STATEMENT OF INSOLVENCY PRACTICE 3A (SCOTLAND)

TRUST DEEDS

1 INTRODUCTION

1.1 This Statement of Insolvency Practice (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.

SIP 3(A) is issued under procedures agreed between the insolvency regulatory authorities acting through the Joint Insolvency Committee (JIC). It was commissioned by the JIC, produced by the Association of Business Recovery Professionals, and has been approved by the JIC and adopted by each of the regulatory bodies listed below:

Recognised Professional Bodies:

- The Association of Chartered Certified Accountants
- The Insolvency Practitioners Association
- The Institute of Chartered Accountants in England and Wales
- The Institute of Chartered Accountants in Ireland
- The Institute of Chartered Accountants of Scotland
- The Law Society
- The Law Society of Scotland

Competent Authority:

- The Insolvency Service (for the Secretary of State for Trade and Industry)

The purpose of SIPs is to set out basic principles and essential procedures with which insolvency practitioners are required to comply. Departure from the standard(s) set out in the SIP(s) is a matter that may be considered by a practitioner's regulatory authority for the purposes of possible disciplinary or regulatory action.

SIPs should not be relied upon as definitive statements of the law. No liability attaches to any body or person involved in the preparation or promulgation of SIPs.

1.2 The Statement has been prepared for the sole use of members resident in Scotland in dealing with trust deeds in Scotland.

1.3 The objective of this statement is to provide practical guidance in relation to issues commonly arising on which current legislative provisions are either silent or ambiguous. The statement which follows assumes that members are familiar with the trust deed procedure gained through practical experience and through knowledge of the relevant statutory provisions.

2 NATURE OF TRUST DEEDS

2.1 The trust deed is a voluntary act by a debtor for the benefit of creditors albeit that the debtor retains a radical right in the assets transferred. It is a deed granted by the debtor in favour of a trustee or trustees under which the estate is conveyed, i.e. assets transferred, to be administered for the benefit of creditors and to effect the payment of debts in whole or in part. The creditors may agree or accede to this procedure, or alternatively may object to the procedure. A trust deed may become protected under the statute, in which case creditors are bound by the terms laid down in the statute.

2.2 In dealing with a trust deed the member should bear in mind an overriding duty to ensure a fair balance between the interests of the debtor, the creditors and any other parties involved. In considering whether to accept appointment as trustee the member should have regard to the ethical guidelines of the authorising body. The member should not accept appointment if objectivity is likely to be impaired or be seen to be impaired.

2.3 The special nature of insolvency appointments makes advertising for an insolvency procedure inappropriate. The member should consider carefully the source from which the work is introduced. Members may in their promotional literature state that they provide insolvency services including advice on trust deeds but they should not specifically place adverts advocating trust deeds, nor should they accept introductions from organisations which advocate trust deeds through advertising, since the member may be perceived either to be acting in conjunction with or as agent of, the organisation.

2.4 Members are reminded that no payment (however disguised) can be made to debt advisors or to any other third parties for the introduction of insolvency work. Work done by such parties prior to the signing of the trust deed ranks as unsecured and should therefore not be paid for by the debtor, or by the member. Such debts may only be paid for subsequently by way of a dividend on unsecured claims duly lodged and adjudicated upon.

3 INITIAL CONTACT WITH THE DEBTOR

3.1 The member, whom failing, a suitably experienced member of staff, must, prior to the signing of the trust deed, meet the debtor personally at the debtor's home and ensure that a written record of the meeting is prepared. In exceptional circumstances should it not be possible for the interview to take place at the debtor's home, suitable alternative arrangements should be made. In addition, if the debtor is carrying on a business the member will require to pay a visit to the business premises as part of the information gathering and planning exercise.

3.2 The member should obtain evidence of the ownership of the property. If the debtor advises that the debtor 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 provided e.g. by means of production of a rent book or written confirmation from the landlord.

3.3 In the event that the debtor owns the property, in whole or in part, the member should obtain a professional valuation.

3.4 Where the member is consulted by two individuals who are either married or cohabiting, the member should ensure that each is assessed individually and then offer advice based on that individual's own circumstances. If the member considers there is a conflict of interest in the member advising both parties, the member should consider not accepting the appointment on the second individual.

3.5 The debtor should be advised at the initial interview of the member's requirement to maintain independence. Members should make it clear to the debtor that their duties as trustee, once the trust deed is signed, cannot be influenced by the wishes of the debtor. It should be emphasised that although trustees under the trust deed are acting primarily for the benefit of creditors, they have a residual obligation to act in the interests of the debtor.

3.6 The debtor should be advised, in writing, that apparent insolvency is constituted by the signing of the trust deed. Debtors should also be advised of the effects of a trust deed not becoming protected, in that a creditor could petition for sequestration. The member should endeavour to obtain, in writing, confirmation from the debtor that in the light of the advice the debtor has received, that the debtor has considered the position carefully prior to signing the trust deed.

3.7 The member should carry out an independent assessment of the financial circumstances of the debtor and should consider carefully whether a trust deed is the most appropriate means for dealing with the debtor's problems. Such consideration should be recorded by the member and explained to the debtor in a letter immediately after the initial meeting. A full Statement of Affairs and

Statement of Income and Expenditure must be prepared by the member and agreed by the debtor.

3.8 At the interview the member must ensure that the debtor is fully aware that all heritable property, including the home, is covered by the trust deed and that any equity therein at the start of the trust deed, or arising during the period of the trust deed, may require to be realised for the benefit of the creditors.

3.9 The member should establish whether or not the debtor has been making regular payments to debt advisors or their equivalent. If so, it must be explained to the debtor that once the trust deed is signed the debtor must not continue to make payments to that party in respect of an arrangement entered into before the trust deed was signed. The member should explain that any sums owing to the third party fall to be treated as an unsecured claim against the estate and that the trustee will have full responsibility for dealing with all creditor matters.

4 PROVISION OF ADDITIONAL INFORMATION

4.1 It is recommended that the debtor be interviewed using a similar style of questionnaire as is used in sequestration proceedings under the Bankruptcy (Scotland) Act 1985 as amended. The questionnaire and appendices should then be signed and dated by the debtor.

4.2 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 purposes of obtaining creditor approval to the trust deed.

4.3 In addition to the statutory requirements, which include the disclosure required under EC Regulations which came into effect in September 2003, the trustee should send to all known creditors and to the Accountant in Bankruptcy:

1. a) An assessment of the debtor's situation;
   b) The statement of income and expenditure;

2. Details of any excluded assets (other than by statute) and the reason for their exclusion;

3. The value of the expected contributions to be made by the debtor during the term of the trust deed. Contributions should be indicated either by way of a note to (a) the statement of affairs or (b) the statement of income and expenditure.

4. The likely 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 must be approved.

5. An indication by way of note on the Statement of Affairs or Statement of Income and Expenditure of the minimum dividend intended to be paid by the trustee.

4.4 Where it becomes clear to the trustee that the fee payable will substantially exceed the estimate provided in accordance with paragraph 4.3(4) above the trustee must notify the creditors and the debtor, providing a revised estimate and providing an explanation for the variation.

4.5 Copies of all circulars must be sent to the debtor.

5 DEALING WITH ASSETS AND CONTRIBUTIONS

5.1 The trustee should follow the Accountant in Bankruptcy guidance notes when dealing with assets. In particular the trustee's attention is drawn to the provisions relating to heritable property. The trustee should ensure that a comprehensive schedule of assets in which the debtor has an interest has been prepared together with explanatory notes. Trustees should take steps to satisfy themselves as to the true value of the assets.

5.2 Equity in property, including matrimonial homes, must be established as soon as practicable by obtaining a professional valuation and obtaining confirmation of the secured liability. Trustees should note that the trustee can only accept income contributions from the debtor during the period prior to the debtor's discharge. These contributions must not be applied to heritable property. Where however it does not prove possible for a third party to buy the property in accordance with the Accountant in Bankruptcy's guidance notes, the trustee should give consideration to extending the debtor's contributions beyond three years allowing the subsequent payments to be treated as payments for the heritage.

5.3 If there is a business, the trustee should consider the manner in which that business is to be dealt with. The trustee will be responsible for any ongoing trading activity of the existing business and the trustee will require to introduce appropriate controls. The trustee should consider whether trading should continue and if so, on what terms. If the trustee decides to continue trading, such a decision should be supported by cashflow forecasts. Trustees must be able to demonstrate the matters considered and that their action is in the best interests of creditors.

6 MEETING OF CREDITORS

6.1 There is no mandatory or statutory requirement to call a meeting of creditors. If however the trustee considers it is in the interest of the general body of creditors such a meeting should be called.

6.2 Trustees should record in the Sederunt Book all requests to hold a creditors meeting. If the trustee considers that a meeting would be in the general interests of all 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 the decision.

7 ACCOUNTING, REPORTING AND REMUNERATION

7.1 Trustees should remember that the trust deed procedure is an alternative to sequestration and as such they should seek to apply similar standards in relation to accounts preparation, reporting to creditors and fee approval. Accounts should be prepared to each anniversary of the signing of the trust deed.

7.2 Fees must be taken in accordance with the provisions of the trust deed. Where there is a committee of creditors the accounts should be submitted to the members for approval together with a claim for remuneration supported by evidence of the hours spent and a resumé of the tasks undertaken.

7.3 A copy of the accounts should be sent to creditors with a brief report on progress and stating the amount if any of previously notified fees which have been taken during the year, unless the trustee can demonstrate that the expense of sending such a circular would be prohibitive due to the number of creditors to be circularised in relation to the funds available.

7.4 Trustees are reminded that the notification of the trustee's estimated fee as referred to in paragraph 4.3 above does not amount to approval of the fee, and that all fees must be properly approved.

7.5 Where the creditors were initially informed that the debtor had promised regular contributions from income and these payments have not been received for a period of three months, the creditors must be informed.

7.6 Where the fees have not been fixed by the Accountant in Bankruptcy the circular should advise creditors of their right to have the accounts audited and the fees fixed by the Accountant in Bankruptcy. It is good practice to delay taking credit for the trustee's fee until 14 days have elapsed since the issue of the circular.

7.7 At the conclusion of the trust deed, a final statement of intromissions must be sent to creditors and to the debtor, and in the case of a protected trust deed to the Accountant in Bankruptcy.

8 PARTNERSHIP TRUST DEEDS

8.1 As well as individual trust deeds, members should be aware of partnership trust deeds.

8.2 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 a sole trader.

8.3 The deed is entered into by a firm and by the partners in the said firm. As such, the estate conveyed is that of the firm, not of the partners as individual debtors, and does not extend to the partners' personal assets. Similarly, only the firm's liabilities are included.

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

8.5 It is open, in appropriate circumstances, for some or all of the partners in the firm to sign individual trust deeds. If the trustee considers there is a possible conflict of interest, the trustee should not take on an appointment on all or any individual partners, but should refer them to another insolvency practitioner.

9 ENDING OF TRUST DEED

9.1 If the trustee considers that 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.

9.2 The procedure to bring a protected trust deed to a close is detailed in the Bankruptcy (Scotland) Act 1985. Not more than 28 days after the final distribution of the estate among the creditors, the trustee sends to the Accountant in Bankruptcy for registration in the register of insolvencies a statement which indicates how the estate was realised and distributed and a certificate to the effect that the distribution was in accordance with the trust deed. The trustee may obtain a discharge from the creditors who have acceded to the deed. If this discharge is obtained the trustee must send notice of the discharge to the Accountant for registration in the register of insolvencies, and send notice of the discharge by recorded delivery to every creditor known to him who has not acceded to the trust deed.

9.3 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 that a receipt for the final dividend should 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.

9.4 The trust deed itself may contain provisions on bringing the trust deed to a close, in which case these should be followed.

9.5 Once the debtor becomes discharged, the trustee must send notification of the discharge to the debtor.

Effective Date: 1 January 2004