PART 26A RESTRUCTURING PLANS PRACTICE STATEMENT

CONSULTATION RESPONSE

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Section 1: Overview

A. BPF involvement in insolvency proceedings:

1. As landlord creditors, our members have significant exposure and experience of Restructuring Plans and other insolvency processes including CVAs. We are keen to ensure that such processes operate as effectively as possible for all stakeholders and firmly believe that an improved process for RPs can lower the costs of the process, promote better outcomes for all parties and reduce the need to take up court time and resources.

2. Our members strongly support the availability of restructuring processes to allow viable businesses to restructure. This brings wider benefits to society and the economy, through saved economic activity, jobs and the wider vitality of high streets and town centres where our members operate.

3. The BPF also facilitates engagement between companies, their advisors and our property owner members prior to launching RPs. This is not intended to serve the role of direct engagement between companies and creditors, but rather it is an opportunity for members to better understand proposals and the rationale behind them and suggest general improvements that would help minimise challenges and delays and hopefully lead to better outcomes. The BPF also facilitates such engagement for proposed CVAs which has historically helped Insolvency Practitioners embed best practice in the CVA process leading to CVAs that are less likely to be opposed by creditors.

B. BPF Recommendations:

4. We welcome the focus on early identification of issues and active case management in the draft Practice Statement and the positive improvements these will bring. We believe this is essential for introducing a fairer and less burdensome process.

5. Additionally, we have three broad recommendations for the Practice Statement. These recommendations reflect our experience of the considerable shortcomings of the way that Restructuring Plans have operated since their introduction. This includes the lack of information disclosed to creditors and the difficulty obtaining this information, the adversarial nature of the process that has developed, the requirement for judges to settle procedural disputes, the high costs of the process for all parties and the need to better encourage engagement between parties.

    (i) A central principle underpinning the Practice Statement should be an obligation on companies to provide adequate disclosure of information. What this requires should be clear for all parties to minimise disputes.
    (ii) The Practice Statement could include stronger mechanisms to ensure and safeguard disclosure of information and support this in practice. These are discussed in more detail in section (3). We would particularly highlight the immediate benefits that a Scott Schedule approach to sharing information would bring, as well as incorporating a standardised NDA into the Practice Statement. In addition, a standard list of information that is expected to be disclosed would support best practice.
    (iii) The Practice Statement should wherever possible encourage engagement between parties and enable them to reach consensual deals. A key purpose of this is to remove creditors from plans, which in turn reduces burdens on court time and the costs of plans.

6. Requiring companies to properly disclose information has the potential to mitigate many of the shortcomings associated with the current process. It enables creditors to engage with and assess plans. It enables companies to demonstrate that they are complying with the process and avoid procedural challenges. It reduces burdens on the courts by ensuring that procedural disputes are avoided and easily resolved, and it contributes to a less adversarial approach, by reducing the incentives for companies to withhold information.

Section 2: General Concerns with the Restructuring Plan Process

7. As noted above, since the introduction of Restructuring Plans in 2020, significant problems with RPs have emerged that affect the efficiency and fairness of the process. Broadly, these problems cover:

    - Difficulty and disputes around obtaining information
    - The adversarial approach taken by participants
    - Lack of engagement with creditors and consensual deals
    - Costs and burdens of the process for participants and courts.

8. The wider concern for creditors is that these problems can result in RPs that do not lead to fair outcomes and balance the rights of stakeholders equally. In the case of property owners, they are often being asked to accept significant cuts to agreed future rental payments, compromise of arrears, service charges and dilapidations owed and changes to other contractual terms. This occurs without transparency that the restructuring surplus is being shared in a fair manner or the ability to adequately scrutinise the relevant alternative or that owners are adequately contributing to the turnover of the business.

9. Notably, Restructuring Plans are also seeing significant compromises to public sector creditors including: HMRC; local authorities through business rates; and UK taxpayers being asked to meet the costs of redundancy payments for businesses which when restructured provide significant value uplift to owners. Without adequate safeguards, there is a risk that stakeholder and public confidence in the restructuring process will be undermined, damaging an important tool to rescue businesses.

10. Difficulty and disputes obtaining information: For creditors, difficulty obtaining information creates obstacles to proper engagement with the RP process. This in turn has increased the costs and burdens of the process for both creditors and companies because it has created disputes about what information should be shared. It has also taken up significant court time because of the need for judges to then deliberate on these matters.

11. Notably, judges have highlighted the importance of information provision in a number of cases. In the Fitness First case, the sanction hearing was adjourned because of a lack of disclosure, with the judge noting in paragraph 28: "there should have been more effort by the Company to engage with Landlords… By approaching it in the way the Company has, it is more likely to arouse suspicion amongst the opposing creditors that things are being hidden from them or that something is being unfairly foisted on them". In Adler, for instance, paragraph 64 required the plan company "make available in a timely manner the relevant material that underlies the valuations upon which it relies," and paragraph 65 that "sufficient time for the proper conduct of a contested Part 26A process must be factored into the timetable [including]….. giving interested parties sufficient time to prepare for hearings…."

12. Companies will frequently delay releasing restructuring plans, despite often having been considering plans with their advisors for considerable periods of time before launch. This increases the difficulty of analysing information and means that creditors will often have extremely limited and unrealistic timeframes to analyse information provided, request further information and engage appropriate advice (the cost of which is more expensive because of the time pressures involved). Judges are understandably reluctant to cause the failure of restructuring plans that might otherwise be sanctioned, but running down the clock before a financial cliff edge to avoid providing information is something that could be avoided with the appropriate guidelines for information provision in place.

13. There is also a need to ensure that disclosure requirements fall on the both the company restructuring and any company in the group that is benefitting from any compromise under the Restructuring Plan, which is needed for property owners to proper ly asses their position (e.g. where lease guarantees are being compromised).

14. Adversarial Nature of process: A feature of the current process, at least for many of the Restructuring Plans that property owners see, is its strongly adversarial nature. Such plans are characterised by a lack of engagement by companies seeking to act in a strategic manner to maximise benefit as in case where there is concern that companies engineer cliff edges and claim that there is no time to meet creditors'

request for disclosure. An important reason why information disclosure is often not forthcoming is that companies perceive there to be advantages in withholding or delaying the release of relevant information so that creditors have less opportunity to consider plans, potential alternatives and the overall fairness of the proposed restructuring.

15. This reflects the considerable powers RPs provide, such as cram-down of dissenting creditors, that are not available in other insolvency processes. Without any need for the company to win creditor votes, or the balance of a strong process to compel information sharing, there has been little to support creditors' access to information except where points of law have been deliberated on by judges in slowly developing case law that has increasingly recognised the importance of and favoured disclosure (but not, as yet, resulted in any meaningful change in behaviour).

16. Lack of engagement with creditors and consensual deals: Because of the adversarial nature of the process, RPs usually see very little early engagement with creditors, which typically means consensual deals between companies and property owners are rare. A reason for this is that within an adversarial process, providing financial information to creditors, which would be forthcoming in any engagement, is perceived as achieving nothing but the increased risk that sanction will be opposed on fairness grounds. This is especially the case when companies do not perceive that engagement with creditors is needed to support plans due to the ability to cram down creditors. It means the opportunity to take creditors out of plans and reduce the cost of the process, scope for challenge and therefore reduce burdens on court time is missed.

17. Overall Cost of RPs and burdens on courts: The overall adversarial nature of the process, where disputes are common has led to a restructuring process with extremely high costs. This has precluded smaller companies from utilising RPs as restructuring tools. It has also placed barriers in the way of creditors obtaining information and engaging with the process, in turn creating avoidable disputes about procedural issues that have led to unnecessary burdens on courts.

Section 3: Suggested options for improving Restructuring Plans

18. We believe that there a number of opportunities to introduce mechanisms into the practice statement that will support the flow of information to creditors, ensure that appropriate information is being disclosed (and therefore companies are not being burdened unnecessarily), support early engagement and also support the court to oversee the process and where necessary to adjudicate on it. These include:

(1) Make provision for a creditors committee to be formed:

- The purpose of a creditors committee would be to facilitate the disclosure of information between companies and creditors, by standardising requests and thereby reducing the costs and burdens on requesting and disclosing information.
- Such a committee could be introduced as a formal part of the process whereby a judge would recognise it, probably at the convening hearing, assuming appropriate conditions are met (invitations sent out to the highest value creditors in each of the classes, a given number of creditors has agreed to form a committee etc). Where no (or insufficient) creditors volunteer to join a committee then this requirement could be dispensed with.
- Requests for information (or clarification of information) would then come from the creditors' committee to the company, which would reduce the burdens of companies responding to requests from multiple creditors as there would be a standardised set of requests. It would also ensure that all creditors receive information disclosed.
- The intention would not be for the committee to approve or provide any opinion about the fairness of the plan. Rather, the committee would be able to provide the judge (and other creditors) with confirmation whether the requested information and/or clarification has been provided. This would assist the judge in deciding whether the right information has been provided for creditors to make an informed decision. It would also enable smaller creditors to obtain such information from the committee at low cost and have greater confidence in proceedings.

(2) Utilise a Scott Schedule approach to manage information sharing:

- This approach would require creditors to present a list of information that they believe should be provided by the company and an explanation of why the information is required. The company would in turn be expected to provide the information or explain why it is not appropriate or practical to share it.
- Appropriate timescales would govern the process, for instance, seven days from convening hearing for creditors to provide the information request and then an appropriate period to review and respond to the request.
- This would then provide a clear framework for managing the process, for courts to identify where the process is not being adhered to and for a judge to oversee disputes. Importantly it would help reduce disputes and also require creditors to justify requests for information. This would avoid creditors taking a "scattergun" approach to such requests which places unnecessary burdens on proposing companies. Such a schedule could be incorporated into a creditor committee or operate independently.

(3) Introduce a court reporter:

- Following the example of Scotland, a court reporter could be appointed to oversee the sharing of information and raise any concerns with the court. Additionally the reporter would record complaints and issues raised by creditors and report back to the court about them.

(4) Introduce a standard list of information to be disclosed:

- Providing a standard list of information that it is felt should be provided upon request would help parties understand what information is typically expected to be disclosed. While it wouldn't necessarily be appropriate for such a list to be compulsory, it would help proposing companies understand where additional requests for information are reasonable and creditors to understand where justification for additional information is needed. Such a list could support the

other processes outlined above and could also help promote good practice by encouraging proposers to pro-actively provide such information. The BPF has already drafted a standard list – (see attached).

- We believe that there would be significant merit in *requiring* companies to provide a set of clearly identified documents (agreed through a further consultation process and likely narrower than the BPF's draft list). This would be provided by the Plan company to all creditors with the Practice Statement in every Plan (with an option to redact highly sensitive information in relevant cases). This would shift the onus to the company, which will have to justify redaction/exemption rather than simply refuse to give disclosure and, so, reverse the current burden on creditors to pursue the Plan company for information. Although we believe in its merits, we do not specifically endorse such a suggestion here as we are mindful that wider stakeholders would currently be more supportive of such a list as a best practice document.

(5) Require standardised Non-Disclosure Agreements (NDAs):

- To facilitate the sharing of information we believe that the process should eliminate or reduce the scope for non-disclosure agreements to be a source of dispute as has been the case in some Restructuring Plans. In some cases we have seen disputes around NDAs used tactically to delay the sharing of information, thus reducing the ability of parties to formulate and raise concerns with plans, something which then leads to disputes and burdens on court time. To avoid this, a standardised NDA should be incorporated into the Practice Statement as an accompanying document, which participants are expected to utilise.

(6) Use of a creditor portal for information disclosure:

- An option to support disclosure of information would be to provide information through a creditor portal or virtual data room. This would especially be beneficial in conjunction with a flexible standard list of information that is relevant to the specific circumstances of each company. Such portals, where used in other insolvencies enable creditors to ask for and receive further information which is then seen and accessible to creditors as a whole. The merit of this is that it

ensures that all creditors receive the same information, ensuring that there is information symmetry for all parties.

Section 4: Specific comments on the draft Practice Statement

19. As well as urging consideration of the above mechanisms to support case management, we have a number of specific comments about how the draft practice statement could be improved to meet its objectives and improve the efficiency and fairness of the process. We believe that the following improvements can be made to the draft Practice Statement: (Specific additions to wording are highlighted in red). To help follow where these changes would occur in the Practice Statement, we have also included them separately in red in a marked up version of the current draft.

(i) Objectives: (Paragraphs 3 and 4)

20. We noted above, the centrality of sharing information for an effective and fair Restructuring Plan process. We also noted the need to encourage engagement to ensure that creditors are excluded from plans wherever possible to reduce costs and burdens on the Courts. To reflect this, we therefore recommend two further objectives are added to the current two objectives in the Practice Statement:

21. "(3) to facilitate the sharing of information so as to enable creditors to make an informed decision whether to support or oppose a restructuring plan or scheme of arrangement"

22. "(4) encourage applicants, wherever possible, to reach consensual arrangements and avoid the need to include creditors in a restructuring plan or scheme of arrangement."

(ii) The Listing Note: (Paragraphs 5 and 6)

23. To support engagement, following paragraph 6(e), in addition to the clarification that material change to the listing note should be notified to the Court, it should also be made clear that part of the process of putting together the listing note requires engagement, identification of likely objectors and points of dispute:

24. "It is inherent in the above that the applicant should have engaged with creditors at an early stage so as to mitigate the scope of any restructuring plan or scheme of arrangement and identify likely objectors and points of dispute. Any material change in the matters covered by the listing note should be notified to the Court as soon as practicable."

(iii) Responsibilities of the applicant: matters for the convening hearing: (Paragraph 10)

25. We believe it would be beneficial for paragraph 10 (e) not to exclude issues going to the merits or fairness of a plan: i.e.: it should read simply:

26. (e) any other issue which might lead the court to refuse to sanction the scheme or plan. ~~(other than issues going to the merits or fairness of the scheme or plan)~~

(iv) Responsibilities of the applicant: notice of convening hearing (Paragraphs 11-13).

27. We include below suggested changes to wording in paragraphs 12 and 13. This reflects our experience that information provided is often difficult to understand and unclear. It also seeks to ensure that companies should not be able to delay the release of information in order to engineer cliff edges.

28. Paragraph 12: "It is the responsibility of the applicant to ensure that such notification is given in a concise form and is communicated to all persons affected by the scheme or plan in the manner which is most appropriate to the circumstances of the case. The applicant should avoid providing unnecessarily long or repetitive information and ideally include a short and/or tabular summary of the proposal at the beginning."

29. Paragraph 13. "Notice should be given and relevant information provided in sufficient time to enable such persons to consider what is proposed, to take appropriate advice and, if so advised, to attend the convening hearing. What is adequate notice will

depend on all the circumstances, including the length and complexity of the information provided. The urgency of the application shall not be a determining factor where the applicant could have provided the information at an earlier date."

(v) Responsibilities of the applicant and other parties in relation to the convening hearing: (Paragraphs 14 – 18)

30. Engagement: To promote engagement, we suggest that at 15 (a), a clause is inserted stating that the applicant should identify:

31. "the steps taken to engage with those affected with a view to mitigating the scope of the scheme or plan and the outcome of that engagement"

32. To ensure that companies take this responsibility seriously, but also to ensure that they seek to explore options to restructure without the need for proposing Restructuring Plans, which are costly and take up valuable Court time, it could also be noted in the Practice Statement that "the Court can stay proceedings to facilitate further engagement – a scheme or plan should be a last resort"

33. Consideration of alternative plans: To make the process of considering alternative plans simpler and to minimise the need for disagreements to be resolved in Court, we recommend the following changes to paragraph 15(d)(iii):

34. "whether any objection to the proposed restructuring has been made by any of the plan company's creditors or members, including whether any better or fairer plan or alternative restructuring proposal has been put forward by any of the plan company's creditors or members and, if so, the nature of the objection or alternative proposal, the applicant's attempts to resolve the objections, including consideration of any alternative proposal, and of any remaining disagreement."

35. Information: To strengthen the requirements for information disclosure already contained within paragraph 15 (d)(iv) and taking account of difficulties that creditors

have had previously obtaining information, this paragraph could also ask companies to confirm and explain information that is not intended to be provided:

36. "what information has so far been provided to creditors or members and, where information has not been provided, or where there is any discrepancy in the level of information provided to different creditors or members, why that is so"

37. As suggested previously, in order to support compliance with the objectives of the Practice Statement, a stated option for the Court to adjourn proceedings while applicants comply with the steps would help ensure good practice:

38. "Should the court not be satisfied that the applicant has taken adequate steps under sub-paragraphs i-iv. above then it may adjourn the convening hearing for an appropriate period of time to allow the applicant to complete the same."

39. Clarity of information: Explanatory statements provided to property owners have often been very difficulty to navigate. This has been the case for both professional advisors and smaller unadvised creditors. To ensure that the Explanatory Statement provides not just appropriate information, but information in a format that creditors can easily digest, and minimises burdens placed upon them, we suggest the following changes to paragraph 17:

40. "The explanatory statement should be in a form and style appropriate to the circumstances of the case, including the nature of the constituencies of members and/or creditors, and should be as concise as the circumstances admit. The applicant should include a short and/or tabular summary of the terms at the start of the document. Key supporting documents appended to the explanatory statement, such as valuations, business plans and cash flow projections should be collated and clearly signposted. In addition to complying with the provisions of the 2006 Act, the commercial impact of the scheme or plan must be explained and members and/or creditors must be provided at the same time as the explanatory statement with such information as is reasonably necessary to enable them to make an informed decision as to whether or not the scheme or plan is in their interests, and on how to vote

thereon. Where a document is incorporated into the explanatory statement by reference, readers should be directed to the material part(s) of the document. Where creditors make requests for information or documents that are already incorporated in the explanatory statement, they should be directed by the applicant to the specific paragraph/page number when responding."

41. Timetabling: We would suggest that incorporating the listing note requirement in 6(e), which covers factors causing urgency in timetabling of proceedings, be incorporated in paragraph 15. This would mean that the explanation is given in evidence, verified by a statement of truth. We also suggest adding in additional wording, so that the requirement to be added in 15 states:

42. "what the factors are giving rise to the urgency and when such factors first came to light and why the application was made at the time that it was"

(vi) Additional Considerations for the Practice Statement:

Costs:

43. The prospect that adverse costs will be awarded against creditors can be a significant deterrent to making submissions. This in turn can deter creditors from making reasonable submissions that benefit the overall process. We recognise that it can be difficult to provide blanket assurance to creditors that adverse costs will not be awarded against them. Comfort however would be provided with a statement that non-compliance by the company with the Practice Statement (particularly paragraph 15) will be taken into account in deciding the matter of costs, regardless of the eventual outcome.

Facilitating case management

44. Section (3) noted the opportunity to use a number of enhanced case management tools. We would suggest the Practice Statement enables creditors to request the use of such tools in advance of the convening hearing and specifies the courts' ability to

utilise such mechanisms to support case management. We particularly think there is merit in incorporating a standard set of directions for the use of a Scott schedule approach to disclosure (where relevant).

Non-disclosure agreements

45. We noted above that agreeing NDAs will often be a source of delay to sharing of information, which can be used as a tactical device by participants. To avoid this, we recommend that the Practice Statement is accompanied by a standard NDA for participants to use. If companies do not wish to use the NDA, then they would have to provide explanation why and an alternative NDA as part of the listing note.