPP attaches to a document and the privilege belongs to the client not the lawyer. The client is often the company subject to insolvency proceedings and, even if the instructions were given by the individuals within the company e.g. the directors, they would have been instructing the lawyer as officers of the company, not in their personal capacity. In *Prudential Plc -v- Special Commissioners of Income Tax*[5] it was held that LPP did not apply in relation to any professional other than a qualified lawyer: a solicitor or barrister, or an appropriately qualified foreign lawyer.

Legal advice privilege also generally applies to relevant communications between the following persons and their clients:

- patent agents, in respect of civil proceedings (s280 of the Design and Patents Act 1988),
- trademark agents, in respect of civil proceedings (s284 of the Design and Patents Act 1988),
- licensed conveyancers (s33 of the Administration of Justice Act 1985), and
- representatives of employees at industrial tribunals, for the purpose of the tribunal hearing.

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[5] Prudential Plc -v- Special Commissioners of Income Tax [2010] EWCA Civ 1094

5.3 The Data Protection Act 1998 (DPA) and disclosure of D returns

Current DPA legislation provides protection and rights for individuals as regards processing their personal data. Section 7(1) provides that any individual is entitled to ask the data controller what personal information is being processed by him, the purpose of the processing, the recipient or classes of recipient of the personal data and a description of the data. It is this section of the DPA which requires disclosure of the D report where that report contains the personal information of the applicant.

The DPA defines personal data as including any expression of opinion about the data subject, and any indication of the intention of the data controller, or any other person, in respect to the individual. On this basis an insolvency practitioner's opinion and intentions in a D report are caught by the DPA and are therefore usually disclosable to the data subject (subject to exemptions that may apply).

The Service considers exemptions in cases where disclosure would prejudice the Secretary of State regulatory function (e.g. disqualification or prosecution proceedings), but only to the extent that disclosure would prejudice these functions.

Frequent requests for release of D reports are received as creditors often consider that the D report is a detailed report on the company. If a D report is requested by a third party such as a creditor, the opinion of the insolvency practitioner will constitute personal data of the director(s) to which the absolute exemption of section 40(2) Freedom of Information Act 2000 (FOIA) applies. The "statutory" information in the remainder of the D report is also subject to the absolute exemption of section 21 of the FOIA as being information which is publicly available from Companies House. However, any such request will then fall within the remit of the DPA.

All enquiries made direct to practitioners about the D decision and requests for copy returns or reports must be referred in the first instance to Intelligence Operations using the contact details provided at the end of this document. This includes all requests from anyone made under the Data Protection Act 1998 ("DPA") and the Freedom of Information Act 2000 ("FOIA") for a report or return.

Practitioners should bear in mind that disclosure of a D report is probable in some circumstances and therefore the report should contain only relevant and pertinent facts and information. The Service is not responsible for checking whether the report may contain defamatory matters.

5.4 Availability of accounting records

Under SIP 2, administrators and liquidators must safeguard and list all company books and records produced to them at the outset of the insolvency. (SIP 17 deals with the requirements of administrative receivers regarding accounting records.)

The accounting records are a crucial source of information to The Service. If proceedings are issued, defendants must be allowed to inspect the records so they can prepare their defence.

It is essential that you recover all accounting records from the directors, bookkeepers, accountants or any other third party and maintain an audit trail so it is apparent when, and from whom, records were obtained. If these have not been delivered, we would ask you to record what steps you have taken to obtain them. You must tell us at the outset of any discrepancies in the records. You should also identify any records held by others. In cases where we have said we would make further enquiries, you must keep us fully informed as to:

- any further records that become available;
- any records that may have to be passed to the company's directors, a successor company or others; and
- any records that are lost, stolen or destroyed while held by you or others.

If you take office as administrative receiver or administrator, you are especially asked to tell us about:

- any records due to be passed to a third-party purchaser of the company’s business; and
- any records that are to be passed back to the directors at the completion of the receivership or administration.

In appropriate cases, we may ask you to photocopy such company records.

5.5 Payment to practitioners

You will not be paid for time taken in discharging your statutory duty to report. The work this involves, done at the time of reporting or later at our request, is set out in Appendix 2.

You may be paid for work done at our request beyond that set out in Appendix 2, in particular work after the start of the proceedings (that is, after issuing the claim form), including witness costs. If you are required to attend the trial you should ensure you are available.

We will only pay for work formally authorised in advance of being undertaken. The authorisation will include the agreed hourly rate for all staff involved with an estimate of the number of hours you or each member of your staff will take. You must let us know when that time estimate is reached and agree any extension you need.

Before authorising work to be undertaken and payment for such, we will consider the following:

- Reasonable work required in the context of the case. Relevant factors include the nature and complexity of the case, the amount of documentation, the number of Defendants, and so forth. The work should be performed at the appropriate (and no higher) level of seniority in the firm, taking such factors into account.
- Whether the rates requested are reasonable to reflect the seniority of the people in the firm doing the work. The rates themselves need to be reasonable. In assessing what constitutes reasonable rates, we recognise that disqualification work is litigation. However in agreeing rates, we will take into account the following factors:

  - The practitioner is already very familiar with the papers in the case.
  - The practitioner is supported by a professional client and their lawyers.
  - A great deal of work is done by our solicitors, who are very experienced in this field.
  - Only exceptionally does the practitioner attend court. (Whilst there may be, on occasion, the possibility of a court appearance, the vast majority of disqualification cases settle or are disposed of at court without the need for the practitioner to attend.)

  The firm's standard charge out rates will inform the agreeing of appropriate rates, taking into account the above factors. Premium rates (if charged by the firm to other clients) will not be relevant to our consideration for the reasons set out above.
- The amount of time likely to be spent on a particular piece of work. This needs to be accurately estimated. It will generally be inappropriate to set estimates by reference to 'bands' of hours (e.g. 4 - 8). If more time is needed than provided for in the estimate the reasons need to be clearly identified.
- You will be paid for time taken if we ask you to consider draft affidavits. We will pay the normal hourly rate of the person who does the work. If, for example, a manager is better placed than you to give evidence, then they rather than you may take on the job. The hourly rate for all staff involved must be agreed in advance with an estimate of the number of hours you or each member of your staff will take. You must let us know when that time estimate is reached and agree any extension you need. We will only pay for work that was formally authorised in advance.
- You rather than we will pay the cost of any legal advice taken by you.

5.6 More than one office-holder

When two or more office-holders are involved with a company (for example, an administrative receiver and a liquidator), every office-holder must send us a return (under rule 4(5) of the reporting rules), except when they have already reported on everyone mentioned in rule 4(2).

When the office-holder believes the conditions in section 6(1) are satisfied, they have the duty to report immediately, even if another office-holder has also been appointed.

An office-holder may be a liquidator, administrative receiver or administrator.

Under rule 4(5)(a) of the reporting rules, each office-holder must send us a return if they are in post six months less one week from the relevant date. Each must act independently from any other office-holder (such as in a previous insolvency) and must report as soon as they become aware of misconduct, even if they hear of it some time after it happened. However, to avoid duplicating outdated work, please contact us for guidance if you are appointed towards the end of the two-year period after the relevant date.

Rule 4(5)(b) of the reporting rules says that if you leave office before the end of the six-month (less one week) period, you must send a return within 14 days of leaving office unless you have already reported.

In a company in compulsory liquidation, which has previously passed a resolution for voluntary liquidation, the voluntary liquidator will be an office-holder.

If a company in voluntary liquidation receives a compulsory winding-up order, the voluntary liquidator must still make a report or return as appropriate. However, once a company is in compulsory liquidation, the official receiver [6] will also make an assessment of the directors' conduct. The official receiver may be replaced as liquidator by a practitioner.

If there are joint appointees to one office, we need only one joint report from that office. The joint appointees should decide between themselves which of them should draft the report. Unless they agree from the outset that one will be responsible for all aspects of submitting the report, both appointees should ensure they are fully satisfied with its content.

[6] In Scotland the Insolvency Practitioner appointed as liquidator of companies wound up by the court.

5.7 Scotland

The primary legislation, namely the Insolvency Act 1986 and the CDDA, are Great Britain Acts. This means they apply to Scotland as well as England and Wales. The secondary legislation applies to Scotland only, and is set out in The Insolvent Companies (Reports on Conduct of Directors) (Scotland) Rules 1996.

All reports and returns in respect of companies registered in Scotland must be sent to the Intelligence and Enforcement Directorate, Birmingham. The statutory forms to use in such cases are the D1(SCOT) and D2(SCOT) forms in the schedule to The Insolvent Companies (Reports on Conduct of Directors) (Scotland) Rules 1996 as amended by The Insolvent Companies (Reports on Conduct of Directors) (Scotland) (Amendment) Rules 2001.

The procedure for making applications to the Sheriff Court is set out in the Act of Sederunt (Company Directors Disqualification) 1986 and the Rules 74.33 and 74.34 of the Rules of the Court of Session. The detail of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987 (as amended by The Insolvent Companies (Disqualification of Unfit Directors) Proceedings (Amendment) Rules 1999) does not apply in Scotland.

In Scotland cases are taken to court by solicitor agents who issue the proceedings, acting on our instructions. The Insolvency Service's Defendant Liaison team issues the notice of intention to commence proceedings and deals with the consideration and administration of undertakings.

Court proceedings in Scotland differ from those in England and Wales. The cases regularly call in court for motion to be made. The proceedings for Court of Session cases are structured as follows:

1. Petition
   Sets out the Secretary of State's case.
2. Answers
   Sets out the defendant's case in answer to the petition.
3. Adjustments
   For both parties until agreement on content or entrenched dispute is reached.
4. Debate
   To dispose of preliminary pleas in law.
5. Proof before Answer
   Proof but pleas in law are outstanding.
6. Proof

The final hearing of the case; each side calls witnesses to prove the facts of the case.

Sheriff Court cases are similar but proceed by way of summary application rather than petition.

6. Contact points

6.1 England, Wales and Scotland

All conduct reports and returns should be sent to:

The Insolvency Service
Investigations and Enforcement Services
Insolvent Targeting Team
3rd Floor
Cannon House
18 Priory Queensway
Birmingham B4 6FD

(DX 713901 BIRMINGHAM)

Tel: 0121 698 4000
Fax: 0121 698 4095

Section Head: l Mark Danks
Tel: 0121 698 4236

Email: Intelligence.Insolvent@insolvency.gsi.gov.uk

Please also send any other enquiries about operational matters and technical queries about conduct matters to this address.

6.2 The Investigations Hotline

The Investigations Hotline is a contact point that can be used to report misconduct to The Insolvency Service where it may be appropriate to use our investigatory and enforcement powers. As well as the headline telephone number: 0300 678 0017 (an answer phone only); on-line, email and post contact points are available.

The Investigations Hotline acts as the main reception point for complaints about live companies and information relating to the conduct of directors, disqualified directors, undischarged bankrupts, individuals subject to debt relief orders, individuals subject to restrictions and the re-use of prohibited company names.

Further information about making a complaint, including our publications, can be found on our website at. www.gov.uk/government/collections/insolvency-service-investigations-and-enforcement-what-we-do-our-outcomes-and-complaints.

Please encourage complainants to use the Investigations Hotline to report misconduct not directly relevant to the company you are reporting on.

Appendix 1

Key points of Statement of Insolvency Practice 2 – Investigations by office-holders in administrations and insolvent liquidations and the accompanying practical guidance note.

This summarises the key points from SIP2 and the practical guidance note, which will affect the discharge of the office-holder's duty to report under the CDDA.

The principles of SIP 2:

An office-holder should carry out investigations that are proportionate to the circumstances of each case.

An office-holder should report clearly on the steps taken in relation to investigations, and the outcomes.

Meeting of Creditors

As an office-holder, you should invite creditors to provide information on any concerns regarding the way in which the company's business has been conducted and to provide information on potential recoveries for the estate. Please raise this request at any meeting of creditors where your appointment is made or confirmed, or at any later meeting you convene and in the first communication you send to creditors.

Creditors/ liquidation committee

You should also specifically invite members of the committee, upon or soon after the formation of the committee, and any predecessor in office to provide the same information as that requested at a meeting of creditors (detailed above).

Questioning directors and other key personnel

You should consider the information acquired in the course of appraising and realising the business and assets of a company, together with any information provided by creditors or gained from other sources, and decide whether any further information is appropriate. You should make enquiries of the directors and senior employees, by sending questionnaires and/ or interviewing them, as appropriate.

Records

At the outset of your appointment, you should locate the company's books and records (in whatever form), ensure they are secured, and list them as appropriate.

When reviewing the records of the company you should ask yourself can changes in the financial position of the company be satisfactorily accounted for from the records of the company covering the period since the date of the last audited or filed accounts, or if none since the incorporation of the company? Furthermore, if there is a material difference between the deficiency disclosed in the statement of affairs and the last audited or filed accounts, after taking into account matters such as writing down asset values then you should give consideration to the preparation of trading and profit and loss accounts for the final trading period.

Investigations

You should make an initial assessment of whether there could be any matters that might lead to recoveries for the estate and what further investigations may be appropriate.

You should determine the extent of the investigations in the circumstances of each case, taking account of the public interest, potential recoveries, the funds likely to be available to fund an investigation and the costs involved.

You may conclude that there are matters that require early investigation. It is for you to decide whether investigation and subsequent legal action should proceed as quickly as possible, without consultation with or sanction by creditors or a creditors' committee.

There may be circumstances where there are clearly insufficient funds to carry out a detailed investigation and you should consider whether it is appropriate to seek funding from creditors or other interested parties.

Reporting requirements

Creditors should be given information regarding investigations, any action being taken, and whether funding is being provided by third parties subject to considerations of privilege and confidentiality. You should include a statement dealing with your initial assessment, whether any further investigations or action were considered and the outcome in the first annual or progress report and a statement dealing with investigations and actions concluded during the period and those that are continuing in each subsequent report.

Record Keeping

You should document, at the time, initial assessments, investigations and conclusions, including any conclusion that further investigation or action is not required or feasible, and also any decision to restrict the content of reports to creditors.

Appendix 2

Documents and information to be included with a report

This list shows items of information you should submit with the D1 report. Some items, as marked, are required in EVERY case, as they contain basic information which is needed for assessment of the case. However, not all items will be required in every case, as some of these listed below will be specific to only certain types of allegations. **Producing one or more of these items after submitting a report, and following a specific request from us to do so, will not be considered additional work for which you might expect payment.**	
Item	**Notes**
Copy Statement of Affairs (**all cases**)	If none is submitted, the report should include an estimate of the company's financial position by listing known assets and liabilities.
Office-holder's report to creditors (**all cases**)	If this is not available, please attach a report detailing the company's history.
Last two sets of annual accounts (**all cases**)	Any draft or management accounts for periods thereafter.
Copies of questionnaires completed by the directors (**all cases**) .	
List of accounting records delivered up (**all cases**)	If none or only some have been obtained, please provide details (if not included in the body of the report) of the attempts made to recover any missing records
Details of the present position of the insolvency and dividend prospects	

(**all cases**)	
Copies of specific, relevant documents referred to, showing evidence of the unfit conduct reported (**all cases**)	If there are numerous documents, you don’t need to provide them all at the time of reporting, but you should give full details of what is available and where it is.
Aged creditors' analysis	If readily available from the company's records.
Position on any civil recovery actions, including legal advice etc.	If not included in the body of the report
Any evidence available in support of insolvent trading	At this stage not, for example, detailed schedules of claims.
Reference to professional advice taken by the directors, and to specific correspondence that sheds light on directors' conduct, for example with banks, solicitors, accountants, creditors.	If not included in the body of the report

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