

# Pre-Packs - The latest attempt at transparency

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## Pre-Packs

Often seen as controversial by the press but essential by restructuring professionals, pre-packs are the arrangement whereby a sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator and the sale is effected immediately on appointment. Pre-packs can be an effective means of rescuing businesses and preserving jobs, yet the practice has been controversial due to concerns about the sale of businesses to connected persons, the lack of transparency and the possible prejudice to unsecured creditors who learn about the sale after the event.

## Graham Review

In response to these concerns, Statement of Insolvency Practice 16 (SIP 16) was introduced in January 2009 (revised in November 2013) to create greater transparency over the pre-pack process by requiring administrators to disclose information to creditors as soon as possible after completion of a pre-pack sale.

In July 2013, the government went further and appointed Teresa Graham, a senior accountant, to oversee an independent review to assess the long-term impact of pre-pack deals on the economy, whether they are beneficial to creditors, and the usefulness of the procedure when rescuing businesses. Her report 'Graham Review into Pre-Pack Administration' was published in July 2014. The report identified that 2365 businesses in the UK entered administration in 2013 and that approximately 600 resulted in a pre-pack sale. It concluded that pre-pack sales bring benefits to the insolvency framework, that reform of the process is worthwhile, but there should be some major improvements to how they are administered, particularly where pre-packs involve connected parties.

The Graham Report recommended the creation of a Pre-Pack Pool to review pre-pack deals before they go ahead; the creation of a "viability review" to reduce the likelihood that unviable businesses will not be allowed back into the market only to fail again; and improved marketing of the pre-pack sale where possible. Better and more stringent guidance on the pre-pack process were recommended to follow in a revised SIP 16.

## Graham Review Implementation

The revised SIP 16 applies to appointments made on or after 1 November 2015. Its aim is to introduce increased transparency and, in turn, increased confidence in the pre-pack process.

The Pre-Pack Pool application process opened on 2 November 2015. The Pool is an independent body of experienced business people (but with no practising insolvency practitioners) who, having reviewed the application and supporting documentation, will offer their opinion on the reasonableness of the proposed pre-packaged sale of a business and/or its assets by connected parties to a company. Its function is performed by Pre Pack Pool Limited and its operation monitored by a number of interested professional bodies (known as the Oversight Group) through a service agreement.

The application for an opinion is submitted through a website and once completed is allocated to one of the 19 members of the Pre-Pack Pool. A fee of £800 plus VAT is payable and the stated aim is that a response will be given within 2 business days. The Pool member can issue one of three opinions:

- Nothing has been found to suggest that the grounds for the proposed pre-packaged sale are unreasonable;
- The evidence provided has been limited in some areas, but otherwise nothing has been found to suggest that the grounds for the proposed pre-packaged sale are unreasonable; or
- There is a lack of evidence to support a statement that the grounds for the proposed pre-packaged sale are reasonable.

The Pool member will not issue reasons for its decision, the justification being that this would cause delay and increase costs. There is no appeal from the decision and no correspondence will be entered into.

The process is currently voluntary and it will be interesting to see how many applications are made. Anecdotal evidence suggests that as at 10 November 2015 there had been one application, the outcome of which is unknown.

At present, an administrator can choose to accept an offer from a connected party and proceed with a pre-pack sale even if the Pre-Pack Pool decides there is a lack of evidence to support a pre-pack sale, but the administrator will have to give a

clear explanation as to why the sale took place in the SIP 16 statement. There is no ostensible sanction for ignoring the opinion of the Pre-Pack Pool but it is possible that an administrator who serially ignores the opinion of the Pre-Pack Pool, or whose pre-pack purchasers don't seek an opinion, may face closer conduct scrutiny than might otherwise be the case.

## The Future for Pre-Packs

The ability to pre-package a business sale is an essential mechanism for administrators to achieve best value for creditors and to secure continued employment for some, or all, of the workforce and it is hoped that by implementing the Graham Review some of the more controversial aspects of old-style pre-packs will fall away.

There is likely to be ongoing debate about the operation of the Pre-Pack Pool in practice. Whilst the 48 hour turnaround period for an application is acceptable, there are issues such as whether purchasers will require professional assistance when completing the application; whether the pool members will have sufficient expertise and experience to understand complex transactions; whether complex matters can be decided within 48 hours in practice; and whether the application fee and professional costs will deter applications to the Pool. Ultimately, if the Pre-Pack Pool is underutilised, or its opinion frequently ignored, then might its fitness for purposes be called into question?

The Government has reserved some powers in the Small Business, Enterprise and Employment Act 2015 ("SBEEA") to prohibit or restrict pre-pack sales. It is hoped that such prohibitions and restrictions will not become necessary if administrators embrace the guidance in the newly released SIP 16 and the Pre-Pack Pool procedure is properly used on a voluntary basis.

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