

COMPANY VOLUNTARY ARRANGEMENT: A GUIDE FOR CREDITORS ON INSOLVENCY PRACTITIONER FEES

SCOTLAND

1. Introduction

- 1.1. In a company voluntary arrangement, as in other types of insolvency, the amount of money available for creditors is likely to be affected by the level of costs, including the remuneration of the insolvency practitioner appointed to implement the arrangement. This guide explains how fees are fixed in company voluntary arrangements, how the creditors can affect the level of fees, and the information that should be made available to them regarding fees.
- 1.2. This guide applies where the nominee in relation to the CVA agrees to act on or after 1 April 2021, or where information is provided by the supervisor about fees, expenses or other payments on or after 1 April 2021.

2. The company voluntary arrangement procedure

- 2.1. Company voluntary arrangements are often referred to as CVAs.
- 2.2. The procedure enables a company to put a proposal to its creditors for a composition in satisfaction of its debts or a scheme of arrangement to settle its affairs. A composition is an agreement under which creditors agree to accept a certain sum of money in settlement of the debts due to them.
- 2.3. A CVA may be used as a stand-alone procedure or as an exit route from an administration. It may also be used where a company is in liquidation, but this is extremely rare. The proposal will be made by the directors, the administrator or the liquidator, depending on the circumstances.
- 2.4. The procedure is extremely flexible and the form that the CVA takes will depend on the terms of the proposal agreed by the creditors.
- 2.5. The proposal must provide for an insolvency practitioner to supervise the implementation of the CVA. Until the proposal is approved by the creditors, the practitioner is known as the nominee. If the proposal is approved, the nominee (or if the creditors choose a replacement, that replacement) becomes the supervisor.

3. Fees, costs and charges - statutory provisions

- 3.1. The fees, costs, charges and expenses that may be incurred for the purposes of a CVA are set out in insolvency legislation. They are:
 - fees for the nominee's services agreed with the company (or, as the case may be, the administrator or liquidator) and disbursements made by the nominee before the decision approving the CVA takes effect;
 - fees or expenses that:
 - are sanctioned by the terms of the CVA, or
 - would be payable, or correspond to those that would be payable, in an administration or winding up.
- 3.2. The following matters require to be set out in the CVA proposal:
 - The amount proposed to be paid to the nominee by way of fees and expenses; and
 - how the fees and expenses of the supervisor will be determined and paid.

4. The role of the creditors

- 4.1. It is for the creditors to decide whether to agree the terms relating to remuneration and the other provisions of the proposal. The creditors have the power to modify any of the terms of the proposal, including those relating to the fixing of remuneration. The nominee should be prepared to disclose the basis of fees, and proposals for charging the supervisor's fees, to the creditors.
- 4.2. Although there are no further statutory provisions relating to remuneration in CVAs, the terms of the proposal may provide for the establishment of a committee of creditors, which may include among its functions the fixing of the supervisor's remuneration.

5. What information should the creditors receive?

5.1. General principles

- 5.1.1. Those responsible for approving payments to the nominee, supervisor or their associates should be provided with sufficient information to make an informed judgement about the reasonableness of their requests.
- 5.1.2. Disclosures by the nominee/supervisor should be of assistance to creditors and other interested parties in understanding what was done, why it was done, and how much it cost.
- 5.1.3. Information provided by the nominee, supervisor or proposed supervisor should be presented in a manner that is transparent, consistent throughout the life of the case and useful to creditors and other interested parties, whilst being proportionate to the circumstances of the case.
- 5.1.4. The nominee/supervisor should disclose:
- the estimated costs of the CVA including the proposed remuneration of the nominee and the supervisor and the bases for those estimates;
 - all payments, arising from the insolvency appointment to the nominee/supervisor or their associates, including:
 - the cost of any additional specialist assistance which will not be provided by any supervisor appointed, and the reason why such assistance is necessary;
 - the identity of the source of any referral of the company, the relationship or connection of the referrer to the company and, where any payment has been made or is proposed to the referrer, the amount and reason for that payment;
 - details of the amounts and source of other payments made, or proposed to be made, to the nominee and the supervisor or their firms in connection, or otherwise, with the proposed CVA, directly or indirectly and the reason(s) for the payment(s);
 - the form and nature of any professional or personal relationships between the nominee/supervisor and their associates.
- 5.1.5. Payments should not be approved by any party with whom the nominee/supervisor has a professional or personal relationship which gives rise to a conflict of interest.
- 5.1.6. The nominee/supervisor should inform creditors and other interested parties of their rights under insolvency legislation and should advise them how they may access suitable information setting out their rights within the first communication with them and in each subsequent report.
- 5.1.7. Where the nominee/supervisor sub-contracts out work that could otherwise be carried out by them or their staff, this should be drawn to the attention of creditors with an explanation of why it is being done, what is being done, and how much it will cost.

5.2. Key issues

- 5.2.1. The key issues of concern to those with a financial interest in the level of payments from the insolvency estate will commonly be:
- the work the nominee/supervisor anticipates will be done and why that work is necessary;
 - the anticipated payment for that work;
 - whether it is anticipated that the work will provide a financial benefit to creditors, and if so what anticipated benefit (or if the work provides no direct financial benefit, but is required by statute);
 - the work actually done and why that work was necessary;
 - the actual payment for the work;
 - whether the work has provided a financial benefit to creditors, and if so what benefit (or if the work provided no direct financial benefit but was required by statute).
- 5.2.2. When providing information about payments from an estate the nominee/supervisor should do so in a way which clearly explains the key issues. Narrative explanations should be provided to support any numerical information supplied. Such an approach allows creditors and other interested parties to better recognise the nature of the nominee/supervisor's role and the work they intend to undertake, or have undertaken, in accordance with the key issues.
- 5.2.3. The office holder should provide an indication of the likely return to creditors when seeking approval for the basis of their remuneration.
- 5.2.4. When approval for a set fee or a percentage basis is sought, the nominee/supervisor/proposed supervisor should explain why the basis requested is expected to produce a fair and reasonable reflection of the work that they anticipate will be undertaken. Where a set amount or a percentage basis is being used, an explanation should be provided of the direct costs included. The nominee/supervisor should not seek to separately recover sums already included in a set amount or percentage basis fee and should be transparent in presenting any information.

6. Expenses

- 6.1. The proposal should include full disclosure of all expenses anticipated to be incurred during the CVA.
- 6.2. Expenses are any payments from the estate that are neither the nominee/supervisor's remuneration nor a distribution to a creditor or a member. Expenses also includes disbursements. Disbursements are payments which are first met by the nominee/supervisor, and then reimbursed to the nominee/supervisor from the estate.
- 6.3. Expenses are divided into those that do not need advance approval before they are charged to the estate (category 1) and those that do (category 2).
- Category 1 expenses are payments to persons providing the service to which the expense relates who are not an associate of the nominee/supervisor. Category 1 expenses can be paid without prior approval.
 - Category 2 expenses are payments to associates. or which have an element of shared costs. Before being paid, category 2 expenses require approval in the same manner as the nominee/supervisor's remuneration. Category 2 expenses require approval whether paid directly from the estate or as a disbursement.

When seeking approval of category 2 expenses, the nominee/supervisor should explain for each expense the basis on which the expense is being charged to the estate.

- 6.4. Any shared or allocated payments incurred by the nominee/supervisor or the nominee/supervisor's firm are to be treated as category 2 expenses and approval sought before payment. This is irrespective of whether the payment is being made to an associate because the nominee/supervisor will be deciding how the expenses are being shared or allocated between insolvency appointments. Requiring approval of these payments enables those who are approving the expenses to confirm that the approach being taken by the nominee/supervisor is reasonable.
- 6.5. If the nominee/supervisor has obtained approval for the basis of category 2 expenses, that basis may continue to be used in a sequential appointment where further approval of the basis of remuneration is not required, or where the nominee/supervisor is replaced.
- 6.6. The following are not permissible as either remuneration or an expense:
- an expense or any other charge calculated as a percentage of remuneration;
 - an administration fee or charge additional to the nominee/supervisor's remuneration;
 - the recovery of any overheads other than those absorbed in the charge out rates.

7. Progress reports and the provision of additional information

- 7.1. Following approval of the CVA, the supervisor should ensure that full disclosure is made, in reports to creditors, of the costs of the CVA and of any other sources of income of the supervisor, associates of the supervisor or their firm, in relation to the case. The supervisor should specify the amount of the remuneration that has been drawn, in accordance with the terms of the proposal. Any disclosure by the supervisor of payments, remuneration and expenses should be of assistance to those who have a financial interest in the level of payments in understanding what was done, why it was done and how much it cost. Reports should provide figures both for the period under review and on a cumulative basis and include a narrative update to support the numerical information supplied.
- 7.2. If the costs of the CVA have increased beyond previously reported estimates, the increase should be reported at the next available opportunity and an explanation of the increase provided.
- 7.3. The supervisor should also provide such additional information as may be required in accordance with paragraph 5.2. Requests for additional information should be treated in a fair and reasonable way and the provision of information should be proportionate to the circumstances of the case.
- 7.4. Where the basis of the remuneration of the nominee or supervisor has been fixed on the basis of time spent, the nominee or supervisor is required to provide certain information about the time spent on the case, free of charge, upon request by specified persons. The persons entitled to ask for this information are:
- any director of the company; and
 - where the proposal has been approved, any creditor or member.
- 7.5. The information that must be provided is –
- the total number of hours spent on the case by the nominee or supervisor, and any staff;
 - for each grade of staff engaged on the matter, the average hourly rate at which work carried out by staff in that grade is charged; and
 - the number of hours spent on the matter by each grade of staff during that period.
- 7.6. The period for which the information must be provided is the period from appointment to the end of the most recent period of six months reckoned from the date of the nominee's or supervisor's appointment.
- 7.7. Where the office holder has ceased to act as nominee or supervisor, information must be provided from the date of appointment to the date that of ceasing to act.

- 7.8. The information must be provided within 28 days of receipt of the request by the nominee or supervisor, and requests must be made within two years from the nominee or supervisor ceasing to act.

Whilst every care has been taken in its preparation, this guide is intended for general guidance only, and does not constitute legal advice.