

**A LIQUIDATOR'S INVESTIGATION INTO
THE AFFAIRS OF AN INSOLVENT COMPANY****Contents**

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INTRODUCTION

1. This Statement of Insolvency Practice is one of a series issued by the Institute of Chartered Accountants in Ireland to insolvency practitioners with a view to maintaining standards by setting out required practice and harmonising members' approach to particular aspects of insolvency.
2. The purpose of Statements of Insolvency Practice is to set out basic principles and essential procedures with which insolvency practitioners are required to comply. Departure from the standards set out in the Statements of Insolvency Practice is a matter that may be considered by the Institute for the purposes of possible disciplinary or regulatory action.
3. This Statement is restricted to the duty of a liquidator of an insolvent company to investigate the company's affairs. The liquidator should carry out a minimum standard procedure in fulfilling this duty, whether there are assets or not, and creditors should be confident that the investigating duty has been properly discharged. The extent of any further investigation beyond that set out below will depend upon the assessment, if necessary with the benefit of legal advice, of the likely benefit to the creditors.
4. The statutory obligation (Section 56, Company Law Enforcement Act, 2001) on liquidators to report to the Director of Corporate Enforcement concerning directors of insolvent companies is dealt with in the Statement of Insolvency Practice "Reporting by Liquidators to the Director of Corporate Enforcement" – S 18B.
5. The purpose of an investigation is to determine the assets and liabilities of the company, to determine the reasons for the failure of the company, and to review the conduct, decisions and actions of the directors. If, during the course of the investigation, any apparent preferences or rights of action come to light, the liquidator should determine, if necessary with the benefit of legal advice, whether or not any particular transactions can be set aside.
6. The extent and nature of the investigation work will vary from company to company, but will generally include the procedures outlined below.

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INVESTIGATION PROCEDURES**Question management**

7. At the outset of the winding-up, all relevant directors including all directors who held office during the last two years, the company secretary and other senior officials should be questioned as to the company's affairs, particularly the reasons for its failure, and requested to outline the scope of their duties and responsibilities in the company. The onus is on the liquidator to consider carefully which directors (officials, former directors or shadow directors) are relevant having regard to their accessibility and the information which he or she believes they may have. Careful records should be maintained of the replies given by the directors and others to these questions.

Committee of Inspection

8. In the initial report to the Committee of Inspection following the statutory meeting at which the liquidator is appointed, the liquidator invites members of the Committee to bring to his or her notice any particular matters which they consider require further investigation.

Examination of minute books and other records

9. The liquidator requests the directors to deliver up all company files and papers in their possession or under their control indicating the subject matters that they cover and where they are kept.
10. In addition to these enquiries, the liquidator makes his or her own investigation and examines all minute books, accounting records and other company papers, in order to establish whether any significant business or any other transaction exceeded the powers of the directors or the company under its Articles of Association, or was not properly authorised by the directors. The investigation is also directed towards verifying the statements from directors and senior officials and to the purposes set out in paragraph 7 above.
11. The records of the company covering the period from the date of the last audited accounts, or, if no audited accounts exist, since the date of incorporation of the company, are examined to account for changes in the company's financial position and to determine material transactions were made in the normal course of business.

Validity of charges

12. Details of all security held by banks and other parties should be obtained and the liquidator should check registration and confirm the validity of any charge.

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Prior insolvency appointments

13. Where liquidation follows receivership, the validity of the receiver's appointment should be confirmed.
14. Where liquidation follows examination, to the extent that significant matters have not been brought to the Court's attention during the examination process, the conduct of the company's affairs during examination should be reviewed.

Comparison of assets with the last audited accounts

15. For the purposes of discovery of assets the statement of affairs is compared with the last audited accounts. The liquidator will wish to be satisfied that material movements in fixed and current assets can be properly explained. Sales of non-current assets over the preceding two years are examined to ensure market value was obtained for same.

Trading losses

16. Consideration should be given to the preparation of a deficiency account, and possibly also trading and profit and loss accounts, in any case where there is a material difference between the deficiency disclosed in the statement of affairs and the last audited accounts or, if none, since the incorporation of the company, after taking into account matters such as writing down asset values. The liquidator will have regard to the probable costs and the benefits which might accrue to the creditors from carrying out such an exercise.

Transactions with related companies or connected persons

17. The books and records of the company are examined to ensure that any transactions with related companies or connected persons (defined in Section 140, Companies Act, 1990, and Section 286, Companies Act, 1963, respectively), were carried out at arms length, material transactions being examined in detail. Particular attention will be paid to transactions involving directors, including any reduction in loan accounts and/or reduction in overdrafts and other debts supported by personal guarantees.

GENERAL

18. The liquidator's investigation into the affairs of the company aims to unearth any rights of action which the company or the liquidator may have against third parties. The liquidator's attention is drawn in particular to the matters discussed in paragraphs 19 to 25 below.
19. Having taken appropriate legal advice, the liquidator should report any criminal conduct in relation to the company to the Director of Public Prosecutions. The matter must also be reported to the Director of Corporate Enforcement (Section 299, Companies Act, 1963).

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20. The liquidator on application to the Court may examine any officer of the company or person known or suspected to have in his possession any property of the company or who is supposed to be indebted to the company, or any person whom the Court deems capable of giving information relating to the promotion, formation, trade, dealings, affairs or property of the company.
21. The liquidator has regard to the extent to which a related company (ies) took part in the management of the company being wound-up and the conduct of the related company(ies) towards the creditors of the company being wound-up. The liquidator considers whether the circumstances that gave rise to the winding-up of the company are attributable to the acts or omissions of the related company.
22. The liquidator considers the extent to which the lack of business records, or failure to keep proper books of account, contributed to the insolvency of the company.
23. The liquidator considers whether the company traded fraudulently or recklessly. In considering fraudulent and reckless trading the liquidator seeks to determine:
 - (a) The reasons for the failure of the company;
 - (b) The date when one or more of the directors became aware of the company's insolvency or should have done so;
 - (c) The steps taken by the directors to address the company's difficulties;
 - (d) The reasons for continuing to trade after the time they knew or ought to have known of the company's insolvency.
24. The liquidator considers whether any remedies exist against any person who contributed to the failure of the company. Such remedies include: disqualification or restriction of unfit directors; potential claims for personal liability for fraudulent trading or reckless trading; return of monies or goods the subject of preference, misfeasances, or improper transfers. The liquidator assesses whether legislation, or provisions of the company's Memorandum and Articles of Association, have been breached in relation to such matters.
25. In the case of both voluntary and compulsory liquidations the liquidator should consider the conduct of the directors in the light of the restriction and disqualification provisions of the Companies Act, 1990. Furthermore, Section 56, Company Law Enforcement Act, 2001, requires the liquidator to make a report to the Director of Corporate Enforcement on each director of the company.
26. In considering the matters discussed in paragraphs 19 to 25 above, the liquidator may deem it appropriate to obtain legal advice to ensure adequate consideration is given to all relevant issues arising in respect of those matters.

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Legal Proceedings

27. The liquidator in a voluntary winding-up should obtain the sanction of the Committee of Inspection in respect of any decision to bring or defend any action or other legal proceedings in the name of and on behalf of the company which may be appropriate following the outcome of the above investigation. In all cases the overriding consideration would be the likelihood of any tangible benefit to the creditors. Where there is no Committee of Inspection the liquidator may decide to call a creditors meeting to consider the matter, or to consider the matter with the main affected creditors of the company.
28. In the case of a compulsory winding-up the liquidator must obtain the sanction of the High Court prior to bringing or defending any action or other legal proceedings in the name of and on behalf of the company.

Effective Date

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

APPENDIX**STATUTORY REFERENCES**

<i>Companies Act, 1963</i>	CA 1963
<i>Companies Act, 1990</i>	CA 1990
<i>Company Law Enforcement Act, 2001</i>	CLEA 2001

The liquidator's attention is drawn in particular to the following statutory provisions:

Validity of charges	Section 99 CA 1963, as amended by Section 122 CA 1990. Section 288 CA 1963, as amended by Section 136 CA 1990.
Misfeasance and misapplication of property and improper transfer of assets	Section 298 CA 1963, as amended by Section 142 CA 1990 and Section 50 CLEA 2001. Section 139 CA 1990.
Uncalled capital	Section 238 and 276(d) CA 1963.
Redemption or purchase of own shares	Section 60 CA 1963, as amended by Paragraph 10, First Schedule CAA 1983. Sections 155 and 244 CA 1990. Part XI of CA 1990.
Substantial property transactions	Section 29 CA 1990.
Loans to directors (unlawful loans)	Section 31 CA 1990.
Fraudulent preference	Section 286 CA 1963, as amended by Section 135 CA 1990. Section 287 CA 1963.
Criminal offences by officers and members	Section 299 CA 1963, as amended by Section 143 CA 1990 and Section 51 CLEA 2001.
Related company actions	Sections 140 and 141 CA 1990.
Proper books of account	Sections 202 – 204 CA 1990.

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Fraudulent trading	Section 297 CA 1963, as amended by Section 138 CA 1990.
Restriction and disqualification of directors	Part VII CA 1990, as amended by Part 4 CLEA 2001.
Powers of liquidator	Section 231 CA 1963, as amended by Section 124 CA 1990. Section 276 CA 1963. Section 131 CA 1990.