

New Guidance On Pre-Packaged Sales In Administrations January 2009

On 1 January 2009, the Statement of Insolvency Practice 16 (E&W) titled "Pre-packaged sales in administrations" came into effect. This SIP is one of a series of guidance notes issued to licensed insolvency practitioners, with a view to maintaining standards by setting out required practice and harmonising practitioners' approach to particular aspects of insolvency.

The SIP sets out the required practice for practitioners who are engaged on a pre-packaged sale. A "pre-pack" is an arrangement to sell all or parts of a company's business or assets prior to the appointment of an administrator. The administrator completes the sale on, or shortly after, his appointment.

Pre-packaged administrations are controversial, as unsecured creditors do not have an opportunity to challenge the sale of the business or assets before it takes place. The recent decision in *DKLL Solicitors v Revenue and Customs* [2007] EWHC 2067 (Ch) reinforced the validity of pre-packaged sales, especially in people businesses where an urgent sale is required to preserve value, but left many feeling uneasy that they were a mechanism for avoiding creditors. The new SIP is intended to improve the transparency of pre-packaged administrations and to provide specific information to creditors.

Practitioners acting on a pre-packaged sale are now required to:

- Keep a detailed record of the reasoning behind the decision to undertake a pre-packaged sale, and should be able to justify why such a course of action was considered appropriate (paragraph 2); and
- Make it clear to the directors of the company, where they act for the company, that their role is to advise the company and the directors should take independent advice – this is particularly important if there is a possibility of the directors acquiring an interest in the assets in the pre-packaged sale (paragraph 3).

Administrators acting on a pre-packaged sale are required to bear in mind the requirements of paragraphs 3(2) and 3(4) of Schedule B1 to the Insolvency Act 1986. These provide that:

- The administrator must perform his functions in the interests of the company's creditors as a whole; and
- Where the objective is to realise property in order to make a distribution to secured or preferential creditors, the administrator has a duty to avoid unnecessarily harming the interests of the creditors as a whole.

Under the SIP, administrators must now provide certain specific information to creditors in all cases where there is a pre-packaged sale:

- The source of the administrator's initial introduction;
- The extent of the administrator's involvement prior to appointment;
- Any marketing activities conducted by the company and/or the administrator;
- Any valuations obtained of the business or the underlying assets;
- The alternative courses of action that were considered by the administrator, with an explanation of possible financial outcomes;
- Why it was not appropriate to trade the business, and offer it for sale as a going concern, during the administration;
- Details of requests made to potential funders to fund working capital requirements;
- Whether efforts were made to consult with major creditors;

Beale and Company Solicitors LLP

London: Garrick House · 27-32 King Street · Covent Garden · London · WC2E 8JB · T: +44 (0)20 7240 3474

Bristol: Venturers House · King Street · Bristol · BS1 4PB · T: 0117 915 4021

Dublin: 92/93 St Stephen's Green · Dublin 2 · Republic of Ireland · T: +00 353 (0)1 428 3450

- The date of the transaction;
- Details of the assets involved and the nature of the transaction;
- The consideration for the transaction, terms of payment, and any condition of the contract that could materially affect the consideration;
- If the sale is part of a wider transaction, a description of the other aspects of the transaction;
- The identity of the purchaser;
- Any connection between the purchaser and the directors, shareholders or secured creditors of the company;
- The names of any directors, or former directors, of the company who are involved in the management or ownership of the purchaser, or of any other entity into which any of the assets are transferred;
- Whether any directors had given guarantees for amounts due from the company to a prior financier, and whether that financier is financing the new business; and
- Any options, buy-back arrangements or similar conditions attached to the contract of sale.

The new guidelines will not prevent legitimate pre-packaged administrations taking place, but should provide creditors with much needed checks and balances. The current economic conditions mean that it probably will not be long until the effectiveness of the SIP is tested.

A copy of the SIP is available at <http://www.sra.org.uk/documents/solicitors/accreditation/insolvency-practitioners-statement-16.pdf>.

For further information on pre-packaged administrations, please contact:

E: [James Hutchinson](mailto:James.Hutchinson@bealeandcompany.com)
T: +44 (0)20 7240 8653