SAICA
THE SOUTH AFRICAN INSTITUTE OF CHARTERED ACCOUNTANTS
develop.influence.lead.

Ref#580168

05 October 2016

Independent Regulatory Board for Auditors (IRBA)

Email: standards@irba.co.za

Dear Sir

SAICA SUBMISSION ON THE IRBA'S PROPOSED GUIDE FOR REGISTERED AUDITORS: CONSIDERATIONS FOR AN AUDITOR OR A REVIEWER OF A COMPANY WHICH IS FACTUALLY INSOLVENT

In response to your request for comments on the **Proposed Guide for Registered Auditors: Considerations for an Auditor or a Reviewer of a Company which is Factually Insolvent,** please find comments prepared by The South African Institute of Chartered Accountants (SAICA).

We thank you for the opportunity to provide comments on this document.

Please do not hesitate to contact us should you wish to discuss any of our comments.

Yours sincerely,

Hayley Barker Hoogwerf
Project Director – Assurance

INTRODUCTION

1. The Independent Regulatory Board for Auditors (IRBA) has recognised the need to create a framework and principles that are in-line with the objective of the protection of the financial interest of the public who place reliance on services provided by registered auditors.
2. With the current uncertainty surrounding the obligations of a registered auditor when engaged with a company that is factually insolvent, we welcome and support the initiative and efforts of IRBA to provide clarity and guidance on this.
3. Clarity and guidance on the obligations of a registered auditor when engaged with a company that is factually insolvent will ultimately lead to aligning the actions of auditors and independent reviewers, as applicable, with the purpose of the legislation being the protection of the financial interests of shareholders and creditors (and other affected stakeholders).

SAICA'S APPROACH TO RESPOND

4. A Task Group of SAICA's Assurance Guidance Committee as well as the Legal Compliance Committee met to provide their views and comments in finalising the SAICA comment letter.

THE SAICA COMMENT LETTER IS ORGANISED INTO TWO SECTIONS, AS FOLLOWS:

Section 1: Response to Request for Specific Comments; and
Section 2: Response to Request for General Comments.

SECTION 1: RESPONSE TO REQUEST FOR SPECIFIC COMMENTS

Question 1
With respect to paragraphs 48 to 50 of this proposed Guide, respondents are asked to consider the implications of the interpretation of "financially distressed" as defined in Section 128(1) (f) of the Act. Respondents are asked to share the basis of their views.

5. In our response, I refer to Section 13.3 of the Exposure Draft 369: Draft SAICA Companies Act Guide, as set out below:

1. Interpretation of Section 128(1)(f)(ii)

6. The first part of the definition seems clear in that it deals with commercial insolvency[1].

7. The second part of the financial distress definition refers to a company becoming insolvent within the immediate ensuing six months and the question that arises here is whether "insolvent" refers to factual (technical) insolvency or commercial insolvency. There are conflicting views. Some argue that because part (i) clearly deals with commercial insolvency, part (ii) must deal with factual insolvency. In terms of this approach, a company is regarded as technically insolvent (and thus financially distressed) if the liabilities of the company exceed the assets. This approach does not take into account subordination agreements or any other management action. On the other hand, others believe that one must consider the definition in conjunction with the definition of business rescue and the objectives of the Act that pertain to business rescue[2].

8. Section 5(1) of the Act requires that the Act must be interpreted and applied in a manner that gives effect to the purposes set out in Section 7. As such, when interpreting these particular provisions one needs to consider the **purpose of the Act** in this regard, which is to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders. In turn, "rescuing the company" means achieving the goals set out in the definition of "business rescue". Business rescue is defined in S128(1)(b) as "*proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for:*
    a. *the temporary supervision of the company, and of the management of its affairs, business and property;*
    b. *a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and*
    c. *the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.*"[3]

9. It should be clear from the above that business rescue is meant to be employed only where a company requires "rehabilitation" and where there is a need to "rescue" the company. If the

[1] Section 13.3.2 of Exposure Draft 369: Draft SAICA Companies Act Guide
[2] Section 13.3.3 of Exposure Draft 369: Draft SAICA Companies Act Guide
[3] Section 13.3.4 of Exposure Draft 369: Draft SAICA Companies Act Guide

purpose of the Act and the purpose of business rescue are considered, it seems unlikely that a company that is factually insolvent, but still able to service its debt, can be regarded as "failing" or financially distressed[4].

10. If this approach is accepted, part (ii) of the financial distress test should consider the **complete financial position of the company** rather than merely pure technical insolvency. In order to adhere to the purpose of the Act, and in light of the definition of business rescue, one must consider the complete financial position of the company when determining whether there is a "reasonable" likelihood that the company will be insolvent within six months. In terms of this approach, a company will only be regarded as in "financial distress" where it is insolvent even after all other circumstances have been considered, including considering alternative fair values of the assets and liabilities; factoring in reasonably foreseeable assets and liabilities, as per the solvency and liquidity test in Section 4; and considering any other proposed measures taken by management such as subordination agreements, recapitalisation or letters of support. This approach was confirmed in a recent Supreme Court decision in the United Kingdom (see BNY Corporate Trustee Services Ltd v Eurosail [2013] UKSC 28) where the court found that the "balance sheet" test for insolvency must take account of the **wider commercial context**, and that courts **must look beyond the assets and liabilities** used to prepare a company's statutory accounts when deciding whether or not a company is "balance sheet" insolvent[5].

11. The proposed Guide for Registered Auditors: Considerations for an Auditor or a Reviewer of a Company which is Factually Insolvent (proposed Guide) does not clearly set out the challenge with the interpretation of the meaning of the second part of the definition of financially distressed as set out in Section 128(1)(f)(ii) of the Act (the Act), as indicated above.

CHANGE proposed:

12. It is suggested that the proposed Guide expand on the challenge with the interpretation of the meaning of the second part of the definition of financially distressed as set out in Section 128(1)(f)(ii) of the Act to provide a practitioner[6] with background to the necessity for such a guide.

2. Assessment of financially distressed

13. In applying Section 5(1) of the Act the interpretation as set out in the proposed Guide, in our view does not achieve the purpose of Section 128 of the Act, being the protection of the financial interests of the creditors.

14. By employing the narrower definition of "financial distress" (i.e. using the factual insolvency test, which excludes subordination agreements and other management actions), **one arrives at an answer that may not serve the best interests of affected parties** (shareholders, creditors and employees). There is very little point in writing to affected parties, informing them that the company is financially distressed when it is in fact perfectly able to continue to do business. Furthermore, start-up companies are generally factually insolvent in the first few years of trading and applying the narrower definition would impair their continued existence. This **approach does not support the purpose of the Act**, which also **purports to promote**

[4] Section 13.3.5 of Exposure Draft 369: Draft SAICA Companies Act Guide
[5] Section 13.3.6 of Exposure Draft 369: Draft SAICA Companies Act Guide
[6] Practitioner refers to a Registered Auditor applicable in the case of a statutory audit as well as an independent reviewer appointed in accordance with Regulation 29 of the Companies Regulations, 2011.

the economic development of South Africa, entrepreneurship, investment and innovation, and may have a detrimental effect on both the company and its stakeholders[7].

CHANGE proposed:

15. In order to prevent imposing a requirement for reporting that may not be aligned with the purpose of the Act, we would suggest that the proposed Guide rather adopt the view that the factual insolvency of a company be an indication of possible financial distress (i.e. a "red flag"), which is then considered in a wider commercial context, looking beyond a mere review of the statement of financial position of a company. The practitioner should obviously not disregard the statement of financial position prepared in accordance with IFRS[8], but we suggest that it be clarified that this should be *one* of the indicators of potential financial distress that practitioners consider in the context of the purpose of the section of the Act being the protection of creditors.

3. Nature of subordinated liabilities

16. Paragraph 88 of the proposed Guide states that a subordination agreement does not change the factual insolvency position, and the subordinated liabilities remain liabilities. While this statement is true from a financial reporting point of view, it has been brought to our attention that this may not necessarily be the case from a legal point of view.

17. In legal terms, a subordination agreement changes the nature of the liability in that the creditor no longer has an enforceable claim. Furthermore, with the inclusion of the following clause in the subordination agreement, the legal enforceability of the subordinated liability is affected and in essence, that liability ceases to exist until such time as the assets of the company again exceed the liabilities:

> *This agreement shall remain in force and effect for so long as the liabilities of Y exceed its assets, fairly stated.*

18. If the purpose of Section 128 of the Act is to assess the potential financial loss to third parties, while the subordination agreement is in effect, the liability ceases to exist and therefore does affect the consideration of the company's solvency position as contemplated in section 128(1)(f)(ii). In the event of liquidation and a list of assets and liabilities is prepared for legal proceedings, this would not be included. The subordinated liability will only become enforceable again when the factual solvency of the company is restored. Furthermore, a tricky situation arises in that Section 4(1)(a) of the Act allows liabilities to be valued at fair value. The fair value of a subordinated loan may therefore well be nil.

19. With the above view, if the directors are able to ensure the continued solvency of the company by obtaining a subordination agreement and based on the considerations of the commercial solvency (section 128(1)(f)(i)); it may be concluded that there is no financial distress; no unlawful act has been committed and hence the reporting of a reportable irregularity would not be required.

CHANGE proposed:

20. It is suggested that the proposed Guide be clarified to indicate that a subordination agreement does not result in the derecognition of the liability from the statement of financial position prepared in accordance with IFRS. However, from a legal point of view, in the event

[7] Section 13.3.7 of Exposure Draft 369: Draft SAICA Companies Act Guide
[8] IFRS refers to International Financial Reporting Standards, as well as International Financial Reporting Standards for SMEs, as may be applicable

of liquidation, the liabilities will still exceed the assets in which case, the subordinated liabilities will not be legally enforceable. As such, any subordinated claims are not included in the list of assets and liabilities in the event of liquidation.

21. To this end, it is suggested that it be clarified that the practitioner needs to be certain that the subordination agreement is legally binding and has substance. With regards to subordination agreements, practitioners should be alerted to the requirements of Section 45 of the Act where, in a group situation, the subordination agreement may be financial assistance subject to the requirements of the so mentioned section.

4. Further Considerations in terms of a Subordination Agreement

22. Although the scope of the proposed Guide is not to deal with commercial insolvency, due to the fact that the definition of financial distress talks about it being reasonably likely within the next 6 months, forward looking considerations are of relevance. An issue could arise with a subordination agreement if there is no room for the loss to grow or for the company to incur further liabilities within the next 6 months; i.e. the quantum of the subordinated liability is only sufficient to make the assets equal the liabilities at a particular point in time. To this end, the practitioner would also need to consider the effective date of the subordination agreement. An agreement that is not valid for the period of consideration would also cast doubt on the situation.

23. The proposed Guide is not clear that the directors should obtain a subordination agreement that does not have the possibility of being traded out of within 6 months because this does not solve the problem.

CHANGE proposed:

24. It is suggested that the proposed Guide be expanded to provide clarity that the directors should obtain a subordination agreement that does not have the possibility of being traded out of within 6 months because this does not solve the problem. The particular subordination agreement and its effectiveness should be evaluated in the context of the company's overall/complete solvency position for the period under consideration.

Question 2
With respect to paragraph 56 of this proposed Guide, respondents are asked whether they agree with the interpretation of Regulation 29(1)(b). Respondents are asked to share the basis of their view.

1. Purpose of approach test

25. The Companies Regulations, 2011 (the Regulations) do not infer factual insolvency, as Section 128 of the Act does and therefore it neither indicates that this is or is not factual insolvency. However, with the purpose of approach test as contained in Section 5(1) of the Act the mere fact that the liabilities exceed the assets is not in itself an indication of the directors acting recklessly. The question that comes to mind is whether the directors and the company are acting/performing so poorly that the intervention of a third party is required. Furthermore, the reporting of a reportable irregularity is considered to be an extreme event that happens in extreme circumstances and as such, the question really should be how big the harm is that this company is really causing? With the purpose of approach in mind, a company is more likely to cause harm when they are commercially insolvent and run out of cash to settle existing liabilities and continue to trade rather than when the liabilities exceed the assets, based on an IFRS statement of financial position.

CHANGE proposed:

26. If we are to assume only one form of insolvency, it is our view that the purpose of this section of the Regulations, being the protection of the creditors would more effectively be achieved if the requirement to report is only triggered when the company is **actually** distressed with the **real** possibility of causing financial loss to third parties and not based on the mere fact that the liabilities exceed the assets, based on an IFRS statement of financial position. The concern with the suggested approach is that it may lead to meaningless communications in the context of the overall purpose of the Act and the Regulations, and therefore the intention of Section 128 of the Act and Regulation 29 of the Regulations may lose their power.

2. Link between Section 128 of the Act and trading under factual insolvent circumstances in Regulation 29 of the Regulations

27. There is nothing in the Regulations that links *trading under factual insolvent circumstances* to Section 128, *financial distress* of the Act.

28. Section 128(1)(f) of the Act defines *financially distressed* in relating to a company as meaning that:

> *'(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or*
> *(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months …'*

29. Part one of the definition talks about commercial insolvency[9]. The second part of the financial distress definition refers to a company becoming insolvent with the immediate ensuing six months and the question that arises here is whether "insolvent" refers to factual (technical) insolvency or commercial insolvency. There are conflicting views. Some argue that because part (i) clearly deals with commercial insolvency, part (ii) must deal with factual insolvency. In terms of this approach, a company is regarded as technically insolvent (and thus financially distressed) if the liabilities of the company exceed the assets[10].

30. Regulation 29 merely states *'trading under insolvent circumstances'* which may be interpreted to mean commercial insolvency and since there is no reference in the Regulations to Section 128 of the Act, it cannot be assumed to include factual insolvency as inferred by Section 128(1)(f)(ii) of the Act. Since the Regulations have no reference to Section 128 of the Act, careful consideration should be made as to whether there is a valid legal argument for the conclusion reached.

CHANGE proposed:

31. Since there is nothing in the Regulations that links "insolvent circumstances" in Regulation 29 to Section 128 of the Act, it is suggested that these matters (i.e. trading under insolvent circumstances versus financial distress) be considered separately. If one is to conclude that section 128(1)(f)(ii) refers to factual insolvency it cannot be assumed that this will necessarily satisfy Regulation 29(1)(b)(iii), in terms of trading under insolvent circumstances. It would therefore not be unreasonable to have a different conclusion on whether the company is financially distressed versus trading under insolvent circumstances.

32. It is further suggested that the proposed Guide clearly distinguish the requirements relating to the Regulations and those relating to the APA as have been done from paragraphs 121 to

[9] Section 13.3.2 of Exposure Draft 369: Draft SAICA Companies Act Guide
[10] Section 13.3.3 of Exposure Draft 369: Draft SAICA Companies Act Guide

123. This will enable a practitioner to focus on the information that is of relevance to the particular engagement and avoid misinterpretation and mixing up of the pertinent application material.

Question 3
Do respondents agree with the identifications, descriptions of and distinctions between the various types of common responses to factual insolvency dealt with in this proposed Guide, being the letters of support, letters of comfort, guarantees and subordinations?

1. Responses to factual insolvency by companies and auditor considerations thereof

33. The proposed Guide includes possible responses to factual insolvency starting with subordination agreements in paragraph 83 continuing onto other responses to factual insolvency which concludes in paragraph 120. A question was raised regarding the order in which the responses have been included. In the event of a company implementing one of the four suggestions included in paragraph 120, this may negate the need for any other response to factual insolvency, as included in paragraph 83 to 119.

34. Furthermore, it was not clear whether some of the responses suggested in the proposed Guide are relevant in responding to factual insolvency or whether they are not actually proposed actions that management can implement in mitigating the risk of contravening Section 22 of the Act and being found guilty of reckless trading.

35. Lastly, there was a concern raised that the terminology used in the proposed Guide in referring to the responses to factual insolvency by companies may create confusion because in practice, different names may be used in referring to these responses.

CHANGE proposed:

36. It is suggested that the order of responses included in this section be restructured so that paragraph 120 appears as the first and potential initial responses by management, with the responses included in paragraph 83 to 119 being the actions available thereafter. If this suggestion is adopted, the wording contained in paragraph 120 would need to be amended to indicate that these are the *initial* responses as opposed to *other* responses to factual insolvency.

37. It is further suggested that the proposed Guide distinguishes between responses to factual insolvency and actions that management can take to mitigate the risk of reckless trading, or at least indicate when actions concerned may serve a dual purpose.

38. Lastly, it is suggested that an explanatory sentence be included stating that the names given to the listed responses may differ in practice and that these are included merely in the context of the proposed Guide and does not necessarily make reference to any legal meaning that may be attached to these.

2. Paragraph 120 of the proposed Guide

39. This paragraph concludes with the sentence ‘up to the date of issue of the financial statements, and the date of the audit report’.

40. The auditor’s report is issued before management issues the financial statements. Furthermore, this only makes reference to the auditor’s report and the question arises as to

whether this obligation is only applicable to a registered auditor in conducting an audit of financial statements.

41. The sentence concerned appears to be lost in the paragraph.

CHANGE proposed:

42. It is suggested that this sentence rather be included in the introduction to the section, as follows:

> Other actions and events that can materially affect factual solvency (and commercial solvency), and the ~~auditor's~~ practitioner's consideration up to the date of the auditor's/independent reviewer's report and the date of the issue of the financial statements include:

3. Paragraph 120 of the proposed Guide and the link with ISA 560, Subsequent Events and ISA 570, Going Concern

43. This paragraph concludes with the sentence 'up to the date of issue of the financial statements, and the date of the audit report'.

44. ISA 560, Subsequent Events indicates that the auditor has no obligation to perform any audit procedures regarding the financial statements after the date of the auditor's report but if the auditor becomes aware of facts before the date the financial statements are issued, the auditor is required to consider the impact thereof on the auditor's report and act as considered necessary[11].

45. ISA 570, Going Concern states that the auditor shall remain alert throughout the audit for audit evidence of events or conditions that may cast significant doubt on the entity's ability to continue as a going concern[12]. This implies that once the auditor has issued the auditor's report, the audit has effectively concluded and there is no further obligation on the auditor to consider events or conditions that follow.

46. ISRS 2400 (Revised), Engagements to Review Historical Financial Statements states that the practitioner has no obligation to perform any procedures regarding the financial statements after the date of the practitioner's report[13]

47. The proposed Guide makes mention of the auditor's considerations up to the date of the issue of the financial statements but it is not clear on the obligations of the practitioner during the relevant periods. This is also not aligned to the requirements of ISA 560, Subsequent Events, ISA 570, Going Concern and ISRS 2400 (Revised), Engagements to Review Historical Financial Statements as indicated above.

CHANGE proposed:

48. It is suggested that the proposed Guide expand on what is expected of the practitioner up to the date of signing the auditor's/independent reviewer's report, after the date of the auditor's/independent reviewer's report but before the financial statements are issued and after the financial statements are issued. It is suggested that these requirements are aligned

[11] ISA 560.10
[12] ISA 570.11
[13] ISRS2400(Revised).59

with, or linked to ISA 560, Subsequent events, ISA 570, Going Concern and ISRS 2400 (Revised), Engagements to Review Historical Financial Statements.

4. Paragraph 120 of the proposed Guide and the obligation to report a Reportable Irregularity

49. This paragraph concludes with the sentence 'up to the date of issue of the financial statements, and the date of the audit report'.

50. A concern was raised that, in the context of the proposed Guide, practitioners may interpret this statement as being applicable in their considerations of whether a reportable irregularity is required to be reported. If the practitioner concludes that, at the reporting date a reportable irregularity has taken place but subsequent to year end, this has been remedied by management through the implementation of one of the suggested responses included in paragraph 120, this may suggest that the reporting of the reportable irregularity is no longer required.

51. An individual registered auditor is required to report a reportable irregularity that **has taken place** or is taking place[14] and in the second report, include a statement that the suspected reportable irregularity is no longer taking place[15] which indicates that the practitioner's obligation to consider a reportable irregularity and, if applicable comply with the relevant reporting requirements is not extinguished if management have subsequently rectified the situation that gave rise to the reportable irregularity. This is further clarified in example two contained in Appendix 7 of the Revised Guide for Registered Auditors: Reportable Irregularities in Terms of the Auditing Profession Act where it states that the fact that the company had already corrected the error does not remove the obligation on the auditor to consider whether, based on the specific circumstances, a reportable irregularity exists.

CHANGE proposed:

52. It is suggested that the proposed Guide should expand on paragraph 120 by explaining what these proposed responses actually impact on, because as indicated above, it cannot be the remedy of a reportable irregularity that existed at year end and that resulted from the company trading whilst factually insolvent (as has been discussed elsewhere in the proposed Guide).

Question 4
This proposed Guide contains an illustrative subordination agreement in Appendix 3. Respondents are asked to comment on whether or not an illustrative subordination agreement should be included in this proposed Guide.

53. With the inclusion of templates in the proposed Guide, there is a danger that the practitioner is seen as providing the client with legal advice and therefore there is a reluctance to include such templates but, on the other hand there is also a danger when there is no available guidance.

54. Since the remedy for factually insolvency, from a legal point of view, is entering into a subordination agreement, the subordination agreement is seen as a minimum requirement and as such we are of the view that an illustrative subordination agreement should be included in the proposed Guide.

[14] Section 45(1)(a) of the APA
[15] Section 45(3)(c)(i)(bb) of the APA

55. However, during our deliberations some concerns were raised with respect to the inclusion of the illustrative reports contained in Appendix 2, *Illustrative communication in terms of section 45 of the Auditing Profession Act.* Templates are available in the Revised Guide for Registered Auditors: Reportable Irregularities in terms of the Auditing Profession Act and the inclusion of these in a second guide could prove an administration burden in ensuring that the two sets of templates are consistent at all times.

    CHANGE proposed:

56. It is suggested that Appendix 2 be removed.

Question 5
Do respondents believe that this proposed Guide should include an illustrative letter of guarantee or letter of support, particularly taking into account the many variations thereof in practice?

57. Since the remedy for factually insolvency from a legal point of view is entering into a subordination agreement, the subordination agreement is seen as a minimum requirement and as such we are of the view that an illustrative subordination agreement should be included in the proposed Guide. We do not believe that there is a need to include other illustrative letters or documents.

SECTION 2: RESPONSE TO REQUEST FOR GENERAL COMMENTS

1. Timeframe Applicable to the Practitioner's Obligation

58. The timeframe applicable to the practitioner's obligation to consider whether there is a potential reportable irregularity in the instance of a company trading whilst factually insolvent is not specifically addressed and could raise some uncertainties.

59. In terms of IFRS and ISA requirements, this consideration is only performed at reporting date, whether this be an interim period/year end reporting, however this is an on-going responsibility in terms of the Act, APA and the Regulations. It could appear that the proposed Guide is written on the premise that the practitioner's responsibility is only triggered when they are presented with numbers and commence the audit process, whether this is an interim period/year end reporting.

60. Based on the requirements contained in the definition of a reportable irregularity included in the APA and the Regulations, the obligation is on the individual registered auditor /independent reviewer and it can therefore be deduced that the obligation to report a reportable irregularity commences as soon as the individual is appointed as either the individual registered auditor/independent reviewer. Does this then mean that there is an obligation on the individual registered auditor/independent reviewer to consider whether there is a potential reportable irregularity in the instance of a company trading whilst factually insolvent based **solely** on the statement of financial position prepared at the end of the reporting period or is there an obligation for the individual registered auditor/independent reviewer to consider this throughout the period of trading. If the obligation to report is only triggered based on the statement of financial position prepared at the end of the reporting period, what are the registered auditor/independent reviewer's obligations in an instance where the company traded while factually insolvent during the period under review but is not necessarily factually insolvent at the end of the reporting period.

CHANGE proposed:

61. It is suggested that the proposed Guide should elaborate on the timeframe applicable to the practitioner's obligation with respect to the requirements of Section 45 of the APA as well as Regulation 29 of the Regulations; providing guidance on whether this obligation only relates to a company that is factually insolvent based on the statement of financial position prepared at the reporting date or whether there is an obligation on the practitioner to extend his consideration to the entire period under review.

2. Meaning of *Trading*

62. Some concerns were raised that the proposed Guide does not contain guidance on the meaning of *trading.*

CHANGE proposed:

63. It is suggested that the proposed Guide expand on the meaning of *trading.* It is further suggested that examples of situations that may arise be included, such as if you are a dormant company only receiving/incurring passive income/expenses, is this considered to be trading.

3. Other suggestions noted

64. The value of the proposed Guide will be enhanced by the inclusion of a definitions section that addresses key terms used throughout the proposed Guide.

65. With reference to paragraph 33 of the proposed Guide, there was a request to consider whether the last sentence that refers to footnote 12 could not be clarified further, since practitioners may have difficulty in comprehending its meaning without referring to the actual case law.

66. With reference to paragraphs 29 to 44 of the proposed Guide, there was a suggestion that the section on case law rather be split out and not included in a section on its own and placed within the other sections of the guide to which it is relevant. For example, include all case law referred to here on reckless trading into the section of the proposed Guide where one goes into the legislation on reckless trading. This could add more value in that it is read in conjunction with the relevant section of the legislation. This will further substantiate/corroborate the guidance included.

67. With reference to paragraphs 27-28, and 45-81 of the proposed Guide, the readability of the guide could be enhanced, by including an introductory paragraph after paragraph 28 to introduce the separate sections of the Act, the Regulations and the APA which are specifically addressed in this guide.

68. Paragraph 68 includes a measurement of the act of reckless trading against the requirements contained in the definition of a reportable irregularity. It is proposed that paragraph 68.2 be split so that the last section of the sentence that addresses material breach of management's fiduciary duty be moved to 68.3. Then, 68.1, 68.2 and 68.3 will cover all three of the elements of a reportable irregularity. The current 68.3 can be deleted, since it is not required.

69. Paragraph 116 of the proposed Guide states that a commitment to provide financial support has **no** effect on factual insolvency. In the context, comprehension of this statement would be enhanced by providing some expanded guidance to clarify the effect of letters of support on the consideration of a company's solvency position, similar to how the proposed Guide addresses this principle in relation to subordination agreements.