STATEMENT OF INSOLVENCY PRACTICE 3.3
(SCOTLAND) : WITH REFERENCE TO THE BANKRUPTCY (SCOTLAND) ACT 2016

TRUST DEEDS

INTRODUCTION

1. A trust deed is a voluntary deed granted by a debtor whereby the debtor conveys all or part of his estate to a named trustee to be administered for the benefit of creditors and to effect the settlement of debts in whole or in part. The trustee may seek to make the trust deed protected by following the relevant statutory procedures. A trust deed will not satisfy the requirements for protection unless it complies with the definition of "trust deed" in section 228(1) of the Bankruptcy (Scotland) Act 2016 "the Act" and satisfies the requirements in section 167 of the Act.

2. Creditors may agree or be deemed to agree to the trust deed. If the trust deed becomes protected, all creditors are bound by the terms laid down in the statutory provisions. However, if objections reach the prescribed levels the trust deed will not become protected. Even if objections do not reach the prescribed levels, protection may be refused by the accountant in bankruptcy in prescribed circumstances.

3. The advice provided by an insolvency practitioner will be central to the decision taken by the debtor. Where the decision is to grant a trust deed and seek its protection the insolvency practitioner will take the necessary steps. The particular nature of an insolvency practitioner's position renders transparency and fairness in all dealings of primary importance. The debtor and the creditors should be confident that an insolvency practitioner acts professionally and with objectivity. Failure to do so may prejudice the interests of both the debtor and creditors and is likely to bring the practitioner and the profession into disrepute.

4. It is not competent in terms of the Act to have a conjoined trust deed signed by more than one party, and purporting to deal with the combined estates of more than one person. Individual trust deeds are required for each separate legal person or entity.

5. The insolvency practitioner should exercise his judgement and consider the extent to which these principles and procedures apply where there is no intention that the trust deed should become protected.

PRINCIPLES

6. The insolvency practitioner should differentiate clearly to the debtor his role in providing initial advice from his responsibilities as trustee. The debtor should be advised of the insolvency practitioner's requirement to maintain independence. The insolvency practitioner should make it clear to the debtor that his duties as trustee, once the trust deed is signed, cannot be influenced by the wishes of the debtor.

7. An insolvency practitioner should ensure that the advice, information and explanations provided to a debtor about the options available are such that the debtor can make an informed judgement on which process is appropriate to his circumstances. An insolvency practitioner should also explain the debtor's responsibilities and the consequences of signing a trust deed.

8. If a trust deed is proposed, an insolvency practitioner should ensure that a fair balance is struck between the interests of the debtor and those of the creditors.

9. In the initial circular to creditors the insolvency practitioner should provide clear and accurate information to enable creditors to decide whether or not to object to the trust deed becoming protected and he should advise of the procedure for objections. At all times an insolvency practitioner should report accurately and in a manner that aims to be clear and useful.

INITIAL CONSIDERATIONS AND REQUIREMENTS

10. The practice of insolvency is principally governed by statute and secondary legislation and is subject ultimately to the control of the court. Where requirements are set out in statute or secondary legislation, an insolvency practitioner must comply with such provisions.

11. The special nature of insolvency appointments makes the payment for, or offer of any commission for, or the furnishing of any valuable consideration towards, the introduction of insolvency appointments inappropriate.

12. An office holder should provide details and the cost of any work that has been carried out in relation to the trust deed other than by the office holder or his or her staff whether chargeable to the estate or not. There should be no additional cost to the estate. Any such payment should reflect the value of the work undertaken, comply with the Code of Ethics of the authorising body, comply with guidance issued by the accountant in bankruptcy, and be approved in line with the provisions of SIP9 (Scotland).

13. In addition to the statutory requirements to provide documentation to creditors and the accountant in bankruptcy, the trustee in the first written communication to all known creditors should provide details of the following matters:-.

    a) Where a payment has been made or is due to be made to a third party (whether by the insolvency practitioner or any other party) for work done in relation to the trust deed,

        - the name and address of the party carrying out the work;
        - the name and address of the party making the payment; and
        - the amount of the payment

    b) Where the insolvency practitioner or his firm or any associate of either (as defined in section 229 of the Act or section 435 of the Insolvency Act 1986) has an interest in the business of the party being paid, that interest should be detailed.

    c) Where the trustee's fee is not a fixed fee in accordance with section 183 the anticipated cost to the estate of the trustee's fee for the period of the trust deed together with a statement of the assumptions made in producing the estimate, trustees are reminded that all fees and outlays must be approved in accordance with SIP9 (Scotland).

14. Where the insolvency practitioner is consulted by two individuals who are married, in a civil partnership, cohabiting or otherwise have a relationship which could give rise to a conflict of interest, the practitioner should ensure that each is assessed individually and offer advice based on each individual's own circumstances. Where the insolvency practitioner has been consulted by two or more parties and considers that there is a conflict of interest in the insolvency practitioner advising both or all parties, the insolvency practitioner should consider which appointment, if any, it is appropriate to accept.

KEY COMPLIANCE STANDARDS

15. Certain key compliance standards are of general application, but others will depend on whether the insolvency practitioner is acting as adviser or trustee.

STANDARDS OF GENERAL APPLICATION

Advice to the debtor

16. In all cases the insolvency practitioner is responsible for ensuring that the debtor has been given appropriate advice.

17. The insolvency practitioner should have procedures in place to satisfy himself that appropriate information and explanations are provided to the debtor at each stage of the trust deed process. He should set out clearly:

    a) the key stages of the trust deed process (i.e. assessing the options available, signing and witnessing the trust deed, asset realisations, contributions, fee approval, discharge of the debtor and trustee, and concluding the trust deed);

    b) the roles of the insolvency practitioner as adviser and as trustee;

    c) the intended duration of the trust deed, any potential delays or complications, and the possibility and likelihood of extending the period of the trust deed;

    d) what is required of the debtor at each stage of the process;

    e) the consequences of signing a trust deed including apparent insolvency, and the responsibilities of the debtor;

    f) the insolvency practitioner's assessment of the likelihood of the trust deed becoming protected, the consequences of it not becoming protected and the consequences of the debtor failing to comply with its terms.

Assessment

18. The insolvency practitioner should have procedures in place to ensure that an assessment is made at an appropriate stage of:

    a) whether the debtor is being honest and open and sufficiently co-operative;

    b) the debtor’s understanding of the process, and commitment to it;

    c) the attitude of any key creditors and of the general body of creditors;

    d) whether a trust deed is an appropriate solution;

    e) whether the trust deed will have a reasonable prospect of becoming protected;

    f) whether the EC Regulation on Insolvency Proceedings applies to the trust deed and, if so, whether the trust deed constitutes main or territorial proceedings.

Meeting the debtor

19. Regular assessment should be made as to whether a meeting in person with the debtor is required, which will be dependent on the debtor's attitude and the circumstances and complexity of the case.

Documentation

20. The insolvency practitioner should be able to demonstrate that appropriate steps have been taken at all stages of the trust deed, by maintaining records of:

    a) discussions with the debtor, the information and explanations provided, and options outlined and the advantages and disadvantages to the debtor of each option;

    b) comments made by the debtor, and the debtor's preferred option;

    c) any discussions with creditors or their representatives;

    d) the way in which any issues raised have been resolved.

    Summaries of the records maintained under (i) and (ii) above where material should be sent to the debtor.

Dealing with Assets and Contributions

21. The trustee should follow the accountant in bankruptcy's guidance notes on trust deeds and sequestrations when dealing with assets. The trustee should satisfy himself that a comprehensive schedule of non-exempt assets in which the debtor has an interest has been prepared, together with explanatory notes. The trustee should take steps to satisfy himself as to the value of the assets conveyed to the trustee.

22. If any asset is not going to be realised, or not realised in full, the reasons for this must be clearly explained in writing to creditors when the trust deed is presented to them for consideration for protection, or at any other time that such a decision is taken.

23. The trustee should be aware that in order to achieve protected status, the trust deed must convey to the trustee the debtor's whole estate with the exception of property which would be excluded from vesting in a sequestration, except that the trust deed may still become protected where the debtor's dwelling house is excluded in accordance with paragraph (b) of the definition of "trust deed" set out in section 228(1) of the Act.

STANDARDS OF SPECIFIC APPLICATION

24. The insolvency practitioner or a suitably experienced member of his staff should interview the debtor prior to the trust deed being signed. A meeting in person should always be offered to the debtor but a telephone interview may be conducted. It is recommended that the debtor be interviewed using a similar style of questionnaire as is used in sequestration proceedings under the Act. The questionnaire and appendices should be signed and dated by the debtor.

25. An assessment should be made as to whether a meeting in person with the debtor is required, depending on the debtor's attitude and the circumstances and complexity of the case.

26. If the debtor is carrying on a business the insolvency practitioner, or a suitably experienced member of staff, must assess whether it is necessary to visit the business premises as part of the information gathering and planning exercise.

27. Whether the debtor is interviewed in person or by telephone, the insolvency practitioner must satisfy himself that appropriate client identification and money laundering procedures have been completed and that relevant copy documentation is retained on the case file.

28. The debtor should be advised that it is an offence to make false representations or to conceal assets or to commit any other fraud for the purpose of obtaining creditor approval to the trust deed.

29. An insolvency practitioner may be approached to give advice on a debtor's financial difficulties, and the way in which those difficulties might be resolved. The insolvency practitioner should have procedures in place to ensure, taking account of the personal circumstances of the debtor, that:

    a) the role of adviser is explained to the debtor and that at this stage the insolvency practitioner is advising the debtor and acting in the debtor's interests but in the context of finding a workable solution to the debtor's financial difficulties;

    b) sufficient information is obtained to make a preliminary assessment of the solutions available and their viability;

    c) it is explained that the debtor will need to co-operate and provide full disclosure. The insolvency practitioner should be able to form a view of whether the debtor has a sufficient understanding of the situation and the consequences, and whether there will be full co-operation in seeking a solution;

    d) when considering possible solutions, account is taken of the impact of each solution on the debtor and on any third parties that may be affected;

    e) the debtor is provided with an explanation of the options available, so that the solution best suited to the debtor's circumstances can be identified. This information should be confirmed to the debtor in writing.

30. Where a Statement of Affairs and Statement of Income and Expenditure are prepared by a third party, these must be checked by the insolvency practitioner. These statements must be agreed by the debtor who should be asked to sign the statements confirming such agreement.

31. The insolvency practitioner must ensure that the debtor is advised the dwelling house (the debtor's sole or main residence over which there is a secured loan) may be excluded from the trust deed and the trust deed may still qualify for protection. The insolvency practitioner must also ensure that the debtor is advised of the risks involved in excluding the dwelling house from the trust deed. In particular, if there is equity in the dwelling house and the debtor chooses to exclude the property the unsecured creditors may not agree to the trust deed becoming protected, and the implications thereof.

32. Where heritable property is to be included in the trust deed the insolvency practitioner must ensure that the debtor is clearly advised that all such heritable property, including the debtor's home unless excluded, is covered by the trust deed. The debtor must also be advised that equity in the property requires to be realised for the benefit of the creditors.

33. The debtor should be asked to sign a separate statement confirming his understanding of the implications of and their decision in respect of heritable property being included or excluded from the trust deed. A copy of the statement should be sent to the debtor and one held on the case file.

34. The insolvency practitioner should be satisfied that a debtor has had adequate time to think about the consequences and alternatives before signing a trust deed. Insolvency practitioners are reminded that once signed, a trust deed is a binding obligation between debtor and trustee and cannot be revoked.

Dealing with Heritable Property & other Assets

35. The trustee should obtain evidence of the ownership of any heritable property. If the debtor advises that he owns the property, either in whole or in part, a property search should be obtained to confirm the position. If the property is rented, evidence should be obtained e.g. production of a rent book or written confirmation from the landlord.

36. If the debtor owns any heritable property, in whole or in part, the trustee should obtain a professional valuation.

37. The trustee's attention is drawn to the provisions in the accountant in bankruptcy's guidance notes relating to heritable property.

38. A trustee should try to reach agreement, as soon as possible, as to how the equity in heritable property will be realised. In realising the equity the trustee should aim to achieve the best return to creditors in the circumstances of the case. The trustee should record on the case file the reasons for his decisions in relation to the heritable property.

39. The trustee should consider seeking legal advice when dealing with an unequal split of a jointly owned heritable property.

40. If the trustee disposes of or abandons his interest in heritable property, and a formal disposition or other conveyance has not been executed, he should issue a letter to the debtor stating the position and confirming that the property has been abandoned to the debtor.

Contributions

41. The insolvency practitioner should verify the debtor's income and major outlays, and agree in writing with the debtor the amount and frequency of any income contributions.

Third Party Payments

42. Where any third party payments are to be paid the insolvency practitioner should try to enter into an enforceable written agreement with the third party for payment. The trustee should recommend that the third party obtains independent legal advice.

43. The trustee should advise the creditors that all or part of the payments are to be paid by a third party. He should advise whether an enforceable agreement has been entered into with the third party. He should also advise that if there is no enforceable agreement and the third party fails to make payment, the third party cannot be forced to pay.

Trading

44. If the debtor owns or has an interest in a business, the trustee should consider the manner in which he will deal with that business. The trustee should consider whether trading should continue and if so, on what terms.

45. Where the trustee decides to continue trading the debtor's business, such a decision should be supported by cash flow and trading forecasts. The trustee must be able to demonstrate the matters considered and that his actions are in the best interests of creditors. The trustee will be responsible for any ongoing trading of the debtor's business, and must introduce appropriate controls. The trustee should be aware that he may be personally liable for loss incurred where he continues trading after the trust deed has been signed and as a result the value of the estate is diminished.

Meeting of creditors

46. There is no statutory requirement to call a meeting of creditors. If however the trustee considers that it is in the interests of creditors such a meeting can be called.

47. The trustee should record in the sederunt book all requests by creditors to hold a creditors' meeting. If the trustee considers a meeting would be in the interest of creditors, a meeting should be convened. If a meeting is not convened the trustee must record in writing in the sederunt book the reason for his decision.

Accounting, reporting and remuneration

48. The trust deed should set out the basis on which the trustee will be remunerated.

49. Where the trustee's fee is not fixed in accordance with section 183 of the Act, the trustee should set out the basis and procedure for approval of remuneration and outlays and the rights of creditors to appeal.

50. Where the trustee's fees have not been fixed the trustee should advise creditors of their right to have the accounts audited and fees fixed by the accountant in bankruptcy. The trustee should delay payment of his fee until 14 days after the issue of the report to creditors.

51. Where there is a fixed fee (including a percentage of contributions and/or realisations) approval of the trust deed is deemed to be approval of the fees. In fixed fee cases fees should not be taken until 14 days have elapsed since the issue of the relevant circular and in any event not before the expiry of the 5 week period for objections to the trust deed becoming protected. In all other cases the trustee is reminded that the notification to creditors of the trustee's estimated fee as referred to in paragraph 13c) above does not amount to approval of the fee and that all fees must be properly approved in the course of the trust deed and in advance of being paid.

52. Where creditors were informed that the debtor had undertaken to pay regular contributions from income and payments equivalent to three consecutive months' contributions have not been received, without a formal payment break being agreed, the creditors must be informed of this in the next annual report. The creditors should be advised of the reasons

for non-payment, what action the trustee has taken in respect of the missed contributions and the impact on the expected final return to creditors.

53. Copies of all written communications to creditors must be sent to the debtor.

54. At the conclusion of a trust deed which is not protected a final statement of intromissions must be sent to creditors and the debtor.

55. The acceptance of commissions from a third party by a trustee during a trust deed represents a significant threat to objectivity. Such commissions should only be accepted for the benefit of the trust deed estate and not for the benefit of the insolvency practitioner, his firm or any associate of either (as defined in section 229 of the Act or section 435 of the Insolvency Act 1986). Such payments should be reflected in the case accounts.

Trust deeds for entities

56. In addition to trust deeds for individuals, insolvency practitioners should be aware that partnerships, trusts and corporate and unincorporated bodies may enter into trust deeds.

Partnership trust deeds

57. Although there should be little difference in the approach of trustees, it must be borne in mind that a partnership trust deed is not a joint and several version of an individual trust deed entered into by an individual.

58. The trust deed is entered into by the partnership and requires the consent of all the existing partners for the trust deed to be granted. As such, the estate conveyed to the trustee is that of the partnership, not the estate of the partners as individual debtors, and does not extend to the partners' personal assets. Similarly, only the partnership's liabilities are included.

59. The granting of a partnership trust deed allows a trustee to take swift control of the partnership's assets and provides the opportunity to preserve the business and perhaps achieve a going-concern solution.

60. It is open, in appropriate circumstances, for some or all of the partners of the partnership to sign individual trust deeds. If the insolvency practitioner considers that there is a possible conflict of interest, the insolvency practitioner should consider whether it is appropriate to accept appointment to all or any of the individual partners.

Ending of the trust deed

<u>Protected trust deed achieving its purpose</u>

61. Where the trust deed contains provisions on bringing the trust deed to a close these should be followed in so far as they do not conflict with statutory provisions.

<u>Protected trust deed not achieving its purpose</u>

62. If the trustee considers the trust deed is not achieving its purpose the trustee must consider appropriate alternatives given the circumstances of the case and bearing in mind the interests of creditors.

Trust deed failing to become protected

63. If the trust deed has failed to become protected, the trustee should immediately inform the debtor in writing and advise the debtor of his options. The trustee should also notify creditors of the position.

64. If the debtor's estate is subsequently sequestrated, the trustee should conclude the trust deed and seek his discharge from creditors. If he is appointed trustee in the subsequent sequestration he should take steps to ensure that the trust deed is terminated (see 66 and 67)

65. In a trust deed which has not become protected, there is no statutory procedure for bringing the trust deed to a close. It is normal practice for a receipt for the final dividend to incorporate a discharge of the trustee and a discharge of the debtor. Creditors who have not acceded to the trust deed have no requirement to grant a discharge to the debtor.

Ending of the trust deed, and subsequent sequestration

66. The granting of a trust deed creates a Trust. The trustee should ensure that all assets are distributed in terms of the trust deed. It is generally accepted where there is a subsequent procedure such as sequestration that the trust deed is suspended and may revive on completion of the other procedure. The trustee should therefore ensure that the style of trust deed used contains provisions for termination of the trust deed in appropriate circumstances and he should adhere to those provisions.

67. In view of the possibility of the trust deed reviving after the sequestration process has been completed the trustee must have processes in place to deal with such an eventuality.

Trust deed not completed but no further process.

68. If the trustee concludes that the terms of the trust deed will not be met:

    a) he should seek his own discharge and bring the trust deed to a conclusion;

    b) in the case of an unprotected trust deed the trustee should also consider whether to discharge the debtor.

Trust deed contains provisions on termination

70. It is generally accepted that where the trust deed contains provisions on termination, such provisions if complied with will be effective in terminating the trust deed. Trustees should ensure that the style of trust deed used contains provisions for ending the trust deed on sequestration and on final distribution.

Effective date: This SIP applies to trust deeds signed on or after 1 July 2014
(*updated on 30 November 2016 to include references to Bankruptcy (Scotland) Act 2016*)