RESPONSE TO THE CONSULTATION: REVISED SIP16

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Overview

I appreciate that the sole purpose of the JIC's consultation is to seek views on whether it will be practical for an IP to comply with the requirements contained in the revised SIP. However, I feel compelled to provide my thoughts on the drafting of the SIP in the hope that it may be made less ambiguous, which I believe would assist both IPs and regulators to ensure compliance.

Paragraph 10

Whilst I appreciate the subtle difference between the words "should" and "must", it has been the JIC's approach to use "should" in SIPs to describe something that an IP is *required* to do. Therefore, it appears out of character to state that "any marketing should conform to the marketing essentials" and then to state: "Where there has been deviation from any of the marketing essentials…" This gives me the impression that anything in SIPs that "should" be done may no longer be required practice. If the JIC is moving away from the use of "should" to "must", then perhaps this SIP16 should be re-written with "must" where appropriate. Alternatively, I would suggest re-wording paragraph 10 to make it clear what elements are *required* practice and what are perhaps merely recommended.

Paragraph 13

It seems out of character for the SIP to state that "if the administrator has been unable to meet this requirement, they will provide…" Perhaps "will" might be replaced by "should" (or, in view of the above comment, "must").

Paragraph 14

The SIP states that "the administrator should seek the requisite approval of the proposals as soon as practicable after appointment…" Of course, in some cases, the Act does not require the administrator to seek approval of the proposals (per Paragraph 52(1) of Schedule B1); in these cases, the proposals may be deemed approved, but this does not mean that the administrator has *sought* approval. Thus, in order to emphasise the importance of swift proposals in all cases, perhaps reference might be made to *sending* the proposals as soon as practicable, as Paragraph 49(4) and (5) requires in any event.

Marketing Essentials

In order to achieve the "best deal" in selling a solvent business, usually one would want to take one's time in seeking out interested parties. However, the optimum marketing efforts may need to be curtailed in the event that one is trading an insolvent business. I do not believe that appreciation for the critical nature of the business being sold is reflected in the SIP16's "marketing should have been

undertaken for an appropriate length of time to satisfy the administrator that the best deal has been sought". Perhaps the focus should be on the wider administration outcome, rather than the sale in isolation.

I accept that sales to connected parties are of particular concern to some creditors. However, it is unhelpful to state that "particularly with sales to connected parties… the administrator needs to explain…" It would seem to me that either the administrator needs to explain the matters for *all* sales to connected parties or not and if the expectation is that other sales will also be explained, then the SIP should clearly state this.

The explanation mentioned above is "how the marketing strategy has achieved the best outcome for creditors". I do not see how IPs *can* achieve the best outcome for creditors in all cases. It is impossible for IPs to know, prior to completing a marketing strategy, what the outcome of that marketing will be. For one thing, as mentioned above, the optimum length of time of marketing must be weighed against the consequences of allowing the company to continue to trade, which could lead to a diminution in the value of the business, which may then lead to reduced offers for purchase of the business. In addition, the marketing effort brings its own costs. All this may lead an IP to conclude that, with the benefit of hindsight, the efforts and time taken to market the business reduced the net realisations for the business and assets. Of course, particularly in the current climate – indeed Teresa Graham reported that some people she spoke to "stated that, if returns are to be low, they would not mind a slightly reduced return… if the sale and marketing process was more transparent" – this outcome might not lead to any criticism of the IP's/company's decisions. However, it would make it difficult for the IP to comply with the SIP's requirement that he explain how the marketing strategy *has achieved* the best outcome for creditors.

Information Disclosure

I suggest that the words "(to be named)" under Initial Introduction be moved to follow "the source", rather than "the insolvency practitioner", as I assume the intention is that the source be named.

I have always wondered at the existing SIP16's requirement that valuers/advisers should confirm their independence and I note that this is repeated in the revised SIP16: I often wonder, independence from what or whom? Do you mean that, prior to receiving instructions, they had no professional or personal relationships with the company, the potential purchaser, and/or perhaps with the IP (other than having been instructed on a number of other cases)? Given that either the company or the IP will have instructed the valuers/agents, I am not sure that they can confirm independence in any other respect. Perhaps this reference to "independence" could be clarified.

The measure of the third party's professional indemnity insurance ("PII") is described in the appendix differently from that in the SIP body. The SIP body requires the IP to advise the company to use a party carrying "adequate" PII, but the appendix requires the IP to confirm that the party has "appropriate levels" of PII. Thus, it would seem to me that perhaps the IP is expected to confirm a higher degree of PII than he will have advised the company to ensure that the party has. Perhaps the same wording could be used in both places.

Connected Party Transactions

It is my view that the SIP should provide a definition of "connected party".

Personally, I also believe that, given the significant additional expectations attaching to connected party sales, a narrow scope of "connected party" is likely to encourage some parties to craft the identity of the prospective purchaser so as to avoid these consequences. As many of the SIP's requirements are designed to manage creditors' *perceptions*, I would have preferred the SIP to require the additional safeguards in cases where the proposed sale could reasonably be perceived as presenting a threat to the vendor's objectivity by virtue of a professional or personal relationship with the purchaser (drawing from wording that appears in SIP9 in relation to payments to the IP's associates).

Use of the phrase "connected party" in this appendix is confusing; it would seem preferable, after first defining which sales are relevant to the pre-pack pool and viability review, to follow the convention of paragraph 13 of the SIP, which refers to the *purchasing entity*.

Pre-pack Pool

As I understand it, the purpose of the pool is to "present the deal's outline and why it is necessary to proceed in this way" (paragraph 9.7 of Teresa Graham's report). Annex I of Teresa Graham's report also suggests that the pool member's opinion might be: "the evidence I have found is not sufficient to support the statement of reasonable grounds". I appreciate that the emergent pool may differ from Ms Graham's vision. However, on the basis of Ms Graham's report and the Insolvency Service's subsequent representations, I find it difficult to see how the pool's opinion may be "disregarded by the connected party"; the purchaser may have regard for the pool member's opinion and still wish to purchase the business. It would seem to me that the pool member's opinion is of more relevance to the vendor. In addition, as described in paragraph 13 of the SIP, only the pool *member's* opinion is provided to the purchaser, not the *entire* pool's.

The SIP provides three possible statements for the administrator to make regarding the pool. As they all begin with "whether", the statements appear to cover the same ground. For example, the first is "whether the pre-pack pool has been approached…" and the third is "whether the pre-pack pool was not approached". It would seem to me preferable to begin each statement with "that", rather than "whether".

It seems odd that the first statement option requires "the opinion given" and the date of the opinion to be disclosed, but the second statement only requires the administrator to disclose that the pool's opinion has been disregarded. Would it not be preferable to require the administrator to disclose the same details about the opinion, whatever the purchaser decided to do with it? This assumes, of course, that the administrator has had sight of the opinion (and knows whether or not the purchaser disregarded it).

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