

Insolvency Engagement Document



Landlords are a key partner for any business and will want to do what they can to support businesses going through tough times. Seeking their input at an early stage will reduce the risk of landlords voting against CVAs and the risk of future challenges to CVAs.

The BPF strongly encourages prospective Proposers of a CVA and their Nominees to consult with the BPF in advance of a CVA Proposal being distributed. This allows representatives of the landlord community to identify particular issues within a CVA that may need to be addressed, and therefore helps to maximise the likelihood of approval. This engagement should be in addition to – and not a substitute for – engagement with individual landlords (or groups of them) in relation to matters specific to them.

This engagement protocol appears to work well and we are keen to see it adopted in all cases where landlords make up a significant element of the creditor body. However, it is important that these engagements are conducted in a fair, transparent and effective manner which allows landlords to make informed contributions.

We set out below a statement of best-practice, which details how we expect to be engaged with on potential CVAs. As part of this guidance, we have provided a list of what the BPF believes to be the top 10 'red-flag' clauses. We caution any prospective landlord voting on a proposed CVA to look out for these clauses and ask that Insolvency Practitioners consider whether they can be removed prior to a CVA being launched. Also included within this booklet is our standardised Non-Disclosure Agreement (NDA), which we expect all parties to sign prior to engagement in order to maintain confidentiality.

In the first instance, Insolvency Practitioners wishing to engage should contact BPF Policy Officer, Laurence Raeburn-Smith at lraeburn-smith@bpf.org.uk or on 020 7802 0121.

British Property Federation

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Expected Best Practice

Insolvency Practitioners and companies seeking to engage with the BPF should adhere to the following best practice guidelines. Where these are not met, the BPF may – depending on the extent to which they are not met – decide to not engage in relation to a particular CVA. The BPF also reserves the right to publicly comment on the extent to which companies and their Insolvency Practitioners have followed these best practice guidelines – with sensitivity to the facts and circumstances of each case.

We ask that:

1. The BPF get at least 5 working days' notice of the CVA engagement meeting.
2. The BPF be approached at an early stage of drafting so that there is ample time for our recommendations to be considered ahead of launch.
3. The NDA be signed at least 48 hours before the engagement meeting.
4. CVA Proposals are often lengthy, detailed technical documents. Where the CVA is in respect of a company with multiple landlords, a supplementary mini briefing pack which pulls the key issues together in one place should be given prior to engagement. This pack should clearly note the inclusion of any of our 'red-flag clauses', as listed below.
5. The CVA briefing pack must be provided at least 24 hours before the meeting to allow enough time for it to be reviewed by BPF attendees.
6. The BPF should receive confirmation of attendees from all parties at least 24 hours before the meeting.
7. We expect Insolvency Practitioners to do all they can to allow our members to dial-in to engagement meetings, should they need to. If less than 5 working days' notice of a meeting has been given, we will generally not engage if members are unable to dial-in.
8. Insolvency Practitioners should provide the BPF with the CVA document itself upon launch and post-creditors meeting.
9. Insolvency Practitioners and issuing companies should come to meetings aware of what are the key issues for landlords, this includes the following:
 - a) As required by the legislation, an explanation of why the CVA is a better option for landlords than administration (particularly in terms of the number of stores likely to be closed)
 - b) An explanation of why the business will be sustainable post-CVA and if relevant, the source of funding to make the CVA financially viable
 - c) The existence and value of any mechanism for creditors (including landlords) to share in the increased profitability of a business following a CVA (e.g. upside/compensation pot or the ability for landlords to take an equity interest in the business)
 - d) The timetable of the proposed CVA, including the expected date of launch. The basis of valuation proposed for the landlords' claims (and the corresponding voting rights, estimated to the nearest 10%)
 - e) The basis of stratification where different options being offered, e.g. different properties continuing to trade or closing and/or different rental discounts being applied
 - f) The ability for either party to terminate a lease, including the method of termination and any conditions attached
 - g) Relevant antecedent transactions

- h) Rent reviews
- i) Rent repayments, including rent paid in advance set off against future discounted rent
- j) The effect on any guarantors
- k) Payments in lieu of dilapidations, and the basis for calculation
- l) The ability, if any, for the landlord to terminate the CVA in the event of default
- m) If there have been previous failures, an explanation of why this CVA stands a better chance of success

Company Voluntary Arrangements: Top 10 “Red Flag” Clauses for Landlords

	CLAUSE	THE ISSUE FOR LANDLORDS
1	New company rights to break and/or other variations to the terms of leases other than to impose rental discounts	<p>Recent case law mandates that a tenant cannot oblige a property owner to accept a surrender of a lease. Including this term will leave the CVA open to challenge. We consider adding a break right for the tenant (including an option to compromise all tenant obligations for the remainder of the lease) to be unfair where the tenant is also getting the benefit of a rental discount.</p> <p>CVAs should not vary any of the other terms of leases other than to impose a rental discount. Varying other terms is opportunistic and unnecessary for the turnaround of the business.</p>
2	Restrictions on termination rights given to property owners in a CVA, particularly by time and/or resulting in a full and final release	<p>The ability given to property owners to terminate leases is the quid pro quo for rental discounts being imposed on them by the CVA. Where the property owner only has a short period to exercise the right, this can render it effectively inoperable. Requiring property owners to accept a full and final release of liabilities is an unfair restriction on their ability to terminate. Case law also now demands that property owners' right to forfeit on insolvency grounds cannot be taken away by a CVA. Similarly, they should also not be prevented from opposing any application for relief against forfeiture.</p> <p>We expect that property owners must always be given a rolling break whereby, as a minimum, they are able to serve notice at any point in the first year of a CVA.</p>
3	No investment being put into the business, aside from the upside gained following compromises made by property owners	<p>Effective restructurings require investment to succeed and it should not fall on property owners as a class of creditors to be the sole contributors to a company's turnaround. At the very least, the BPF expects it to be incumbent on the company to prove why it has been unable to source new funding from elsewhere.</p>
4	Property owners' voting rights discounted by 75%, or claims against a compensation fund discounted by the same amount	<p>The discounting of property owners' claims for voting purposes is a controversial practice; the only justification given is that the Insolvency Act 1986 allows future rent claims to be valued at £1 for voting purposes (if the company has no evidence of the landowners' real loss) though the chair of the creditors' meeting should assess claims more fairly and accurately if they are able to.</p> <p>Previously, property owner claims for voting purposes were arbitrarily discounted by 75%. This was manifestly unfair and thankfully market practice has moved toward less severe discounts being applied. We expect property owner claims to be assessed on a fair and accurate basis.</p> <p>There is also no justification for applying discounts to property owners' claims against compensation funds as this puts them at an unfair disadvantage compared with other creditors.</p>
5	Company's right to trigger a rent review at the end of the CVA or upwards only rent reviews rewritten	<p>It should never be necessary to give the company additional rights outside the CVA period. By that time, either the CVA has succeeded and the company is in a good financial position, or it has failed and the company has appointed administrators. For property owners, it means supporting a company through the CVA period by accepting discounted rents, only to accept another loss at the end of it (when the company should be profitable).</p>

6	Dilapidations compromised to % rent (or another fixed sum)	The company will typically have obtained advice on dilapidations from property consultants. It should not, therefore, be necessary to treat all property owners in the same way with a set rate for dilapidations. Liability for dilapidations does not correlate to the level of rent. Dilapidations should not be compromised at all where the company is continuing to use the property.
7	Rental discounts for the whole of the term, or which survive termination of the CVA	<p>It should never be necessary to give the company additional benefits outside the CVA period. This would involve the CVA imposing rental discounts for a period beyond the company's business/turnaround plan and profit forecasts. If the business is profitable then this is simply enhancing shareholder value at the property owners' expense.</p> <p>Termination of a CVA should apply to all of the operative terms. It is unfair for rental discounts to survive termination when the property owners will not then get the benefits provided in return by the CVA, including the prospect of a business rescue and solvent tenant.</p>
8	Compensation fund limited to the first 3 years' profits (or less)	The company should allow property owners to share in the future success of the business by way of a share of profits or compensation fund. This mitigates some of the unfairness that might otherwise arise from compromising their rights as a way of enhancing shareholder value (as opposed to just avoiding insolvency). When the fund is referable to a period when the company's profits will be low or nil then it is not achieving that purpose.
9	Rental discounts to less than market rent and/or rental discounts for profitable sites	<p>No rent reductions imposed by the CVA should entitle landlords to receive less than the market rent for any property. This is established case law.</p> <p>Rent should never be reduced where the property is a net contributor to the business. Where a rent reduction is necessary then this should be no more than is strictly necessary to make the property viable. Rebasing rents to reflect a perceived level of market rent is never acceptable where the site is profitable.</p> <p>Service charge for on-going services should also never be compromised by the terms of the CVA.</p>
10	Connected creditor and/or trade creditors kept unimpaired	<p>Trade creditors and/or connected creditors should not be kept unimpaired without good reason. If keeping trade creditors unimpaired is critical to the business, then detailed justifications should be provided in the CVA proposal.</p> <p>It is very unlikely that there will ever be a valid reason for connected creditors to remain unimpaired by a CVA whilst landlords are expected shoulder the burden of rescuing the business.</p>

NON-DISCLOSURE AGREEMENT

DATE

PARTIES

(1) [NAME OF COMPANY] (incorporated and registered in [England and Wales] under company registration number [COMPANY NUMBER]), the registered office of which is at [REGISTERED OFFICE ADDRESS] (the “**Proposer**”); and

(2) **BRITISH PROPERTY FEDERATION** (incorporated and registered in England and Wales under company registration number 778293), the registered office of which is at St Albans House, 5th Floor, 57-59 Haymarket, London SW1Y 4QX (the “**BPF**”).

1. DEFINITIONS

1.1 In this agreement:

1.1.1 “**Confidential Information**” means information provided by the Proposer to BPF to enable BPF to consider the Proposed CVA in respect of which the Proposer makes a written request to BPF to treat that information as Confidential Information;

1.1.2 “**IA**” means the Insolvency Act 1986 and all applicable Insolvency Rules.

2. PURPOSE

2.1 The Proposer is considering proposing a company voluntary arrangement pursuant to IA 1986 in relation to [] (the “**Proposed CVA**”) and wishes to obtain the views of BPF on the Proposed CVA before taking any further steps in relation to it.

2.2 BPF agrees to consider the Proposed CVA with a view to commenting on it and to meet with the Proposer to discuss it at times and in locations agreed between the parties to this agreement.

3. DISCLOSURE

3.1 In consideration of the Proposer disclosing the Confidential Information to BPF and of BPF agreeing to consider that information and comment on the Proposed CVA the parties agree with each other as follows (subject to clauses 5 and 6):

3.1.1 BPF will hold the Confidential Information in strict confidence and will not disclose the Confidential Information or use it other than for the purpose of considering and commenting on the Proposed CVA;

3.1.2 each party will keep the contents of this agreement and of any meetings, discussions, advice, negotiations and opinions relating to the consideration of the Proposed CVA confidential and will not make any announcement in relation to those matters;

3.1.3 the Proposer (without limiting clause 3.1.2) will not make or permit any announcement or statement saying that, or indicate in any way that, BPF have reviewed, commented on or approved or endorsed the Proposed CVA.

4. TERM AND TERMINATION

4.1 The parties’ obligations under this agreement shall terminate on the earlier of:

4.1.1 [two] years after the date of this agreement; and

4.1.2 approval of a Proposed CVA in accordance with the provisions of IA 1986, such termination shall be without prejudice to any antecedent breach of either party of its obligations in this agreement.

5. PERMITTED DISCLOSURE

- 5.1 BPF may disclose or permit to be disclosed Confidential Information to its members and advisers when it considers that disclosure is necessary for the purpose of considering and commenting on the Proposed CVA provided that it procures that each such person to whom the Confidential Information is disclosed complies with the obligations set out in this agreement as if they were BPF.
- 5.2 BPF may also disclose the Confidential Information to the minimum extent required by any order of any court of competent jurisdiction or any applicable regulatory, judicial, governmental or similar body or authority or the rules of any stock exchange but BPF will inform the Proposer of the disclosure, to the extent legally permissible, as soon as reasonably practicable.

6. EXCLUSIONS

The obligations set out in clause 3 a. shall not apply, or shall cease to apply, to Confidential Information which the BPF can show is or becomes generally available to the public other than as a direct or indirect result of the information being disclosed by BPF in breach of this agreement, or which was already lawfully in BPF's or any of its members or any of its or their advisers' actual possession or has been received by BPF or any of its members or any of its or their advisers from a third party source that is not connected with the Proposer and that such source was not under any obligation of confidence in respect of that information, and, b. shall not, once it has become public knowledge that the company is considering or may enter into a CVA, prevent BPF from disclosing that it has entered into discussions with the Proposer in relation to the proposed CVA.

7. RETURN OF THE CONFIDENTIAL INFORMATION

- 7.1 BPF shall as soon as reasonably practicable on receipt of a written request from the Proposer return any Confidential Information received in hard copy to the Provider
- 7.2 Nothing in clause 7.1 shall require BPF or any of its members or advisers to destroy, or prohibit it from keeping a copy of, any Confidential Information contained in any electronic file created pursuant to any routine back up or archiving procedure (so long as such file is not generally accessible beyond the need for disaster recovery or similar operations) or which it or they are required to keep by any applicable law, rule or requirement of any regulatory or governmental authority or professional body or stock exchange.

8. REMEDIES

The parties acknowledge that damages alone may not be an adequate remedy for any breach of their respective obligations under this agreement and, accordingly, without prejudice to any other rights or remedies that they might seek, they shall be entitled to the remedies of injunction, specific performance and other equitable relief for any threatened or actual breach of the provisions of this agreement.

9. MISCELLANEOUS

- 9.1 The terms of this agreement may only be amended or modified by written agreement between the parties.
- 9.2 This agreement does not give rise to any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this agreement.
- 9.3 This agreement is personal to the parties and neither party shall assign, transfer, charge or deal in any other manner with this agreement or any of its rights under it nor purport to do any of the same.
- 9.4 This agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) are governed by the law of England.
- 9.5 The parties to this agreement irrevocably agree that the courts of England have exclusive jurisdiction to determine any dispute or claim that arises out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes or claims).

Signed by [FULL NAME OF INDIVIDUAL],

.....

a duly authorised signatory for and on
behalf of [NAME OF COMPANY]

Position (in BLOCK CAPITALS)

.....

Signed by [FULL NAME OF INDIVIDUAL],

.....

a duly authorised signatory for and on behalf of [NAME
OF COMPANY]

Position (in BLOCK CAPITALS)

.....

Agreement to be dated once signed by both parties

