SQUIRE PATTON BOGGS

Local Connections. Global Influence.

Managing the Financial Health of Your Business

August 2023

Contents

Key Considerations to Help Manage the Financial Health of Your Business

Managing the financial health of a business to ensure it continues to be viable and successful can be challenging, particularly in today's economic environment.

Not only are businesses facing a barrage of external pressures, such as raw material and energy price inflation and other supply chain issues, but internal stresses, such as wage inflation and skill shortages, make it even more important to focus on managing the financial health of a business.

This quick guide sets out some of the key factors for all businesses to consider that could help alleviate those pressures.

Pressure Points

- High inflation
- Raw materials costs
- Transport/Logistic difficulties
- Energy price hikes
- Supply chain issues
- Wage inflation
- Interest rates rises
- Credit insurance challenges
- Brexit/COVID fallout
- Market uncertainty
- Exchange rate inflation

Cash Flow Support

Existing Facilities, Borrowings and Security

- Will lenders agree to extend current facilities?
- Can you draw down additional funding if there is sufficient headroom?
- Can/Should you refinance?
- Have you considered private equity funding?
- Can shareholders/director provide additional funds?
- Can you get better rates/terms?
- Should you restructure your security arrangements?
- Will your existing lender agree a period of forbearance?
- Will the government's Recovery Loan Scheme provide better terms?
- Are there any other government grants/subsidies?

Working Capital Solutions

- Have you considered using alternative funders?
- Will invoice discounting/factoring provide additional working capital?
- What about asset-based lenders (ABL)?
- ABLs and debt financers can help unlock capital without increasing debt.

There may be scope to obtain additional finance to improve cash flow. Whether you do this by borrowing more from your existing lender or taking out new or additional finance will depend on the financial circumstances of the business. However, you should take care when deciding on the best option to ensure that you comply with your director duties.

Manage Key Stakeholders

Landlords

- Is your rent above market rate?
- Will your landlord agree to reduce rent?
- Can you pay monthly instead of quarterly?
- Do you need the premises?
- Can you negotiate a surrender or exit your lease?
- Are there alternative/cheaper solutions?
- Will your landlord "pain share" to secure your ongoing occupation?

There are a number of ways that a business can restructure lease costs, ideally, by agreeing upon something directly with landlords, but where that is not possible, there are other solutions. See our quick guide.

Suppliers

- Review your supplier contracts.
- Do these contracts allow suppliers to pass on increased costs?
- Are they at a fixed price that is no longer competitive?
- Can you renegotiate the contract to improve price or contractual protections?
- Can you find an alternative supplier if your current supplier(s) are overpriced?
- If the contract is competitive, consider whether you can extend payment terms or agree upon a payment plan.

In addition to making sure your supplier contracts work for your business, have you mapped your supply chain to identify any risks that your supplier may pose to your business?

If not, **see our guide below**.

Creditors

- Can you improve your credit control processes or shorten payment terms?
- If your creditors are placing pressure on the business, can you
- Agree to a repayment plan?
- Offer security or guarantees for payment?

Debtors

- Review contracts: Are payment/other terms being observed?
- Consider credit insurance.
- Consider offering prompt payment discounts.
- Maintain tight control to avoid bad debts.

Support With Tax

Time to pay (TTP)

- HM Revenues and Customs (HMRC) can agree to TTP accrued tax debts in instalments, typically over a three- to12-month period.
- There is a dedicated support line (0800 0159 559).

HMRC will support viable businesses. For further details about how to manage that conversation.

See our guide below.

Review Key Contracts

- Review existing contracts.
- Identify where costs can be reduced or where the business would benefit from additional protections.
- Can contracts be renegotiated?
- Can payment terms be improved?
- Can you pass on increased costs to your customers?

Operational Costs

- Consider where you can reduce costs in the business.
- Identify high-cost areas: Are there alternative sources?
- Can employee numbers be reduced?
  - If so, ensure appropriate redundancy processes are followed.
- Manage key contracts and stakeholders (see above).
- Can unviable/loss making parts of the business be sold or closed?

Planning and Protection

- Prepare regular cash flow forecasts and review them.
- Prepare for the worst, plan for the best.
- Avoid staying static, be flexible and look for opportunity.
- Have an appetite for change.
- Minute key decisions and the reasons for those.
- Put in place a good support network

What are the Common Signs of Business Stress/Distress?

What is Stress?

Internal or external factors which put pressure on a business and/or mean that it isn't performing or operating as well as it should be

What is Distress?

Internal or external factors that mean the viability of some or all of the business is threatened

A failure to recognise and address stress in a business may lead to distress.

A failure to recognise and manage distress will more often than not result in either business failure or serious value dilution for key stakeholders.

Timely identification and management of stress and distress will usually save money, jobs and, ultimately, businesses.

We have set out in this guide some key signs of stress or distress to look out for.

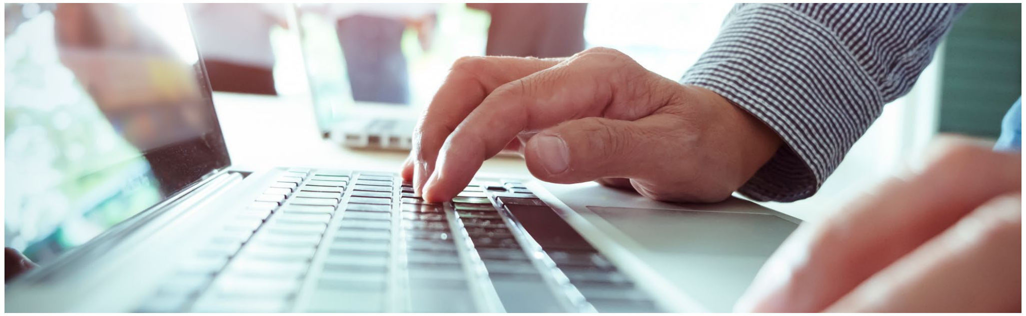
	Signs of Stress	Signs of Distress
Customer, Supplier and Creditor Relations	• Margins on supply contracts becoming tighter • Supplier tightening payment/protection terms (such as retention of title (ROT)) • Credit insurance is difficult to find, or it is becoming more difficult or expensive to increase cover • Key suppliers falling behind with deliveries, or decreases in quality of goods, will impact the performance of the business • Disputes with landlords, suppliers or creditors • Customers seeking greater visibility of financial performance before placing an order • Supply chain disruption creating pressure on funding and performance • Overreliance on individual projects, customers, suppliers or contracts • Unplanned-for increase in stock levels • Demand for goods and/or services slowing within the market generally	• Loss of key supplier or customer • Receiving letters of demand, court proceedings, unpaid judgments, statutory demands and/or winding up petitions • Suppliers put the business "on stop" • Credit insurers withdraw cover • Customers are demanding performance bonds • Contracts are being placed elsewhere
Corporate Activity	• Plans for acquisitions are delayed or shelved due to uncertainty • Disposals are taking longer than anticipated • Rebranding or expansion into different sectors may cause margins to be stretched too thinly • Refinancing terms are more expensive than expected	• Financing has failed or is significantly delayed • New borrowings are unavailable • Disposals of parts of the business or assets are contemplated to free up cash or eliminate losses
Management	• Growth is still pursued, but there is recognition of the need to self-fund. • There is a difficulty in attracting new senior management	• Sudden focus on cash and cost rather than growth • Looking to borrow additional funds to plug cash flow gaps • Significant and quick changes in senior management and/or at board level • Loss of key employees • Numerous or irresolvable disputes at board level

Performance	• Borrowing margins are becoming tighter and headroom in facilities is squeezed • HMRC debt is increasing • Profitability, within the business or specific departments, has fallen or has not grown in line with forecasts • Top line growth, which was previously consistent, has plateaued • A material increase in borrowing is forecast • Emergence of a strong competitor • Market conditions are worsening • There are sector-specific challenges in the market the business operates in • Exchange rate inflation • Raw material and/or production cost inflation • Inability to pass on increasing costs to customers • Increasing overhead costs without a corresponding increase in revenue • Business model challenged by technological advances	• Borrowing facilities have been (or are expected to be) exceeded • Cash flow has become tight • Credit terms exceeded • Taking longer than usual to pay suppliers • Business is (or is expected to be) in breach of loan covenants • HMRC Time to Pay arrangements have been utilised • Revenue is falling, even though there is growth elsewhere within the market or sector • Earnings before interest, tax and amortisation (EBITA) is insufficient to fund interest, investment or financial commitments • There are acute supply chain problems, e.g. key supplier failure • Significant hikes in prices, e.g. raw materials or energy, that aren't hedged or otherwise budgeted for • Subsidiary company significantly underperforming or loss-making
Lender Attitude	• Lenders are requiring a greater level of information • Agreed lender forbearance due to end • Existing lenders signal an unwillingness to increase their exposure • Lenders appoint specialists to oversee credit issues alongside relationship bankers • Higher interest payments	• Lenders are requesting the appointment of reporting accountants, or reporting accountants are appointed • Existing lenders are restricting the use or availability of funds, or refusing to advance further monies • Management of the company's accounts has been transferred to a specialist unit within the lender • Loans are being marketed to or have transferred to alternative capital providers • New borrowings are unavailable
Communications	• Profit warnings • Accounting reference date is changed • Management are downplaying growth expectations • Customer/end-user complaints or disputes	• Two or more profit warnings • Delays to announcements in relation to results • Delays in filing accounts • Significant uptick in adverse social media reports
Other Issues	• Staff shortages • Lack of investment in new technologies • Doubts over the efficacy of accounting policies	• There is an accounting "black hole" • Fraud • There is a large pension deficit • Creditor demands for payment

What are Your Directors' Duties when a Business is in Stress/Distress?

Scope and Purpose of This Note

This note summarises the duties that directors of companies incorporated in England and Wales are subject to.



Directors' Duties

- Directors have statutory duties that they owe to the company. Each director owes these duties individually. In the exercise of those duties, generally and while the company trades solvently, the directors must act in the way they consider in good faith would be most likely to promote the success of the company for the benefit of its members as a whole. Their statutory duties require that directors also take into account wider factors, such as the environment, employees, the standard of their business conduct, business relationships with suppliers and customers, and any other relevant circumstances.
- If the company becomes insolvent, while these statutory duties are still owed legally to the company, they become subject to other interests to which the directors should have regard, such as those of the creditors of the company. However, the interests of the shareholders are still relevant.
- A breach of any of the statutory duties is actionable by the company, and any right of action could be exercised by an appointed insolvency practitioner should the company later enter a formal insolvency process.
- The law makes no distinction between executive and non-executive directors or shadow directors. All members of the board have the same duties to the company. A director must exercise reasonable care, skill and diligence. This means the care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that may be reasonably expected of a person carrying out the functions carried out by a director in relation to the company and the general knowledge, skill and experience of that director.
- While the interests of shareholders remain relevant during any period in which the company is or may be insolvent, the directors should not be influenced by any power any individual shareholder has to remove or replace the directors (or any of them) and must act in what they consider to be in the best interests of the company's creditors as a whole.

Trading Insolvently/Wrongful Trading

- A company is likely to be insolvent if:
  - It cannot meet all its present and due payment obligations (i.e. it is unable to pay its debts when they fall due), in which case it is likely to be insolvent on a cash flow basis.
  - The value of its assets is less than the amount of its liabilities (taking into account its contingent and prospective liabilities), in which circumstances it is likely to be insolvent on a balance sheet basis.
- Directors should be aware that while there is no statutory prohibition against trading while insolvent, there could be some degree of risk of the directors being required to contribute personally to the assets of the company if they continue to do so.
- If the directors continue to trade in circumstances where they knew or ought to have concluded that the company was insolvent, or bordering on insolvency or that there was no reasonable prospect that the company would avoid going into insolvent liquidation or administration, then they may be liable for wrongful trading under section 214 of the Insolvency Act 1986 (IA 1986).
- In such circumstances, the directors could be personally liable for any losses suffered by creditors caused by continued trading unless they take every step possible with a view to minimising those losses that they ought to take.
- The key consideration for directors is, therefore: "Is there a reasonable prospect of avoiding insolvent liquidation or administration?" If there is, the directors will not be liable for "wrongful trading" so long as they hold that belief reasonably, having regard to information available to them and the standards of skill and care expected of them.
- The directors should, among other things, consider whether:
- The company is presently operating within existing facilities while managing the position with creditors generally
  - The company can meet its obligations to repay monies borrowed under one of the government schemes (Coronavirus Business Interruption Loan Scheme, Coronavirus Large Business Interruption Loan Scheme, COVID Commercial Financing Facility or the Bounce Back Loan Scheme).
  - The company should utilise one or more options under the Pay As You Grow Scheme to repay a Bounce Back Loan (if taken)
  - The company is eligible for any financial support being made available by the government
  - The company's financiers have withdrawn any facilities previously made available to it (such as overdraft facilities) or have indicated that they will be unable to provide ongoing support
  - The impact on the company's cash flow will be material if the company has deferred payment
  - The company is able to apply for a "time to pay" (TTP) arrangement with HMRC to spread its current tax liabilities over a period of three to 12 months
  - Its shareholders have been made aware of any additional working capital requirements and have indicated a willingness to extend facilities to the company
  - There is a realistic prospect that the company can be sold as a going concern at a value sufficient to ensure all creditors will be paid in full, with a return to shareholders, and have instructed advisors to market the business
- The directors should be aware that there may be a risk of challenge to their view if any assumptions that they were making relating to these points prove to be materially inaccurate. If the company subsequently enters into an insolvency process, then the period of trading prior to that formal insolvency process will be reviewed by an insolvency practitioner with the benefit of hindsight. To mitigate against this risk, the following matters should be carefully and regularly reviewed during this period of uncertainty to ensure that so far as possible:
  - Any new credit, supplies and services are necessary and bona fide for the purpose of continuing the business
  - Any transactions out of the ordinary course of trade are the subject of particular scrutiny and avoided wherever possible.
  - The company is able to meet payroll for employees.
  - No creditors are specifically preferred (see below) or transactions entered into at an undervalue (see below) unless in good faith and that are critical to ensure the survival of the business and the prospects of achieving a turnaround and/or solvent disposal/restructuring.
  - The directors work to develop expeditiously a credible business plan for the immediate term with as realistic and prudent assumptions as it is possible to make, incorporating reasonably achievable options for a recovery for creditors and (if possible) a return to shareholders.
  - The directors consider what contingency strategies could be put in place to protect the interests of creditors should the new business plan prove unsuccessful (see below).
  - The directors consider the net deficiency position of the company's assets immediately and analyse whether it is believed continued trading will either reduce or increase that deficiency. The directors should keep this under regular review with a comparative analysis of the net deficiency compared against what would be the position if continued trading had not occurred and regularly forecasted for a week in advance. This will provide supporting evidence that losses to the company were constantly under review and corrective action to reduce losses was taken at an early stage. The analysis must show that any continued trading is intended to reduce the net deficiency of the company, but also that it is designed appropriately so as to minimise the risk of loss to individual creditors. This exercise should be further reinforced by circulating the net deficiency analysis to an insolvency practitioner each week for advice in respect of continued trading.
- The board should keep full and accurate minutes of its reviews, decisions (including any dissenting views of individual directors), the reasons for those decisions and the information (particularly financial information that should be attached to the minutes) upon which such decisions are based.

Personal Liability

Liability for Tax Debts

- Directors should be aware that the Finance Act 2020 introduced legislation with the aim of deterring individuals from placing a company into insolvency as a means to evade a company's unpaid tax liabilities. The legislation allows HMRC to issue a notice making directors (including former directors) and shadow directors jointly and severally liable for unpaid tax owed to HMRC by the company.
- The circumstances in which HMRC can issue such a notice are complex but are designed to combat tax avoidance, tax evasion and cases of repeated insolvency and those where the company has been charged a penalty for facilitating tax avoidance or evasion.

Personal Guarantees

- Directors should be aware that any who have given personal guarantees may be personally liable for the company's debts under them.

Dividend Payments

- A dividend may be unlawful to the extent that the dividend is in excess of available distributable profits.
- A dividend may be challengeable as a transaction at an undervalue even if the company has distributable profits if the company subsequently enters insolvency.
- A director who authorises payment of an unlawful dividend may be personally liable to repay or restore funds in respect of losses caused to the company, even if the director is not a shareholder, if they have acted in breach of their duties.

Possible Redundancies

- The directors should consider, at an early stage, whether redundancies to the company's workforce may be necessary in order to save the business, and if so, whether consultation is required pursuant to the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).
- Under section 188 of TULRCA, there is an obligation on the company to inform and consult appropriate representatives of affected employees when 20 or more redundancies are proposed to take effect in a period of 90 days or less. The appropriate representatives of affected employees are either trade union representatives or, where no trade union is recognised, employee representatives elected for the purposes of consultation. The directors should consider what steps will need to be taken to effect collective consultation. Consultation must last for a minimum of 30 days where 20-99 redundancies are proposed (or at least 45 days if 100 or more redundancies are proposed) prior to any dismissals taking effect.
- For completeness, where an employer proposes to dismiss fewer than 20 employees within a 90-day period, there is no requirement to consult collectively with representatives of affected employees. However, an employer is still required to follow a fair procedure if it wishes to avoid unfair dismissals.
- Under section 193 of TULRCA, there is an obligation on the company to notify the Secretary of State (currently via the Department for Business, Enterprise and Industrial Strategy (BEIS)) in writing using Form HR1 in a collective redundancy situation. Again, notification is to be received by BEIS at least 45 days before the first dismissal takes effect where the company is proposing to dismiss 100 or more employees, reduced to at least 30 days for between 20 and 99 employees.
- The directors should keep full and accurate minutes of the board's proposals, and in respect of decisions taken to make any employees redundant, ensure that consideration has been given to the company's obligations to consult collectively and to notify the Secretary of State. In the case of the collapse of parcel delivery firm City Link Limited, a prosecution was initially brought against the directors for not notifying the Secretary of State. While the City Link directors were eventually acquitted on the narrow facts of that case, there is a real risk that directors who are proposing to make redundancies could be prosecuted for failing to notify in the event of any delay in doing so. The directors may even wish to notify the Secretary of State as a protective measure. While it remains to be seen how strictly this requirement will be enforced in the current circumstances, directors should continue to comply with the notification provisions to avoid risk of prosecution.

Contingency Strategy

Having identified a solvency risk in the business directors should immediately consider what steps they should be taking in order to protect the business. Presently businesses are operating in a challenging global economic environment which has seen inflationary price hikes, energy costs spike and supply chain challenges. A number of businesses face challenges posed by these external factors and will be at risk of trading while insolvent and in these circumstances the directors will need to take every step to minimise losses to creditors. This does not necessarily mean an im`mediate cessation of trading, but businesses may need to restructure to remain viable and we would recommend taking urgent further advice on the options available.

Challengeable Transactions

- **General**

  Certain transactions that take place at a time when a company is insolvent, or becomes insolvent as a result of the transaction, are open to challenge by an appointed insolvency practitioner if the company subsequently enters a formal insolvency procedure.

  Directors, to the extent responsible for such transactions, can be held personally liable for any loss suffered by the company as a result of the transaction, both under IA 1986 and as potential misfeasance.

  Directors should be aware of the grounds for such challenges and, in considering any relevant transactions, determine whether it is appropriate for such transactions to proceed. Any such decisions should be carefully minuted.

- **Transactions at an Undervalue (s 238 IA 1986)**

  A transaction will be at an undervalue if it is a gift by the company, or the company receives no consideration, or the value of the consideration received by the company (in money or money's worth) is significantly less than the value of the consideration given by the company in the transaction.

  If assets are disposed of directors should keep records of the basis on which the disposed asset was valued and why.

  Any such transactions taking place within two years of formal insolvency will be open to challenge, ifthey took place at a time the company was insolvent or became insolvent as a result of the transaction (which is presumed if the transaction was with a connected party).

  However, the transaction will not be subject to challenge if:

  – It was done in good faith for the purpose of carrying on the business

  – The directors had reasonable grounds for believing that it would benefit the company

  Therefore, in considering any asset disposal to raise liquidity (for example) at less than market value, the directors should address specifically whether it is justifiable on the grounds set out above. We recommend specific advice is taken in relation to any relevant transaction, and the decision is carefully minuted at the time.

- **Preferences (s 239 IA 1986)**

  A preference is a transaction with a creditor (or a surety or guarantor of any of the company's liabilities) under which the creditor is placed in a better position than it would have been in if the transaction had not occurred and the company proceeds into insolvent liquidation.

  A preference is open to challenge if the company proceeds into formal insolvency within six months of the transaction in question if the creditor is not a connected party, and within two years if the creditor is connected. This is provided the company was insolvent at the time, or became insolvent as a result of the transaction (which is presumed if the creditor is connected).

  However, in effecting the preference, the company must have been influenced by a desire to give the creditor the preferential position. This is presumed for transactions with connected creditors, but can be rebutted.

  In circumstances where decisions have to be made on a daily basis during cash flow difficulties as to which creditors to pay, preference issues are highly relevant. In this regard, the directors should consider the following:

  – Is the payment necessary for the continued operation of the business and, therefore, necessary to preserve the prospects of a going concern survival and payment in full to creditors, i.e. **is it business critical?** This may include payment to key suppliers of goods and/or services where such supplies are critical and cannot easily be resourced elsewhere at the speed and price required. Consideration should be given as to whether payment over time for historical debt can be agreed as a condition of continued supply.

  – Is the payment necessary to avert action being taken by the creditor, which may prejudice the survival of the business? If payment is made under threat of winding up proceedings, or legal proceedings that the company cannot defend or afford to defend, or to avoid distraint on goods, it is unlikely to be considered a preference. Evidence of this threat and the company's response should be documented.

- **Directors' Remuneration, Expenses and Employees**

  As connected creditors of the company, particularly careful attention should be paid to discharging outstanding expenses claims and arrears of remuneration to directors. If the company is continuing to trade on the basis that the directors hold a reasonable belief that the company will avoid insolvent liquidation and pay all creditors in full, it would be questionable if, at the same time, significant arrears of expenses and remuneration are discharged when other creditors are not being paid.

  Employees, on the other hand, will be a necessary part of continuing to operate the business. As directors under a contract of employment are employees and a critical requirement to ensure the company is managed through this phase, ongoing payments of remuneration and expenses (and general payroll) may be appropriate to ensure continued services to the company. Payment of arrears of remuneration and expenses claims may be justifiable in the circumstances, if not to do so would cause genuine financial hardship for the director personally, such that the director could not continue with their responsibilities without seeking an alternative source of income. If such circumstances exist, any such director should consider taking independent advice on their personal position if the directors as a whole consider such payment cannot be made presently within the resources available.

- **Unpaid National Insurance Contributions (NIC)**
  - If a company does not pay the correct amount of NIC, HMRC has the power under s121C of the Social Security Administration Act 1992 to issue Personal Liability Notices to recover the unpaid NIC plus interest and penalties from the directors or any other officers personally. Before issuing a notice, HMRC must be satisfied on the balance of probabilities that the failure to pay was due to fraud or neglect, judged by an objective test.
  - HMRC will consider issuing a notice where, in the face of persistent failure to pay NIC, a company made significant and/or regular payments to other creditors, connected persons or companies, or in the form of directors' salaries.
- **Offences Under the IA 1986**

  The directors should be aware that since 1 October 2015, the right to bring claims for certain offences under the IA 1986, including Fraudulent Trading and Wrongful Trading, has been extended to an administrator and/or can now be assigned by an appointed insolvency practitioner (i.e. either a liquidator or administrator). For the sake of completeness, we set out below a summary of the other main offences that will be investigated by the appointed insolvency practitioner if the company proceeds into formal insolvency:

  Fraudulent Trading: (s213 IA 1986)

  - It is an offence to knowingly carry on the business of a company with intent to defraud creditors and any person who does so may be ordered by the court to make such contributions to the company's assets as it thinks fit.

  Misfeasance or Breach of Fiduciary Duty: (s212 IA 1986)

  - It is an offence for a director of a company to have misapplied or retained or become accountable for any money or other property of the company or been guilty of an misfeasance or breach of fiduciary duty in relation to the company, allowing the court to order the director to repay, restore or account for the money or property together with interest or contribute to the company's assets by way of compensation.

Directors Disqualification

- Where a company proceeds into formal insolvency, the appointed insolvency practitioner has a duty to report to the Secretary of State on the conduct of each of the directors and former directors of the company. The Secretary of State must then decide whether to bring proceedings against the directors to disqualify any of them from acting as a director or in the promotion, formation or management of any company on the grounds of unfitness, for between two to 15 years.
- The directors should, therefore, be aware that should it not prove possible ultimately to effect a solvent turnaround and/or disposal, their conduct as directors (particularly at this time and going forward) will be subject to scrutiny.
- It is, therefore, critically important for this reason, and to deal with risks in relation to all the matters raised in this note, that the directors regularly (i.e. at least weekly) review the ongoing financial position and progress of the business plan, any relevant transactions for which particular consideration should be given, and its continuing belief in the appropriateness of continuing trading.
- All such reviews should be carefully minuted, to include the information available to the directors, matters discussed, all views expressed and considered, any decisions reached and the rationale for such decisions having regard to the points and recommendations made in this note. The directors should also keep a notebook of daily discussions and matters, so that there is always a contemporaneous note to support their actions in the conduct of the business during this time.

Deposits and Trust Accounts

- There is no case law or statutory authority that states, in the company's present circumstances, the directors are under a duty to protect deposit creditors by the operation of a trust account to "ring-fence" deposit monies.
- By contrast, there is case law authority that highlights the risk of a preference in creating a trust for such creditors and using company funds to place monies into a trust account for this purpose. Further, within the context of director disqualification, the courts have held that where directors are pursuing a reasonable prospect of avoiding an insolvent liquidation and a full return to all creditors, there is no legal obligation to depart from normal trading practice so as specifically to protect deposits and pre-payments by a trust account.
- Where there is uncertainty regarding the current position, we do not believe the directors could be criticised for seeking to protect deposits received going forward by the operation of a properly constituted trust account, but would make the following comments:
  - At the time of receipt of the deposit, it must be paid on an express trust obligation (or on terms that evidence a trust) such that the deposit is properly held on trust. This would require clear terms and conditions with such customers to this effect (which we would be happy to assist with) and making sure operational practices are in place to ensure those terms apply. Even if deposits have been received, and placed in a separate account, there would remain a preference risk if the account is not properly constituted as a trust account to avoid the fund being regarded as an asset of the company.
  - Placing deposits on trust would reduce the working capital available to the company with which to pursue a recovery strategy that protects all creditors and a return for shareholders, thereby shortening the time available to achieve this.
  - If, in light of these comments, the directors elect not to proceed with arrangements for placing deposits on trust, we would nevertheless recommend that an account be set up or kept open (as applicable) for that purpose should it prove necessary in due course. In the meantime, the directors should take care not to actively encourage higher levels of deposits than would ordinarily be experienced to avoid any criticism in that regard.
- Should the company be at risk of trading while insolvent, we believe the courts are likely to consider placing deposits on trust as a step that "ought to be taken" to minimise losses to creditors.

Restrictions on the Use of Company Names: (s 216 IA 1986)

In the event that the directors wish to consider a management buyout from insolvency practitioners, they should be aware that it is an offence for a director or shadow director of a liquidated company to be involved either directly or indirectly with a new company with a similar name for a period of five years beginning with the day on which the old company went into liquidation. If a director breaches this provision, the penalties include imprisonment, a fine or both, together with personal liability for the debts of the new company.

However, there are specific circumstances in which the above section will not apply and we can advise you further if required.

Defined Benefit Pension Schemes

The UK Pensions Regulator (TPR) has far reaching powers, which are particularly evident when there is a restructuring of a sponsoring employer of a defined benefit (for example, final salary) pension scheme. In certain circumstances, directors could also incur liability. We have summarised below the key powers that could potentially impact a corporate recovery process. Directors should take appropriate professional advice before looking to restructure an employer with a defined benefit pension scheme.

- **Anti-avoidance Powers**
  Certain acts or omissions can result in TPR exercising its power to require a person that is connected or associated with an employer of a defined benefit pension scheme to make a payment into the pension scheme, where TPR considers that it is reasonable to do so. This power could capture other group companies and also directors in a personal capacity and is a measure that should be taken into account when restructuring a business. Failure to comply with a contribution notice could incur a criminal penalty of an unlimited fine, or a financial penalty of up to £1 million. Where a scheme employer is under resourced, TPR also has the power, in certain circumstances, to require another group company to provide support to the pension scheme, for example by way of guarantee or security.
- **Sanctions for "avoidance of an employer debt" or "conduct risking accrued scheme benefits"**
  Controversially, anybody involved with the running of a defined benefit pension scheme or the operation of an employer (e.g. company director) could be caught by two new offences of "avoidance of an employer debt" and "conduct risking accrued scheme benefits" if they do not have a reasonable excuse for their actions. These offences were introduced by the Pension Schemes Act 2021 and are not limited to those who are connected or associated with a scheme employer, in the way that a contribution notice is.

  The offence of conduct risking accrued scheme benefits includes any act or failure to act that detrimentally affects in a material way the likelihood of accrued scheme benefits being received where the person knew or ought to have known that such a course of action would be likely to have that effect. While the offence of avoidance of an employer debt could be said to be fault based, the offence of conduct risking accrued scheme benefits is not fault based. There does not have to be any intention to risk accrued pension scheme benefits in order for a person to be caught by this offence. The penalty for being found guilty of either of these offences is up to seven years in prison or an unlimited fine. Alternatively, TPR could issue a financial penalty of up to £1 million.
- **Notifiable Events**
  Certain transactions constitute "notifiable events" that must be notified to TPR after the event occurs. From April 2022, there will be new "super" notifiable events, in respect of which separate requirements will apply, such as a requirement to notify TPR and the trustees of a defined benefit pension scheme at certain points before completion of a transaction. There will also be a requirement to state the likely impact of the transaction on the pension scheme and whether compensation has been offered to the pension scheme trustees to take account of that likely impact. Failure to comply could incur a financial penalty of up to £1 million.
- **Financial Penalties Regime**
  The Pension Schemes Act 2021 introduced a financial penalties regime for certain acts/failures to act, including failure to make a notifiable event submission, and/or providing TPR or pension scheme trustees with false or misleading information. Directors as well as corporates can be caught by these sanctions, which could result in a fine of up to £1 million.

Identify Pinch Points in Your Supply Chain and De-risk Them

Every supply chain will be different, and your exposure can depend on where you sit in the chain. Undertaking a supply chain mapping process involves reviewing the whole of a business's supply chain (including your supplier's suppliers) to identify risk areas, assessing the likelihood and potential impact of identified risks, and developing contingency plans for worst-case scenarios. However, what are the key risk areas to look out for?

Supplier Showing Signs of Stress

If a key supplier fails or starts to underperform, this can pose a serious threat to a business, particularly if it does not have a plan to address the impact. The supplier may be experiencing short-term cash flow problems, supply problems of its own, or something more serious that could lead to an insolvency process.

Identifying stress in a business that is not your own, and where you do not have access to the financial details, can be difficult. However, there are a number of indicators/enquires that we have set out below to help you "stress test" your supplier (see "How to Stress Test Your Supplier").

It is important to monitor and audit a supplier's financial health throughout the life of the contract at regular intervals as well as key stages, such as inception and when contracts are renewed, particularly where a supplier is critical to a business.

Contract Review

Is your business tied into a fixed-cost supply contract that is no longer competitively priced? Are there contractual protections to address raw material/product price increases, pass on freight costs, etc.? Are you certain which terms and conditions are incorporated, and what they mean? Do you have a contractual right of audit?

Reviewing the terms of supply contracts will help identify whether the provisions are sufficiently robust to protect your business in the event of a supplier failure, to enable you to terminate a contract should you need to, or to renegotiate price or other terms.

Geopolitical Issues

Identify which suppliers are, or could be, impacted by sanctions or trade restrictions. What connections do your supplier and its suppliers have to Russia/Belarus/Ukraine? Examine the raw materials and components you receive from your suppliers to look through and identify any levels of the supply chain that may suffer from trade blacklists and plan how each element could be removed in short order if required.

Different companies will be affected by the imposition of/increases in tariffs, blacklisting and other trade restrictions in different ways, but actively monitoring trade policy developments and assessing the consequences of changes before they happen enables a business to amend contracts to pass risk or terminate, make alternative supply arrangements or shorten the chain.

Import/Export Challenges

There are a number of import/export challenges that can affect supply chain performance. Being aware of factors such as the following (and how they will impact your suppliers) will help you formulate a plan to address them:

- The imposition of tax and duties may increase prices
- Delays at borders and freight holdup may impact contract deadlines
- Changes in VAT registration and other tax requirements, including reporting and collection obligations, could also cause price fluctuations or delays in performance
- Changes in customs practices that may result in product/component delays, shortages and/or increased costs
- Changes to product certification and registration
- Risk of significant changes in inflation rates (and variations in these between countries) may hike prices

Consider the extent to which costs may be passed up and down the supply chain and how delays/shortages will impact the ability of your business to perform its own contracts.

Lack of Competition/Viable Alternative

Does your business have a sole supplier arrangement or is there a key supplier who you feel overly reliant on? Are you tied into any exclusivity arrangements? Have you considered whether there are any viable alternatives? Work out how important your suppliers are to you if something goes wrong with them, and plan accordingly.

Other Risks

While it is easy to focus on the above issues, maintaining an ongoing assessment of your supply chain for IT risks, compliance with data protection and anti-corruption laws, and potential ESG issues, as well as reviewing suppliers' product safety history, will help reduce the risk of potential hefty fines for non-compliance, significant reputational damage, expensive product recalls and interruptions to critical supplies.

How to Stress Test Your Supplier

Individually or taken together, the following factors may indicate that your supplier is a risk to your business:

Late/missed delivery dates – Be vigilant for any early warning signs, such as late or missed deliveries. Are you being "gazumped" by other customers while goods are in transit?

Disputes (e.g. quality/quantity issues) – Has the quality of products lowered? Are you returning more items? Are there shortfalls in delivery? Is the supplier trying to avoid dealing with matters or unnecessarily disputing your claims?

Change in behaviours/conduct – This could be anything, but noticeable changes in how a supplier engages with you could flag underlying issues, i.e. requests for money on account (where that is not usual practice) or aggressive credit control.

Economic conditions/Sector challenges/Political events – External factors impact the viability of all businesses. How do these affect your suppliers? Are they particularly reliant on a country that is now in turmoil, blacklisted or affected by sector issues, i.e. availability of raw materials? Will increased tariffs or inflationary rises "stress" your supplier?

Credit checks – These are often run at the start of a relationship, but by running regular credit checks, you can keep track of your supplier's credit rating and whether it is deteriorating. If this is not possible in house, there are many external providers who offer this service.

Financial Information – What do the records at Companies House say? Are accounts being filed late? Review the latest accounts: Is the financial position of the supplier worsening? Consider the wider group position: Is there an underperforming subsidiary or loss-making division that may impact the performance of your supplier? What is the inter-company debt position?

Insolvency – Check Companies House to see if an insolvency practitioner has been appointed and review insolvency notices published in The Gazette on a regular basis. Something as simple as checking who has signed in when visiting a supplier might highlight that they may be taking advice on their financial position!

News/Social media reports – Keep an eye on what is being reported. Sometimes insolvencies are first reported in the news, but reports may also reveal whether your supplier is involved in a contentious dispute or other financial difficulty, or is in acquisition talks. Further, if there is a lot of bad press about your supplier, this might indicate that all is not well.

De-risking/Managing Supply Chain Stress

If you have identified potential areas or suppliers of concern, there are a number of options available to proactively address the risk:

Alternative Sourcing (Dual/Local/Multi) and New Suppliers

Finding alternative suppliers and dual/multi sourcing products mitigates (potentially in different geographical locations) the risk of an unexpected issue with a key supplier. It is also important to identify and monitor particularly carefully any areas where dual sourcing is not possible and plan how you would deal with the loss of any single-source supplier.

Identify practical issues that could make it difficult to move to a new supplier (e.g. tooling held at the supplier's premises, certifications tied to a particular production line or reliance on proprietary supplier intellectual property) and put in place contractual protections or contingencies to deal with these.

Moving to local suppliers can also reduce the risk of logistics issues and delays where suppliers are based overseas.

Shorten the Chain

Identify how you can shorten the supply chain. Use different distribution channels, platforms, technologies, products, sources, etc. Consider acquiring a supplier, as integrating your key supplier into your business through a merger-and-acquisition (M&A) process will give you more control. If logistics (and the increased costs of transportation) are a challenge, can you leverage scale?

Litigation

Consider whether it is appropriate to bring a claim against a supplier for breach of contract or to terminate the contract and find an alternative supplier.

Finance Options

If cash flow is a problem for your supplier, introduce a funder or consider providing working capital funding directly (with appropriate protections).

Renegotiate Contract Terms

Renegotiate key contracts to ensure that they contain sufficient contractual protections:

- **Termination** – Ensure termination provisions in the contract are robust and can be enforced at the earliest opportunity and ensure that exit plans have all been agreed and tested well before any potential contract termination event occurs. Consider including rights to terminate and/or increased monitoring for material adverse change in the supplier's finances. Is there an ability to pause the contract?
- **Insolvency** – Ensure that the insolvency provisions in contracts are up to date, appropriate for the jurisdiction and take effect early enough in the insolvency process.
- **Retention of title** – Be aware of any retention of title provisions and assess their likely effectiveness.
- **Payment terms** – Can these be flexed to support a stressed supplier or improved to support your business?
- **Price increases** – Do the terms address how price/cost increases, the impact of currency fluctuations, and the associated risks will be mitigated and/or shared?
- **Address specific issues (e.g. lingering Brexit and/or COVID-19 challenges)** – Whether as general terms or to address specific identified issues (e.g. tariffs, delays, materials/staffing shortages, travel restrictions and costs).
- **Tariffs** – Who will bear the cost of any new duties/tariffs that may be imposed and any associated additional administrative and logistical costs? Delivery terms (e.g. EXW, c.f. or DDP) may, therefore, take on added importance.
- **Sanctions** – Assess risks to performance of the contract by the imposition of/increases in tariffs, blacklisting of companies and other trade restrictions and determine whether there is scope for passing these down the supply chain or terminating arrangements that are/become uneconomical or unlawful.
- **Financial health protections** – Ensure contracts are signed with the group company against whom financial due diligence has been performed and seek parent company guarantees where appropriate.
- **Audit Rights** – Include audit rights to obtain necessary information/documents from your supplier as well as obligations on the supplier to do the same with their suppliers and to report to you.
- **Bolster compliance and processes** – With an ever increasing focus on compliance, remember to address key focus areas and include protections on hot topics such as data protection, IT and cybersecurity, anti-bribery and corruption (ABC), product safety (and product recall) and environmental, social and governance (ESG).

How Much Support Can Your Business Expect From HMRC?

HMRC has a published policy that sets out its approach to debt enforcement which says that they will "take an understanding and supportive approach".

However can a UK business assume HMRC will support it if it is struggling to meet its tax liabilities? The simple answer is no.

This might, on the face of it, appear to go against HMRC's message, however it is important to remember that, as the UK's revenue authority, HMRC's primary function is to collect taxes. HMRC does not exist to "prop up" a business that is not ultimately viable by allowing tax debts to continue to accumulate that are unlikely to be paid. When taxes fall due, they are payable in full. However, in the right circumstances and with the right approach, HMRC support can be obtained.

This alert considers the approach that HMRC takes towards tax collection and explains the practical steps that business owners can and should be taking.

When Will HMRC Support a Business?

The answer to this question very much depends on the shape of the business and its finances.

HMRC's policy documents make it clear that it intends to work with businesses to find a solution where a business has "temporary cash flow issues" or "temporary financial set backs" but as the language itself indicates, HMRC will only support a viable business with short-term remediable cash difficulties – it is not there to "bank roll" the business.

It is critical for a business that has accumulated tax debts to determine the overall financial health of the company in order to assess how (and if so, the appropriate extent to which) HMRC might be able to support the business moving forwards and, if not, what other options (such as restructuring the business) are available to protect the business, directors and interests of creditors.

Given that HMRC will also look at the overall financial position of the business, owners will need to consider the cost of repaying any COVID-19 borrowings and other bank debt and creditors alongside accumulated or expected tax liabilities. How much is owed and when is payment due? Can arrangements be put in place with other creditors to defer payment or spread out the cost.

Does the business have access to additional finance? HMRC will not consider their position in isolation; it will want to understand the financial position of the business as a whole in order to assess its long-term viability.

For directors, they should also be mindful of their directors' duties when trying to restructure (even informally) debt repayments, to avoid potential personal liability if the business runs into financial difficulties in the future, and by engaging the company's professional advisors to assist, this may reduce personal risk.

HMRC's approach is to support viable businesses where it can – but the emphasis here is very much on viability.

Key Considerations for UK Businesses

1. Do not assume that HMRC will agree a plan to manage tax payments.
2. Consider cash flow and finance options and come up with a viable plan for the business as a whole.
3. If HMRC decided not support the business (e.g. did not agree a TTP agreement), what effect might that have on the business' cash flow?
4. Can the business afford to pay accumulated or future tax liabilities without HMRC support?
5. Take advice from professionals who can assist in negotiations with creditors, HMRC and lenders.
6. Be mindful of directors' duties and ensure those are taken into account when making decisions about the future of the business.
7. Engage with HMRC early and candidly.

When Will HMRC Not Support Businesses?

If, having assessed the overall financial health of the company, it appears there is little chance for the business to recover, HMRC is unlikely to agree a repayment plan with the business in relation to its tax debts and will seek to enforce payment as liabilities become due and payable. If the business fails to pay amounts due and continues to accrue tax debts, HMRC will consider winding up the company.

In this situation, it is imperative that directors take advice on their position and act in accordance with their duties as directors to protect the business, its creditors and, ultimately, themselves from personal liability.

HMRC is also likely to commence enforcement where businesses are unwilling to engage with HMRC, whether to discuss a repayment plan or by ignoring HMRC's attempts to contact the business. It is vital, even for viable businesses, to engage with HMRC as soon, and as transparently, as possible.

What Can a Business With Accumulated Tax Liabilities Expect to Happen?

If relevant businesses do not themselves contact HMRC, they will be contacted by HMRC by phone, post or text message to discuss their position and, if appropriate, agree a way to proceed. Businesses should respond to any communication from HMRC as soon, and as fully, as possible. A failure to respond or engage increases the risk that HMRC will think that a business is unable, or simply refusing to pay its tax debts. This will increase the risk of greater investigation and intervention, and, ultimately, of enforcement action being taken.

Even if a business cannot pay straight away, it is better for a business to get in touch with HMRC to discuss its position, than ignore any correspondence. HMRC may be able to offer a short term deferral (i.e. nothing would need to be paid for a set period of time, and no further action to collect the tax debt would be taken until that time has lapsed) and will also explore other options with the business, such as the PAYG scheme. A company's professional advisors will also be able to assist with negotiations and ensure that all relevant information is provided to HMRC to give the business the best chance of agreeing a repayment plan.

Early engagement with HMRC is crucial. If a business does not respond to initial correspondence from HMRC, HMRC is likely to escalate matters to the next stage, which is likely to result in officers attending the business' premises to make further enquiries about the financial position of the company, to make sure the company is aware of the tax debt and to discuss options.

If a business fails to engage with HMRC, or has been unable to convince them of its plans to return to long-term profitability, HMRC may consider starting debt collection proceedings. These could include presenting a winding up petition, taking control of goods, summary warrants or court action. Although HMRC has stressed that insolvency proceedings will only be used as a last resort, if a business is deliberately non-compliant, or continues to accrue debt with no realistic prospect of being able to settle existing debts, it is likely to face a petition.

While HMRC will take a "cautious approach" to collecting debts, it is clear that a business should proactively and candidly engage with HMRC (and should do so as soon as possible) to protect itself against what could be avoidable recovery proceedings. Again, being mindful of and acting in accordance with directors' duties will also be important.

HMRC's Attitude Towards Company Voluntary Arrangements (CVAs) and Restructuring Plans (RPs)

Since December 2020, HMRC has been a preferential creditor in insolvency proceedings in respect of certain tax debts. This change will be felt most keenly if a company proposes a CVA, because a CVA cannot vary the rights of a preferential creditor without their consent. Accordingly, unless HMRC agrees otherwise, the company will have to pay HMRC in full.

This has also led to situations where a restructuring has failed, because HMRC has not exercised its power to vote.

However, HMRC have recently advised that it will be more proactive in using its voting right to support a restructuring- provided that it does not think that the proposal could do, or should, do better!

Conversely, although a CVA cannot vary the rights of HMRC, an RP can, and has been used to 'cram down' a restructuring plan on HMRC that voted against it.

Early engagement is key because without HMRC support (perhaps through a time to pay agreement) a CVA may be unviable.

What Is Time to Pay?

In circumstances where a taxpayer is unable to meet its tax liabilities immediately, HMRC has a discretion to allow the taxpayer to pay tax after the due date, over an agreed period, and without incurring late payment penalties. This is known as "Time to Pay" (TTP). The primary purpose of TTP is to assist HMRC to collect taxes due efficiently and effectively. It is worth emphasising that there is no right for taxpayers to be granted TTP. It is also important to understand that HMRC is obliged to agree and operate any TTP arrangements in a particular way and in accordance with its published guidance.

HMRC recognises that in certain circumstances, outside of the control of businesses, a tax deadline can lead to commercial difficulties. TTP is intended to allow viable businesses, which genuinely cannot pay tax on the date it is due, to pay it over a realistic period of time. Most arrangements will last for a period of months and will involve regular monthly payments. They rarely exceed 12 months (and so will only do so in exceptional circumstances).

Who Is Eligible for TTP?

There are no fixed rules. The same principles should be applied to all taxpayers, with each case being considered on its merits and the level of risk to the Exchequer (that is, of non-payment of tax). As a result, any TTP arrangement should be agreed "on a case-by-case basis and ... tailored to individual circumstances and liabilities".

Generally, larger tax liabilities, requests for longer TTP periods and a questionable compliance record are likely to attract greater due diligence, information requests and investigation by HMRC. The business' previous compliance record is likely to be especially important in relation to the success or otherwise of obtaining TTP.

Where a business has a good record, and has made tax payments on time, HMRC is more likely to consider a request for TTP to be genuine. In contrast, a poor record, previous late payments and repeat applications will result in closer scrutiny. Even if COVID-19 has had a role to play, HMRC is likely to view previous payment problems as symptomatic of deeper problems and will be less likely to agree TTP.

Making a successful application for TTP depends on the business being able to show it is:

- In genuine difficulty;
- Unable to pay its tax on the due date; but (crucially)
- Able to pay if HMRC allowed more time – this necessitates not only proving that it has (or will have) the means to meet the scheduled TTP payments, but also that it can meet any other tax liabilities that will (or may) become due during the TTP period.

HMRC will seek to make the TTP period as short as possible. Importantly, where a business' ability to pay improves during the TTP period, it has an obligation to contact HMRC to increase its payments and clear the debt more quickly.

Briefly put, the business must be ready to engage and be fully prepared to explain, and provide evidence for, the situation in which it finds itself. It should be willing to enter into reasonable negotiations with HMRC in relation to the terms and conditions of the TTP arrangement, including in relation to the amount covered and the overall time period involved.

Business Viability – Cannot Pay or Will Not Pay?

TTP is only available to viable businesses. Before agreeing to TTP, HMRC will try to understand why a business cannot pay and, just as importantly, what it is doing to address this in the future. HMRC will assess whether the business' plans (whether to reduce costs or increase sales) are realistic in the context of the size of the tax debt relative to the business' turnover. This will be the benchmark against which any TTP agreement will be monitored.

Critically, the TTP arrangement must be reasonable. Neither the business nor HMRC will want to enter a TTP arrangement that commits the business to a repayment schedule that it cannot afford, such that it results in further default. Equally important, to HMRC at least, is that the business does not request a period that is longer than absolutely necessary to clear the debt. In deciding whether a business is eligible for a TTP arrangement, HMRC will draw a distinction between:

- **Eligible "cannot pay" businesses** – That is, those that want to make the payment but currently do not have the means to do so, or, although they do, making that payment could force them out of business (because other liabilities could not be met). HMRC will expect businesses to have explored accessing new or increased borrowing facilities before approaching HMRC for a TTP arrangement, including taking full advantage of the various government lending and other support schemes. It should be noted that wanting to pay, however genuinely held, is not enough: a business that cannot pay, or cannot satisfy HMRC that it has a realistic plan to ensure it can afford its future liabilities, will be refused TTP.
- **Ineligible "will not pay" businesses** – That is, those that can, but will not, pay the tax. HMRC will refuse TTP and is likely to take swift enforcement action in such cases.

HMRC will be looking to the business to prove that it is eligible for TTP. Therefore, when preparing to apply, the business should be ready to provide HMRC with as much information as is relevant to support the submission. This will ideally include providing:

- **Detailed financial information** – This should include recent management accounts and (even more importantly) future budgets and cash flow expectations.
- **Details of the steps the business has taken to seek support from other stakeholders** – This might include outlining discussions the business has had concerning new or additional financial support from existing or new lenders, current shareholders, management and any other forms of support (e.g. extending credit or relaxing payment terms) from other creditors and suppliers.

HMRC will consider the position in the round including whether the business has explored all practical steps to take full advantage of the government support schemes. For example, for businesses that have taken out a "bounce back loan", there are a number of options available to a business to manage repayment of that loan under the Pay as You Grow (PAYG) scheme. HMRC will expect a business to have "drawn on the full range of financial support and opportunities available to them to keep up to date with their tax repayments". In the right circumstances, borrowing further finance via the extended Recovery Loan Scheme may be appropriate.

An important point to note is that HMRC will expect future tax liabilities to be paid when they arise and that will also need to be factored into the submission.

Early engagement, followed by regular and transparent communications, with HMRC by the business will be imperative, especially in situations where the facts and particular circumstances are not straightforward.

Monitoring, Review and Enforcement

Even if a TTP arrangement is in place, businesses should be aware that HMRC will actively monitor and review the agreement to ensure compliance. HMRC will be looking to confirm that:

- The agreed payments are being made as agreed on time
- Other tax liabilities are being met
- Tax administration and compliance obligations are being satisfied (i.e. computations and returns are being submitted)

At the same time, HMRC is likely to be using the data it collects to identify any change in the business' ability to pay the tax due.

Nonetheless, once it agrees to it, HMRC is bound by a TTP agreement and businesses should take a degree of comfort from the fact that, provided they continue to abide by the terms and conditions of TTP, HMRC cannot seek to unilaterally accelerate recovery of the tax debt.

That said, HMRC will assert its right to withdraw from (i.e. cancel) a TTP arrangement in the following specific circumstances:

- New facts come to light that mean TTP is no longer appropriate or available in the circumstances, or mean recovery of the tax due is at increased risk
- The business has misled or lied to HMRC
- The business defaults on the terms or conditions of the arrangement

In cases where HMRC believes a business is in breach of a TTP agreement, its first course of action will be to contact the business by issuing a reminder letter. In cases where an instalment payment has been missed, the reminder letter will set out the amount of tax that is now overdue, demand immediate payment and explain that failing to comply will mean the TTP arrangement will be cancelled.

If the business fails to respond, HMRC will issue a cancellation letter. At that point, the TTP arrangement falls away and HMRC will demand full payment of all tax amounts overdue. The chance of agreeing a new TTP arrangement at that point is remote and, if the tax is not paid, HMRC will initiate enforcement proceedings utilising all and any of the (growing number of) powers at its disposal.

Time to Pay?

TTP is a valuable formal procedure that will protect viable, compliant businesses facing genuine difficulties in meeting their tax liabilities on time. The protection a TTP arrangement affords can provide a business with critical time to plan for recovery without tax liabilities weighing on its cash flow.

However, it is also important to appreciate that TTP merely defers the point at which the tax is payable; the liability does not go away and will instead simply fall due under the TTP schedule. In addition, new tax liabilities and compliance obligations will continue to arise.

Entering into a formal arrangement with HMRC for the payment of overdue tax provides certainty, but also brings additional compliance obligations and opens the business to greater scrutiny from HMRC. A TTP arrangement should not be sought lightly and, once it is obtained and agreed, a business must make every effort to comply with its terms and conditions. It is crucially important that businesses do not overpromise under TTP, continue to monitor their own compliance and promptly communicate any change in circumstance that could affect the agreement (positively or negatively) to HMRC.

HMRC examines requests for TTP carefully and will be monitoring a business' compliance with an agreement equally as carefully. It is worth remembering that the primary purpose of HMRC is to collect taxes due and protect the Exchequer. In appropriate cases, HMRC uses TTP as a tool to help it achieve that aim. However, where there is a breach of a TTP agreement, HMRC will not shy away from exercising its enforcement powers to recover the tax owed.

Top Ten Takeaways for Managing your Directors Duties

Managing Directors' Duties When There is Stress/Distress in A Business

1

Put in place a good team of advisors. They will have been here before and so can provide a good sounding board, and hopefully help relieve personal stress and risk.

2

Hold regular (weekly) board meetings to review current status, receive updates and take key decisions.

3

Keep full and accurate minutes of board meetings and any other key decisions, and explain the reasons for those decisions.

4

Prepare and update thirteen-week cash flow forecasts, and review these.

5

Establish a payments committee to review and document decisions in relation to payments to creditors.

6

Engage with key stakeholders (lenders, HMRC, suppliers, landlords, other creditors, and debtors) and manage those relationships – negotiate where appropriate, look at alternative options where necessary.

7

Consider whether key contracts can be renegotiated, and map your supply chain to identify risk areas.

8

Consider whether overheads can be reduced – look at headcount reduction but ensure that proper redundancy procedures are followed.

9

Develop a credible business plan for the immediate term with prudent assumptions.

10

If the business is carrying HMRC debt, consider entering a time-to-pay agreement with HMRC. Your advisors will know how best to do this.

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