

New marketing and disclosure requirements for pre-packs

From 1 November 2015, administrators wishing to effect a quick pre-packaged sale of a distressed business will have to satisfy more onerous marketing, valuation and disclosure requirements than ever before.

The insolvency regulatory authorities in England and Wales have issued a revised Statement of Insolvency Practice 16 (SIP16). The revised SIP 16, which is essentially a best practice guide to be followed by insolvency practitioners, is the result of an independent review into pre-pack administrations that was first published in June 2014. The review, whilst recognising the value of pre-packs in the context of business rescues, set out six recommendations aimed at improving transparency around such sales.

The review's recommendations fell into two broad categories, firstly those

Recommendations

- Connected parties:
 - A voluntary referral to a pre-pack pool of independent business experts
 - A voluntary viability review stating how the purchasing entity will survive for at least 12 months
- All pre-packs:
 - Six principles of good marketing
 - Valuation by professional
 - Changes to SIP 16
 - new monitor for insolvency practitioners

applying to pre-packs which involve a connected party and secondly those applying to all pre-packs. The recommendations are set out in the box below. For more details on the review and its recommendations see our earlier client briefing, "[Pre-pack reports: the good, the bad and the ugly](#)" *June 2014*.

The revised SIP 16 brings together the main themes of the recommendations. Perhaps the most significant changes are in the Appendix to the SIP 16, which now lists the "marketing essentials" that an administrator is obliged to consider to ensure he gets the best available consideration on a pre-pack sale. These marketing essentials include the following:

1. **Broadcast:** ensuring that the business is marketed as widely as possible;
2. **Justify the strategy:** explaining the marketing and media strategy;
3. **Independence:** being satisfied as to the adequacy and independence of the marketing strategy, especially where the business is marketed by the company before his appointment;
4. **Publicise rather than simply publish:** marketing should be for an appropriate length of time;
5. **Connectivity:** including online media; and

Key issues

- From 1 November 2015:
 - More onerous marketing and disclosure obligations for all pre-packs
 - Voluntary pre-pack pool and viability statement for connected party sales
- Secured creditors not connected parties

6. **Comply or explain:** especially in sales to connected parties.

Many of the marketing essentials may appear to be very sensible when viewed in an ordinary commercial context. However, in a distressed situation where speed, confidentiality and continuity of the business enterprise are typically key, they seem very ambitious and in some cases will be impossible to achieve. The added focus on marketing is designed to silence critics of the pre-pack process who argued that a lack of transparency and insufficient marketing meant that it was not obvious to creditors that the best deal had been done.

In addition to the increased emphasis on marketing, the revised SIP 16 requires the administrator to:

- obtain an independent valuation of the business or, failing that, provide a compelling explanation of why and how he was satisfied as to the value of the assets; and
- deliver a report to creditors no later than 7 days following the pre-pack summarising the valuation (and its underlying rationale) and providing detailed information relating to the pre-pack transaction itself, including disclosure of the commercial deal and how the consideration has been allocated across asset classes and security interests.

The added emphasis on marketing, valuation and disclosure may do much to silence the critics of pre-packs, but has the potential to limit the effectiveness of pre-packs as a tool to rescue distressed businesses. Imposing significant marketing and disclosure requirements that are aimed at curbing the worst kind of behaviour may discourage the use of the procedure, not least because commercial purchasers may be reluctant to have the details of the deal broadcast in such a way.

In principle, the added burdens imposed by the revised SIP 16 should not prove to be an absolute barrier to using a pre-pack as the new rules do recognise that strict adherence to the marketing essentials may not be possible. However, it will fall to the administrator to justify the reasons for non-compliance.

For connected parties, the additional practicalities of consulting with the pre-pack pool and issuing a viability statement are still, to a great extent, an unknown. Whilst members of the pre-pack pool of experts have been recruited, little has been published about them and how the pool will operate in practice. It should also be

remembered that the new processes for connected parties are at this point completely voluntary. As a result, the deals which require the most scrutiny may not actually be brought before the panel. Secured creditors are not connected parties for these purposes simply because they hold share security and have voting rights. So for financial restructurings which involve a secured party with share security taking ownership in the form of a newco purchaser, the secured creditors do not have the dilemma of deciding whether they should submit to the pre-pack pool or produce a viability statement.

A potential consequence of the revised SIP 16 is that we may see more pre-packs in liquidation instead, as the revised SIP 16 only applies to administrations.

So whilst pre-packs have seemingly survived for the moment (there is a reserve statutory power contained in the Small Business Enterprise and Employment Act 2015 to restrict sales to connected parties), the bolstered best practice imposed by the revised SIP 16 has the potential to discourage the use of pre-packs and/or their effectiveness as a business rescue tool. The onus is clearly on administrators to get comfortable with the new burdens imposed on them.

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