



MALAYSIAN INSTITUTE
OF ACCOUNTANTS
ACCOUNTANTS: MANAGERS OF VALUE



IGN L1

INSOLVENCY GUIDANCE NOTE

Members' Voluntary Winding-up

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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. A members' voluntary winding-up can only be initiated when a company is solvent and with the consent and approval of its shareholders.

The 'solvency' test is the key determinant differentiating a members' voluntary winding-up from a creditors' voluntary winding-up.

2. The provisions encompassing the members' voluntary winding-up under the Companies Act 1965 are contained in Part X Of the Act under the following divisions and sections:-

<u>Division</u>	<u>Section</u>	<u>Provision</u>
I	211-216	Preliminary on winding-up
3	254-276	Voluntary winding –up
4	277-313	Every mode of winding-up

3. The Rules which are applicable for creditors' voluntary winding-up and court winding-up may be used as reference for similar situations in members' voluntary winding-up where the Act is silent.

Definitions

4. Except where otherwise stated or indicated by the context in which they appear, the following terms have the respective meanings shown for the purpose of this guidance note:

"Act" means the Companies Act 1965.

"Books and Records" means any registers, indices, minute books, books of account, documents, papers and any other record of information of any kind, including books within the meaning of Section 4 of the Act.

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

"Court" means the Courts in Malaysia.

"Guidance Note" means the Insolvency Guidance Note ("IGN") as approved by the Council of the Malaysian Institute of Accountants.

"Liquidator" means liquidator or liquidators appointed under members' voluntary winding-up.

"Rule or Rules" means the Companies (Winding-up) Rules 1972.

"Section" means the Section or Sections of the Act.

“SSM” means Companies Commission of Malaysia and includes the Registrar of Companies designated under Section 7(1) of the Act

Pre-Commencement Considerations

5. Certain matters should be considered or attended to prior to the proposed appointment of Liquidator, so that the members’ voluntary winding-up may proceed with minimum complications thereby minimising the costs of winding-up. Generally, the more that can be done before the winding-up which begins on the passing of the resolution to wind-up, the better.

Professional Independence

6. Before accepting the appointment, IAGN G1 requires the practitioner to consider the implications of such an appointment, in light of the By-Laws/Code.

The By-Laws/Code states that "a member in public practice should be, and be seen to be, free of any interest which might detract from objectivity in each professional assignment he undertakes.

The By-Laws/Code provides that no partner or employee of a firm should accept appointment as Liquidator of a company where they have had a continuing professional relationship with the company including the receiver of any assets of the company for the previous two years if the company is insolvent. Where the company is solvent, such appointment could be accepted but only after careful consideration has been given to the implication of acceptance in that particular case.

7. The member should also conduct a company search at SSM and check details of directors and secretaries to determine if there exists any potential conflict of interest.

Eligibility to Act

8. In addition to the restrictions provided under the Act and By-Laws, a member in public practice shall not knowingly consent to be appointed, and shall not knowingly act, as Liquidator of a company in a members' voluntary winding-up:-
 - a. if he is indebted to the company or to a corporation that is deemed to be related to the company by virtue of Section 6 in an amount exceeding two thousand five hundred ringgit;
 - b. if he becomes bankrupt;
 - c. if he assigns his estate for the benefit of his creditors or makes an arrangement with his creditors pursuant to any law relating to bankruptcy; or
 - d. if he is convicted of an offence involving fraud and dishonesty punishable on conviction by imprisonment for three months or more.

[Section 10(1)(b),(d) to (f)]

9. Any person other than the exceptions mentioned in paragraph 12 above can act as a Liquidator for the purpose of a members' voluntary winding-up.

However, the person shall not be appointed as Liquidator of a company unless he has prior to the appointment consented in writing to act as such Liquidator.

[Sections 10 (1) (a) & (c), 10(4)]

Review of Company's Balance Sheet

10. The directors should review the financial position of the company and take steps to realise as many assets as practicable and reduce the liabilities pari passu before the resolution to wind up the company is passed. Such actions include the settlement/reduction of inter-company loan accounts and payment of creditors, and the distribution of dividends from retained profits to the shareholders.
11. The Liquidator should review the tax position of the company regarding status of tax returns and payments and consider the likely tax implications of the proposed liquidation. Consideration should also be given to reduce activities that have tax implications which may prolong the winding-up.

Advising the Company's Directors of the Effects of the Winding-Up

12. The company's directors should be made fully conversant with the effects of a winding-up prior to their decision to proceed to pass the special resolution for winding-up. Emphasis should be placed on the following:-
 - a. All the powers of the directors shall cease unless the Liquidator or the company in a general meeting with the consent of the Liquidator approves the continuance thereof;
 - b. The company, shall from the commencement of the winding-up cease to carry on its business, except so far as may be necessary for the beneficial winding-up thereof; and
 - c. Any transfer of shares, except for transfers made with the sanction of the Liquidator and any alterations in the status of members, made after the commencement of the winding-up, shall be void.

[Sections 256 (1) & (2), 258(2)]

Initiation of Members' Voluntary Winding-Up

The initiation of the Members' Voluntary Winding-up may entail the following sequence of steps:-

Declaration of Solvency

13. A majority of the directors at a meeting of directors may make a written declaration in Form 66 ("the Declaration") to the effect that they have made an inquiry into the affairs of the company

and that at a meeting of directors, formed the opinion in the declaration that the company will be able to pay its debts in full within a period not exceeding twelve months after the commencement of the winding-up.

[Section 257(1)]

14. There must be attached to the Declaration, a Statement of Affairs of the company, made up to the latest practicable date before making the declaration, showing the assets of the company and the total amount expected to be realised therefrom, the liabilities of the company, estimated expenses of the winding-up and estimated surplus, after paying debts in full.

[Section 257(2)]

15. The directors should not take into account contingent assets when forming an opinion that the company will be able to pay its debts in full within a period not exceeding twelve months after the commencement of the winding-up. Conversely, the directors should take appropriate steps to ascertain the full extent of actual or contingent claims, if any, against the company, including claims that may arise from the directors or employees as a result of the proposed winding up.

16. A declaration so made shall have no effect unless it is: -

- a. made at the meeting of the directors;
- b. made within 5 weeks immediately preceding the passing of the resolution for members' voluntary winding-up; and
- c. lodged with SSM before the date on which notices are sent convening the general meeting at which the winding-up resolution is proposed.

[Section 257(3)]

17. Both the Declaration and the Statement of Affairs must be lodged with SSM, usually by the company secretary, prior to the date of despatch of the said notice for the general meeting.

18. A director who makes the declaration of solvency without reasonable ground that the company will be able to pay its debts in full within the period stated in the Declaration can be prosecuted and if found guilty, the penalty is three years imprisonment and/or Ringgit Malaysia ten thousand fine.

[Section 257(4)]

19. If the wound-up company cannot pay its debts within the period stated in the Declaration, the directors are presumed until the contrary is shown to have had no reasonable grounds in making the declaration.

[Section 257(5)]

Calling Of Shareholders' Meeting

20. Within five weeks of the making of the Declaration, a general meeting is required to be convened to pass a special resolution to wind-up the company and empower the Liquidator to distribute part or the whole of the company's assets in specie or in kind and an ordinary resolution for appointment of one or more Liquidators and determination of the remuneration to be paid to them.

[Section 258(1)]

21. A special resolution requires 21 days' notice and a 75% majority unless approved by majority holding not less than 95% in nominal value of shares or voting rights.

[Section 152(1)]

22. A company may be wound-up voluntarily:

- a. when the period, if any, fixed by the memorandum or articles for the duration of the company expires; or
- b. the event, if any, occurs, on the occurrence of which the memorandum and articles provide that the company is to be dissolved and the company in a general meeting has passed a resolution requiring the company to be wound-up voluntarily; or
- c. if the company so resolves by special resolution.

[Section 254(1)]

23. If the company to be wound up is a wholly owned subsidiary, then after the lodgement of the Declaration of Solvency with SSM by the company secretary or directors of the subsidiary and in any event within five weeks after the making of the declaration, the subsidiary must hold a meeting attended by an authorised representative of the holding company to sign the minute to pass a special resolution to wind up the subsidiary.

[Section 147(6)]

24. A copy of the minutes in Form 52, applicable only to the winding-up of a wholly-owned subsidiary of a corporation, shall be lodged with SSM within one month thereafter.

[Section 147(7)]

Filing Of Resolution with SSM

25. Within seven days after the passing of the special resolution, the company shall lodge a printed copy of the resolution in Form 11 with SSM.

[Section 254(2)(a)]

Advertisement

26. A notice of the resolution to wind up the company and appointment of Liquidator(s) should also be advertised in a newspaper circulating generally throughout Malaysia within 10 days of the passing of the resolution
[Section 254(2)(b)]

Commencement of Winding-Up

Date of Commencement

27. A members' voluntary winding-up shall commence at the time of the passing of the resolution for voluntary winding-up.
[Section 255(6)(b)]

Effect of Commencement

28. The events mentioned in paragraph 16 on the cessation of powers of the directors, the company's business and shares transfer shall take immediate effect.
29. The corporate state and corporate powers of the company continue until it is dissolved. However, the yearly filing of the company's annual return is no longer required.

Powers and Duties of Liquidator

30. The Liquidator in a members' voluntary winding-up will settle all debts in full.
31. The Liquidator, with the approval of a special resolution of the company, may exercise any of the following powers:-
- a. subject to Section 292, pay any class of creditors in full;
 - b. make compromise or arrangement with the creditors;
 - c. compromise calls, debts and liabilities capable of resulting in debts;
 - d. appoint an advocate to assist him in his duties; and
 - e. accept shares, etc as consideration for the sale of the company's property.
- [Sections 269(1)(a), 270]*
32. The Liquidator may also exercise any of the powers given by the Act to the liquidator in a winding-up by the Court, exercise any powers of the Court to settle a list of contributories, make

calls and summon general meetings of the company to pass special resolution in respect of any other matters.

[Section 269 (1)]

33. The acts of a Liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification. Bona fide transactions for value and without notice of such defect or irregularity between the Liquidator and other parties are valid.

[Section 268]

34. Where several Liquidators are appointed, the powers shall be exercised by one or more of them as may be determined at the time of their appointment or in default thereof by any number of not less than two.

[Section 269(3)]

35. If the Liquidator is at any time of the opinion that company will not be able to pay or to provide for the payment of its debts in full within the period stated in the Declaration, he should forthwith summon a meeting of the creditors to present a statement of assets and liabilities of the company and for the creditors to appoint some other person to be Liquidator. The winding-up shall thereafter proceed as a creditors' voluntary winding-up.

[Section 259]

Immediate Steps after Commencement of Winding-Up

36. The immediate steps to be taken by the Liquidator after commencement of winding-up shall entail the following:-

Notification that Company is in Liquidation

37. The company shall have the words "in liquidation" added after the name of the company where it first appears on every invoice, order for goods or business letter issued by or on behalf of the company or the Liquidator.

[Section 283(1)]

Notice of Appointment and Address of Liquidator

38. Lodge Form 71 being the notice of appointment and situation of office with SSM and the Official Receiver within 14 days of his appointment.

[Section 280(1)]

Books and Records

39. Take control of the company's seal, share register, minute book and all books and records particularly, documents of title and other documents of value. A list of Books and Records in existence should be compiled. Advise the directors that they must not dispose of any of the company's Books and Records until otherwise advised by the Liquidator.
40. The Liquidator shall retain the books and papers for 5 years from date of dissolution of the company or earlier as the company, normally at the final meeting, by resolution directs. The Liquidator may destroy them thereafter.

[Sections 284(2) & (3)]

Taking Possession of Assets

41. Obtain a list of assets from directors or compile one from enquiries and observation to determine what the assets are.
42. Take steps to account for and secure prompt control of all known assets of the company and ensure their security. Conduct stock takes and/or valuation of assets to provide a basis for negotiations to sell assets and also to establish those that did exist at the date of appointment for control purposes.
43. Where a creditor has issued execution against the moveable property or land of the company or has attached any debt due to the company, serve notice on the creditor, its' solicitors and Court's bailiff, if relevant.
44. Any creditor or bailiff shall not be entitled to retain the benefit of the execution or attachment unless he has completed the execution or attachment before the date of commencement of winding-up or before the date of the receipt of the notice for the proposed voluntary winding-up.

[Sections 298, 299]

45. Under the following sub-sections of Section 298(2):-
 - a. an execution against goods is completed by seizure and sale;
 - b. an attachment of a debt is completed by receipt of the debt; and
 - c. an execution against land is completed by sale, or by the appointment of a receiver.

Insurance

46. Notify the company's insurers, if any, of the Liquidator's appointment and ensure that all assets are properly and adequately insured and the Liquidator's interest is noted on the policies.

Bank

47. Notify the company's bank(s) of the Liquidator's appointment including a certified copy of the resolution and giving specific instructions that all payments or withdrawals from the company bank account will be immediately frozen whilst the bank shall continue to accept deposits and incoming remittances. Request the bank to release any company documents held by them to the Liquidator. Initial verbal advice should be confirmed in writing.
48. Open a Liquidator's bank account in the company's name in liquidation ("the Liquidator's Bank Account") and effect the transfer of any credit balance from the company's bank account. All monies received shall be banked into the Liquidator's Bank Account and any sum exceeding RM200 shall be banked in as soon as possible and should not be later than 10 days.

[Section 238(2)]

49. Ensure that the bank balance is regularly reviewed and surplus funds placed on fixed deposit or other authorised investment.

[Section 285]

Professional Advisors

50. Notify the company's solicitors, auditors and other professional advisors of the Liquidator's appointment. Appropriate status reports should also be requested from these professional advisors.

Creditors and Proving of Debts

51. In every winding-up, all debts payable on a contingency and all claims against the company present or future shall be admissible to proof against the company in Form 77.

[Section 291(1)]

52. Advise creditors of Liquidator's appointment and send notice to creditors to lodge their claims with proof of debt in Form 77 by giving at least 21 days notice and place a copy of the notice in a daily newspaper. No gazetting of the notice is required for members' voluntary winding-up.

[Rule 91]

53. The Liquidator may admit or reject any claim made in accordance with Rule 92. The Liquidator must endeavour to establish those who are justly, legally and properly creditors of the company. He should not admit any claim which appears to be doubtful and must require sufficient evidence to dispel that doubt.

Directors' Powers

54. Write to all directors advising them that their powers have now ceased unless the Liquidator or, the company, in a general meeting, with the consent of the Liquidator, approves the continuance of any power to be exercised by the directors.

[Section 258(2)]

Notice to Debtors

55. Send notice to debtors advising them of their indebtedness to the company and request payment of the account.

Notice to Government Authorities, EPF and SOCSO

56. Send notice to government authorities, for example, to the relevant government authority in respect of income tax and sales tax and also to EPF and SOCSO to determine amounts owing to them.
57. Section 69(1) of the Sales Tax Act, 1972 and Section 65B of the Customs Act, 1967 require the Liquidator to notify the Director General of Customs within 14 days of his appointment and shall before disposing of any of the assets of the company set aside such sum out of the assets as appears to the Director General to be sufficient to provide for any such taxes as are or will thereafter become payable in respect of the company. Similar provision exists in the Service Tax Act, 1975.

Winding-Up Process

Review of Company's Affairs

58. Review the affairs of the company. Prepare the schedules needed to provide the information for this review and record the decisions taken. The schedules should, as appropriate in each case, cover:
 - a. details of all Books and Records of the company;
 - b. cash and bank balances;
 - c. insurance cover;
 - d. documents of title;
 - e. tenancies and leases;
 - f. physical assets;
 - g. hire-purchase contracts;
 - h. debtors (including record of all collections and actions taken);
 - i. creditors;
 - j. quoted and unquoted investments;

- k. details of registered charges or cross guarantees given in respect of advances to the company or related companies;
- l. details of personal guarantees given by directors in respect of advances to the company;
and
- m. details of registered business names, copyrights, trademarks and patents.

Liquidator's Records

59. Maintain books which may be required to record entries or minutes of proceedings and which will be prima facie evidence of the truth of all matters purporting to be recorded therein.

[Sections 277(1), 284(1)]

Where the Company is still trading

60. The majority of members' voluntary winding-ups are of companies which have ceased trading. They may be dormant or they may still own assets which the Liquidator must realise.
61. In the minority of cases where the company is still trading, at the date of the winding- up, it will be necessary to consider the matters listed under this heading:
- a. Take control of all keys to the company's premises, stores, safes, filing cabinets and vehicles and prepare a schedule of all persons to whom keys are re-issued. Change locks of company's premises.
 - b. Obtain details of all credit and agency cards issued to directors and employees and consider immediate cancellation.
 - c. Ensure that all employees are informed of the appointment of the Liquidator. Where a Union is involved, meet with the Union Officials.
 - d. Prepare schedules to cover the following items:
 - i) Employees;
 - ii) contracts in progress (with documentation to show consequences of either completing or abandoning the contracts);
 - iii) stocks and work-in-progress (including estimates to cover the consequences of either disposal in existing condition or upon completion);and
 - iv) third party properties

- e. Trading may only be carried on to achieve beneficial realisation of assets. It should be regarded as short term only and as a positive step towards maximising the value at which assets can be realised.

Consider the extent to which continued trading will, after meeting all the cost incurred, result in a more beneficial realisation of assets than immediate cessation.

[Section 256(1)]

- f. Identify problems and make decisions about future trading and the further steps needed to safeguard the assets and minimise liabilities. Deal with all matters arising which are likely to include the following:-
 - i. instructions to directors and managers making clear the extent of any continued authority and the terms of their future employment;
 - ii. finance and banking arrangements consequent upon trading;
 - iii. arrangements to write up the books;
 - iv. insurance cover required consequent upon trading;
 - v. tenants and landlords;
 - vi. arrangements with customers for the abandonment or continuation of contracts and orders in progress. Consider if any contracts can be disclaimed;
 - vii. instructions to suppliers of goods-and services regarding deliveries and terms of payment;
 - viii. instructions to persons holding property belonging to the company;
 - ix. instructions to debtors on payment of amounts due and instituting a system of collection and control of debts;
 - x. conforming with any licences and regulations necessary for operations that are to continue; and
 - xi. Termination of employees' contracts

Other Procedures

62. Other procedures that may be necessary include the following:-

- a. Change registered office to that of Liquidator, if necessary;
- b. Arrange for re-direction of mail as necessary;
- c. Arrange for cancellation of telephone, electricity and other services, if necessary;

- d. Carry out periodic reviews of the winding-up and note the results;
- e. Settle list of contributories, if necessary;
- f. Ensure that shareholders are kept informed of the progress of the winding-up;
- g. Consider at intervals during the winding-up whether there are sufficient surplus funds available to warrant an interim distribution to shareholders according to their rights and interest. Nevertheless, the Liquidator may deem it necessary to secure an indemnity from the company's shareholders prior to making any such distributions; and
- h. Lodge Income Tax return, if any taxable income is derived during the liquidation.

Liquidator's Accounts

63. Every Liquidator shall keep proper books in which he shall cause to be made entries or minutes of proceedings at meetings and of such other matters as are prescribed, and any creditor or contributory may, subject to the control of the Court, personally or by his agent inspect them.

[Section 277(1)]

64. If winding-up process exceeds 6 months from the commencement date, within one month after the expiration of six months from the date of the appointment and within one month of the end of each subsequent six months and within one month after he ceases to act as Liquidator, the Liquidator is required to file with SSM and the Official Receiver, the Liquidator's Statement of Receipts and Payments and Statement of the Position in the Winding-Up in Form 75, affirmed by statutory declaration.

[Section 281(1)]

Annual Meetings of Members

65. If the winding-up continues for more than one year, the Liquidator should summon general meetings of the company within three months after at the end of the first year from the commencement of the winding-up and of each succeeding year.

[Section 271(1)]

66. The Liquidator shall present an account of his acts and dealings and of the conduct of the winding-up for the preceding year. Although the Act is silent on the period of the notice, the Liquidator shall give not less than seven days' notice of the meeting to the shareholders.

[Rule 114]

67. If a vacancy occurs by death, resignation, removal of one of the joint Liquidators, the meeting may be convened by the continuing Liquidators or any contributory.

[Section 258 (4) & (5)]

Closing Duties

68. Before calling for the Final Meeting, the duties to perform would include the following:-
- a. Review all files thoroughly to ensure that all matters have been completed, that all assets have been realised and all liabilities settled;
 - b. Obtain formal clearance from the Inland Revenue Department, Customs and Excise Department, the Sales Tax Department and other government authorities, if necessary, in respect of income tax, sales tax and other taxes;
 - c. Pay Liquidator's fees which may be agreed at the general meeting of members;
 - d. After obtaining clearance as in paragraph b. above, the Liquidator is to resolve to distribute any remaining assets in accordance with Section 264. Distribute remaining assets amongst the members according to their rights as laid down in the Company's Articles of Association; and
 - e. Where a Liquidator has in his hands or under his control, any unclaimed dividend or other moneys that have remained unclaimed for more than six months or after taking final distribution, any unclaimed or undistributed monies arising from the property of the company, he shall forthwith pay those monies to the Official Receiver to be placed to the credit of the Companies Liquidation Account and close the Liquidators' bank account. The prescribed certificate issued by the Official Receiver for receipt of the unclaimed moneys shall be an effectual discharge to the Liquidator.

[Section 286 (1)]

Final Meeting

69. When the Liquidator has fully paid off the company's debts, wound-up the company's affairs, distribute the surplus, if any, to the members and upon completion of the accounts of the winding-up, he should summon a general meeting of the shareholders for the purpose of laying the Liquidator's final account and giving any explanation.

[Section 272(1)]

70. The final meeting shall be called by advertisement published in a national newspaper one month at least before the meeting.

[Section 272(2)]

71. The Liquidator shall obtain ordinary resolutions for disposing of the Books and Records of the company and of the Liquidator, otherwise such Books and Records shall be retained for five years from the date of dissolution of the company.

[Sections 284(2), (3)]

72. The quorum for the final meeting shall be two members and if no quorum is present, the Liquidator shall prepare a report in Form 69 stating that the meeting was duly summoned and no quorum was present thereat.

The Liquidator shall forward a copy of the Minutes of Final Meeting of Members to his client.

73. The Liquidator shall file with SSM and the Official Receiver a return relating to the Final Meeting in Form 69 together with the Liquidator's final account within seven days after the final meeting.

[Section 272 (3)]

74. The Liquidator shall file with SSM and the Official Receiver the Liquidator's accounts of receipts and payments in Form 75 within one month after he ceases to act as Liquidator following the lodgement of Form 69.

[Section 281(1)]

75. On the expiration of three months after the lodgement of Form 69, the company shall be dissolved.

[Section 272(5)]

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