MALAYSIAN INSTITUTE
OF ACCOUNTANTS
ACCOUNTANTS: MANAGERS OF VALUE

IGN G2

INSOLVENCY GUIDANCE NOTE

Professional Conduct and Ethics in Insolvency Practice

November 2009

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FOREWORD

This foreword has been approved by the Council of the Malaysian Institute of Accountants for publication. The Guidance Notes represent what constitutes good practice in stated areas of insolvency.

The Guidance Notes are issued with the view to harmonising the approach of members to questions of insolvency practice. However, the Institute recognises that there may be instances where the circumstances encountered by a practitioner render it inappropriate for the guidance given in a particular Note to be followed.

The Guidance Notes are prepared from the perspective of an insolvency practitioner operating under the laws of and practices in Malaysia. Nevertheless, the Notes are not intended as a definite interpretation of the law, and the Institute disclaims liability for any loss or penalty suffered, or claims sustained, by any member as a consequence of his following the procedures set out in the Guidance Notes.

The Guidance Notes do not form part of the Institute's By-Laws (On Professional Conduct and Ethics) [Revised 1 January 2007].

It is believed that the issuance of the notes will help to improve the quality of insolvency practices. They are not prescriptive in nature. The notes are for guidance only. However, in determining the acts of members in the performance of their respective duties, the Council may take into consideration the recommended practices as contain in these IGNs.

EFFECTIVE DATE

These IGNs are effective for members to observe from the date of issuance and these are set out in each of the IGN proper.

Introduction

1. The Insolvency Guidance Note on Professional Conducts and Ethics in Insolvency Practice (hereinafter referred to as "IGN G2") provides guidance on the professional conduct expected of Members in insolvency practice. It relates to practice and conduct in insolvency appointments and administrations under the Act and other statutory legislation.

2. In assuming insolvency roles, the preservation of objectivity needs to be protected and demonstrated by the maintenance of a Members' independence from influences which could affect his objectivity. Before a Member accepts or carries out those roles, which are detailed in the guidance which follows, the Member must not only be satisfied as to the actual objectivity which he can bring to his judgment and decisions, but must also be mindful of how his acceptance and conduct will be perceived by others.

Definitions

3. Except where otherwise stated or indicated by the context in which they appear, the following terms have the respective meanings shown for the purposes of IGN G2:

"Act" means the Companies Act 1965.

"By-Laws"/"Code" means the By-Laws (On Professional Conduct and Ethics) [Revised 1 January 2007].

"COI" means the Committee of Inspection.

"Court" means the Courts in Malaysia.

"Member" means a person who is registered in accordance with the Accountants Act 1967 as a public accountant, registered accountant or licensed accountant. Where a Member is in public practice, this definition would include the practice entity and the partners and personnel of the entity.

"MIA" means The Malaysian Institute of Accountants.

"Receiver" means a Receiver, Manager or a Receiver and Manager of any part or all of a company's property and undertakings appointed under any instrument and includes a Receiver or a Receiver and Manager appointed by the Court.

Solicitation of Insolvency Appointments

4. While recognising the benefits of competition and the need for promotion, Members should exercise discretion in the manner and degree by which they seek an appointment and should be careful to avoid the creation of obligations to or by those who are responsible for an appointment.

5. Members' attention is also drawn to By-Law 240 which prohibits a Member from paying a commission to obtain a client or receive a commission for a referral to a client of products or services of others unless adequate safeguards are established to eliminate the threats or reduce them to an acceptable level.

6. In addition to any statutory consequences which may result, soliciting for insolvency appointment in a manner amounting to harassment, or otherwise so as to represent a material departure from IGN G2, may render a Member liable to be referred to the Investigation Committee of MIA.

7. A Member may be requested by a creditor to consent to act as insolvency appointee in competition with another Member who has already commenced insolvency proceedings at the request of the company or its directors. It is fundamental that creditors have the right to appoint the Member of their choice but in those circumstances:

    a. Reasonable notice (not less than 24 hours) must be given by one Member to another;

    b. There should be no garnering of or soliciting for proxies by Members either with or without threats or inducements; and

    c. Members should act professionally towards each other and act, and be seen to act, in the creditors' interests rather than their own.

Acceptance of Insolvency Appointments

General

8. The following paragraphs refer to specific situations in which a Member may not properly accept appointment. In situations other than those dealt with below, a Member should only accept office in an insolvency role sequential to one in which a Member of his practice or a current employee of the practice has previously acted in another capacity after giving careful consideration to the implications of acceptance in all the circumstances of the case, and satisfying himself that objectivity is unlikely to be compromised, by a prospective conflict of interests or otherwise. If he remains in doubt as to his position the Member should seek advice from MIA via its Secretariat.

9. The attention of the Members is drawn to the statutory disqualifications on acting as insolvency practitioners in Sections 10 and 182 of the Act.

10. The possibility of a conflict of interest should be carefully considered prior to any Member consenting to act or accepting an appointment. Conflicts, actual or potential, should be avoided.

    a. Pre-Appointment

    Where it is apparent at the time a Member is approached to consent to act that there will be a conflict of interest if consent is given, then the Member should not consent to act. When a Member is requested to consent to act and his review of the information available is such that he forms an opinion that a conflict of interest may arise during the appointment or administration, consent to act should not be given unless all relevant parties (including the Court where appropriate) are advised of the possibility of a conflict arising, and they do not object to the appointment.

    b. Post-Appointment

    If, during the course of an appointment or administration, a conflict or apparent conflict arises, the Member should, as soon as is practicable, fully disclose details of the matter to the appointor, COI, creditors, the Court or other appropriate body, depending upon the form of administration and the circumstances.

11. A Member who is invited to accept an insolvency appointment jointly with another practitioner should be guided by similar principles to those set out in relation to sole appointment. Where a Member is specifically precluded by the guidance herein from accepting an insolvency appointment as an individual, a joint appointment will not render the appointment acceptable.

12. Where there has been material professional relationship with a client, no Member or employee of the practice should accept appointment as liquidator, provisional liquidator, Receiver, of the client, if the client is insolvent.

    Where the client is solvent, such appointment should not be accepted without careful consideration being given to all the implications of acceptance in the particular case, and a Member should satisfy himself that he is not at the time of appointment aware of any circumstance that the directors' declaration of solvency will not be substantiated.

13. A material professional relationship with a client, such as is referred to in paragraph 16 above arises where a practice or, subject to paragraphs 23 and 24 below, a Member is carrying out, or has during the previous two years carried out, material professional work, whether of a continuing nature or not, for that client. Material professional work would include the following:

    a. Where a practice or person has carried out, or has been appointed to carry out audit work for a company or individual to which the appointment is being considered; or

b. Where a practice or person has carried out one or more assignments whether of a continuing nature or not, of such overall significance or in such circumstances that a Member's objectivity in carrying out a subsequent insolvency appointment could be or could reasonably be seen to be prejudiced.

14. In forming views as to whether a material professional relationship exists, not only does one need to look at the materiality of such assignments in the context of the client's overall activities, but due regard should also be paid to the possibility that any subsequent insolvency practitioner may need to make enquiries into, and possibly take action over such assignments thereby resulting in a potential conflict of interest. Members should also have regard to existing or previous relationships with firms with which they are, or have been associated which might affect or appear to affect their objectivity, including relationships whereby they or their firm are held out by name, association or other public statements as being part of a national or international association.

15. A material professional relationship with a client includes any material professional relationship with companies or entities controlled by that client or under common control, where the relationship is material in the context of the company or individual to whom the appointment is being sought or considered. A material professional relationship may also arise where a practice or person has carried out professional work for any director of a company of such nature that a Member's objectivity in carrying out a subsequent insolvency appointment in relation to that company could be or could reasonably be seen to be prejudiced.

16. A Member should take reasonable steps prior to his acceptance of any insolvency appointment to ascertain whether any of the above work has been performed.

17. A material professional relationship, having regard to paragraphs 17, 18, 19 and 20, shall not arise:

    a. Where the relationship is one which springs from the appointment of the firm of the Member by, or at the instigation of, a creditor or other party having an actual or potential financial interest in the company to investigate, monitor or advise on its affairs provided that:

        i. There has not been a direct involvement by a Member in the management of the company or business, and

        ii. The practice has its principal client relationship with the creditor or other party, rather than with the company or proprietor of the business, and the company or the proprietor of the business is aware of this.

    b. Where the professional relationship arises from the appointment of the Member by the Court to investigate, monitor or advise on the company's affairs and such appointment is not actively sought having due regard to the preceding paragraphs.

Groups, Associated and Family Connected Companies

18. Members should be particularly aware of the difficulties likely to arise from the existence of inter-company transactions or guarantees in group, associated or family-connected company situations. Acceptance of an insolvency appointment in relation to more than one company in the group or association may raise issues of conflict of interest. Nevertheless it may be impracticable for a series of different insolvency practitioners to act. A Member should not accept multiple appointments in such situations unless he is satisfied that he is able to take steps to minimise problems of conflict and that his overall integrity and objectivity are, and are seen to be maintained.

19. When two or more practices merge, Members of the merged practice become subject to common ethical constraints in relation to accepting new insolvency appointments to clients of either of the former practices. However, existing appointments which are rendered in apparent breach of IGN G2 by such merger need not be determined automatically, provided that a considered review of the situation by the practice discloses no obvious and immediate conflict. Otherwise, a Member should endeavour to terminate the appointment as soon as possible.

20. Where a Member has, in any former practice, undertaken work upon the affairs of the company in a capacity which is incompatible with an insolvency assignment of his new practice, he should not personally work or be employed on that assignment, save in the case of an employee of such junior status that his duties in the former practice did not involve the exercise of material professional judgment or discretion.

21. A Member should not accept an insolvency appointment in relation to a company where any personal connection with a director or former director is such as to impair or reasonably appear to impair the Members' objectivity. The attention of the Members is also drawn to the definitions relating to persons 'connected' with a director in Section 122A of the Act.

22. A Member should, in general, decline to accept an insolvency appointment in relation to a company if he has such a personal or close and distinct business connection with the debenture holder as might impair or appear to impair the Members' objectivity. It is not considered likely that a "close and distinct business connection" would normally exist between an insolvency practitioner and for example, a clearing bank or major financial institution.

    However, such a close and distinct business connection would exist where a Member holds an insolvency appointment in relation to such a bank or financial institution.

Other Potential Conflict of Interests

Purchase of the Assets of a Company or Other Entity

23. A Member appointed to any insolvency appointment in relation to a company or other entity shall not himself acquire directly or indirectly any of the assets of the company or other entity. A Member shall also not acquire nor knowingly permit any close relative of the Member, directly or indirectly to do so, without prior approval of the Court or creditors to whom full facts must be disclosed. An indirect purchase of the assets of the company by a Member or close relative of the Member include purchase via an individual or a company or an entity in which a Member or close relative of the Member has substantial interests and/or exercise significant influence over the management of the company or entity.

    Where a contract is already in existence between the company or other entity and an employee of the Members' practice, the Member should seek guidance from the MIA Secretariat as to the propriety of accepting appointment.

Conversion of Members' Voluntary Winding-up to Creditors Voluntary Winding Up

24. Where a Member has accepted appointment as liquidator in a members' voluntary winding up and is obliged to summon a creditors' meeting under Section 259 of the Act because it appears that the company will be unable to pay its debt in full within the period stated in the directors' declaration of solvency, the Members' continuance as liquidator under a members' voluntary liquidation will cease:

    a. If the company will not be able to pay its debts in full and the Member has previously had a material professional relationship with the company such as is set out in paragraphs 15 to 21 above, he should not accept nomination under the creditors' winding up.

    b. If the company will not be able to pay its debt in full and the Member has had no such material professional relationship, he may accept nomination by the creditors and continue as liquidator with the creditors' approval, subject to giving the careful consideration as to the implications, etc. referred to in paragraph 12 above.

    c. If the Member believes that the company will eventually be able to pay its debts in full he may accept nomination by the creditors and continue as liquidator. However, if it should subsequently appear that this belief was mistaken the Member must offer his resignation, and may not accept re-appointment if he has previously had a material professional relationship with the company.

Insolvent Liquidation following Appointment as Receiver

25. Where a Member is, or in the previous two years has been a Receiver of the company or any of its assets, no Member of the practice should accept appointment as liquidator of the company in an insolvent liquidation. This restriction does not apply where the previous appointment was made by the Court. However, before a Court appointed Receiver accepts subsequent appointment as liquidator, he should give careful consideration as to whether his objectivity could be open to question and if so, the appointment should be refused.

Audit following Appointment as Receiver

26. Where a Member (subject to the provisions of paragraphs 23 and 24 above) has been a Receiver of the company or any of its assets, no Member of a practice should accept appointment as auditor of the company for any accounting period during which the receiver or receiver and manager acted.

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