

## Director's Duty to Prevent Insolvent Trading: ASIC Regulatory Guide on its Way

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In late 2009, ASIC released for comment Consultation Paper No. 124 providing proposed guidance for directors on their duty to prevent insolvent trading. The Consultation Paper includes a draft regulatory guide setting forth the key principles that ASIC considers directors need to take into account in order to comply with their duty to prevent insolvent trading and provides guidance on how ASIC will assess whether a director has breached that duty.

The Consultation Paper identifies four key principles which ASIC considers directors should follow when endeavouring to meet their obligation to prevent insolvent trading:

1. directors must keep themselves informed about the company's financial affairs, and regularly assess the company's solvency;
2. directors should investigate financial difficulties immediately when they identify concerns about the company's financial viability;
3. directors should seek appropriate professional advice to help address the company's financial difficulties; and
4. directors should consider and act appropriately on the advice received, in a timely manner.

The draft regulatory guide included as part of the Consultation Paper expands on ASIC's expectations of a director's conduct in order to satisfy each of the four principles together with factors that ASIC will take into account in assessing whether a director has breached their duty.

While not carrying the force of law, the regulatory guide is of significance to directors because, once implemented, it will be used by ASIC, and probably by liquidators and creditors, as a "measuring stick" against which the actions taken by a director to discharge their duty to prevent insolvent trading can be judged.

The consultation period concluded on 22 January 2010. ASIC is yet to release a finalised regulatory guide. The Consultation Paper can be accessed on the ASIC website: [www.asic.gov.au](http://www.asic.gov.au).

For further information please contact:

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