



MALAYSIAN INSTITUTE  
OF ACCOUNTANTS  
ACCOUNTANTS: MANAGERS OF VALUE



IGN L3

# INSOLVENCY GUIDANCE NOTE

A Liquidator's Assessment and Review into the Affairs of the Insolvent Company

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. This Guidance Note is issued for the use of members in connection with liquidation of insolvent companies registered in Malaysia under the provisions of the Companies Act, 1965.
2. The Guidance Note concentrates on the duty of a liquidator of an insolvent company to assess and review the company's affairs. The winding-up of a company may be either by the Court or voluntary.

## 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 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.

**"COI"** means the Committee of Inspection

**"Court"** means the Courts in Malaysia.

**"Creditors voluntary winding-up"** or **"Creditors voluntary liquidation"** means a voluntary winding-up under the Act, other than a member's voluntary winding-up.

**"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 creditors' voluntary winding-up and court winding-up and includes the Official Receiver when acting as the liquidator of a corporation

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

## Duties of Liquidator

4. The Liquidator's primary duty in the conduct of liquidation is to take possession and realize the assets of the company and distribute them to the creditors, after establishing the liabilities of the company. Hence, though there is no specific provision in the Act that requires the Liquidator to carry out an investigation, the Liquidator is to undertake an assessment and review what assets can be realised and what other recoveries can be made. The creditors have an interest in the

Liquidator's assessment and review, because both the level of recoveries and the costs of the assessment and review will affect the funds that are available for distribution to them. The Liquidator should maintain communication with the creditors to obtain their views about actual and prospective assessment and review, and to keep them informed of the progress and possible outcome.

5. While the primary purpose of undertaking an assessment and review is to determine the assets and liabilities of the company, Liquidator appointed under an Order of Court should note the requirements of Section 235 of the Act. Under this Section, a Liquidator is required to submit a preliminary report to the Court as soon as practicable after receiving the statement of affairs from the directors. This report must state the following:
  - a. the amount of capital issued, subscribed and paid up and the estimated amount of assets and liabilities;
  - b. if the company has failed, the causes of the failure; and
  - c. whether in the Liquidator's opinion, further inquiry is desirable as to any matter relating to the promotion, formation or failure of the company or the conduct of the business thereof.
6. Under Section 235, the Liquidator may also, if he thinks fit, furnish further reports to the Court stating the manner in which the company was formed and whether, in his opinion, any fraud has been committed or any material fact has been concealed by any person in its promotion or formation or since its formation or if any officer of the company has contravened or failed to comply with the Act. In addition, the Liquidator is required to report to the Court on any other matters which in his opinion are desirable to be brought to the attention of the Court. The Liquidator should also take cognisance of Rules 36 to 38 in considering reports under Section 235 of the Act.
7. The Liquidator is required under Section 306(3) of the Act that if it appears to him, in the course of any winding-up, the insolvent company will be unable to pay its unsecured creditors more than fifty cents in the dollar, to report the matter in writing to the Official Receiver and to furnish the Official Receiver with such information and give to him such access to and facilities for inspecting and taking copies of any document as the Official Receiver may require.
8. The extent and nature of the work to be carried out for the purposes stated in paragraph 8 will vary from company to company, but the Liquidator should consider including the work as set out in the paragraphs that follow.
9. One of the objectives is to reassure creditors that the Liquidator has followed a minimum standard procedure in assessing and reviewing the affairs of the insolvent company whether there are assets or not and to report thereon to the creditors or committee of inspection, if one has been formed. The assessment and review should also facilitate the rendering of the various reports stated in paragraphs 9 to 11, if they are required.

## Records

10. At the outset of the appointment, the Liquidator should ascertain the location and safeguard and list the company's Books and Records and accounting information (including computerised information). If the Liquidator does not receive co-operation he should record the steps taken by him.

## Initial Review

11. At the outset of the liquidation, the Liquidator should conduct an analytical review, based on initial information available, in order to assess whether there is prima facie case for further or a more detailed assessment and review into any aspect of the company's affairs. In undertaking this review, the Liquidator should undertake the following preliminary enquiries:
  - a. invite creditors, or members of COI, if formed, to bring to his attention any matters which they consider require detailed assessment and review;
  - b. the Liquidator should make enquiries of the officers and directors of the company as to the affairs of the company, including reasons for failure and location of company's Books and Records and property. If the Liquidator does not receive co-operation he should record the steps taken by him;
  - c. the statement of affairs should be compared with the last audited accounts to ascertain whether all the fixed and current assets can be identified and material movements in fixed and current assets can be properly explained; and
  - d. the Liquidator should conduct a review of the Books and Records over the last six months in order to identify any unusual or exceptional transactions.
12. The Liquidator should consider whether the initial review discloses any matters that suggest there are grounds for more detailed assessment and review or possible rights of action which the company may have against third parties. In conducting this exercise the Liquidator should take into consideration the size of the case, the level of assets available to fund any further assessment and review, and the materiality of the matters disclosed.

## Consultation with Creditors

13. Where the Liquidator believes there are grounds for further assessment and review or possible action, the Liquidator should discuss the matter with the creditors, or COI, if formed, in order to ascertain their views on such further work. This assessment will need to take into account possible benefit and likely costs of the exercise. The Liquidator should provide any information that may be required by the creditors to provide their views.

14. If further assessment and review should be undertaken, the Liquidator should discuss the scope of work and funding issues with the creditors or COI, if formed.
15. The Liquidator should report the progress of the assessment and review at specific intervals or at appropriate stages during the conduct of the assessment and review. When reporting, the Liquidator should provide details of cost incurred to date, and should seek the views of creditors or COI, if formed, on continuing with the assessment and review.
16. Where there is no COI, the Liquidator should seek the views of the creditors either by correspondence or by way of meetings, or where this is impracticable by discussion with the major creditors.

## Matters for Detailed Assessment and Review

17. Where it is agreed to conduct further assessment and review, the following points may be useful, depending on the circumstances of the case and nature of the assessment and review.

### Question / Interview Management

18. The onus is on the Liquidator to consider which directors, including those who held office during the material time prior to liquidation and shadow directors, company secretary, senior officials and employees, and company's professional advisers are relevant having regard to their accessibility and information which he believes they may have.
19. The Liquidator should take cognisance of the following statutory requirements:
  - a. Section 249 of the Act and Rule 49 in connection with power of the Court to summon persons connected with the company;
  - b. Section 250 of the Act and Rule 50 in connection with power of the Court to order public examination of the promoters, directors, or any officers of the company; and
  - c. Rules 52 to 58 regarding the Liquidator's further powers and duties in relation to Sections 249 and 250 of the Act.

Under Section 250, the Liquidator would need to make a report to the Court stating that in his opinion, a fraud has been committed, or that any material fact has been concealed, etc, and the Liquidator may, under Section 250(2), take part in the examination either personally or by an advocate.

### Statutory Books

20. The statutory books of the company should be examined together with the Minutes Book and compared with a search obtained from SSM. Particular attention should be given to the identity of directors who held office during the material time prior to the liquidation.

## Trading Losses

21. The Liquidator should review the deficiency account prepared by the directors, to reconcile the balance on the last available profit and loss account to the deficiency disclosed by the statement of affairs. If the apparent trading losses are material, consideration should be given to the preparation of the accounts to support the reasons given by the directors for the losses incurred.

## Validity of Charges

22. Details of all securities held by banks and other parties should be obtained and the Liquidator is to check the registration and to consider the possible invalidity of any charge. Where liquidation follows receivership, the validity of the appointment of the receivers should also be confirmed.

## Reconciliation of Assets with the Last Balance Sheet

23. For the purposes of discovering assets, the statement of affairs should be compared with the last audited accounts and the movement in assets reconciled by reference to cash and other records.

## Transactions with Related Companies or Connected Persons

24. The Books and Records of the company should be examined to ensure that any transactions with related companies or connected persons were carried out at arms length and material transactions should be examined in detail. Particular attention is drawn to transactions involving directors, including any reduction in loan accounts and/or reduction in overdrafts supported by personal guarantees.

## Other General Matters

### Recovery – Rights of action

25. Should the Liquidator's assessment and review of the affairs of the company unearth any rights of action which the company or the Liquidator may have against third parties, the Liquidator's attention is drawn in particular to the following provisions in the Act:

Section 132C	Approval of company required for disposal by directors of company's undertaking or property
Section 132E	Substantial property transactions involving directors
Section 133	Loans to directors
Section 133A	Prohibition of loans to persons connected with directors
Section 214	Liability as contributories of present and past members

Section 223	Avoidance of dispositions of property, etc
Section 234	Statement of company's affairs to be submitted
Section 236	Powers of Liquidator
Section 244	Settlement of list of contributories and application of assets
Section 245	Payments of debts due by contributory to company and extent to which set-off allowed
Section 269	Powers and duties of Liquidator
Section 293	Undue preference
Section 294	Effect of floating charge
Section 295	Liquidator's right to recover in respect of certain sales to or by company
Section 300	Offences by officers of companies in liquidation
Section 303	Liability where proper accounts not kept
Section 304	Responsibility for fraudulent trading
Section 306	Prosecution of delinquent officers and members of company

26. The provisions stated above are not exhaustive and the practitioner may need to refer to other specific sections of the Act and the Rules depending on the nature and circumstances surrounding the transactions being assessed and reviewed.
27. If in the course of a winding-up, a Liquidator appointed under a voluntary winding-up discovers that criminal acts have been committed, he should consider relevant laws and regulations, and may wish to obtain legal advice, before rendering any report to the creditors. If it appears to the Liquidator in the course of a voluntary winding-up, that any past or present officer, or any member, of the company has been guilty of any offence in relation to the company for which he is criminally liable, he shall forthwith report the matter to the Minister under Section 306(2) of the Act. It is advisable that the Liquidator obtain legal advice before making the report.
28. If, during the course of the assessment and review any apparent preferences or rights of action come to light, the Liquidator should seek legal advice as to whether or not any particular transaction can be set aside.
29. The Liquidator should obtain the sanction of the creditors or the COI, if one has been formed, in respect of any decision to bring or defend any action or other legal proceedings in the name of the company. This sanction is not a statutory requirement as the Liquidator has the powers to do so. However, it is recommended that the Liquidator seek this consent in instances where the likelihood of any tangible benefit to the creditors as a result of taking such action is not clear. The Liquidator should take cognisance of Sections 236(1)(e) and 269(1) of the Act in respect of the approval required either of the Court or the creditors or COI for each appointment of an

advocate to assist him in his duties. Should the COI or body of creditors disagree with the Liquidator on the conduct of further assessment identified in his report to Court, the Liquidator should apply to the Court for direction.

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