

INSOLVENCY GUIDANCE NOTE

Procedure for Winding up an Insolvent Company Voluntarily

Foreword

1. This Guidance Note has been approved by the Council of the MACPA for issue by the Insolvency Practice Committee to members for guidance in connection with the liquidation of companies registered in Malaysia. It should be read in conjunction with the MACPA's Code of Professional Conduct and Ethics and in the context of the Preface to Insolvency Guidance Notes. Practitioners should also be conversant with all legislative and other requirements relevant to their work.
2. The aim of this Guidance Note is to provide guidance to members who have received instructions from the company's directors for advisory services to wind up an insolvent company voluntarily. This Guidance Note may also be used to advise creditors generally.
3. This Guidance Note cannot be and does not set out to be a definitive guide on all administrative matters.

Introduction

4. The only permissible mode of winding up an insolvent company voluntarily is by way of a creditors' voluntary winding up and the prerequisites and procedures for winding up an insolvent company voluntarily are compliance with Sections 255 and 260 of the Companies Act, by the directors, holding of a meeting of shareholders to pass a special resolution to wind up voluntarily, followed by a meeting of creditors of the company.
5. The meeting of creditors should be convened to be held immediately after the shareholders' meeting, on the same day or the next, and both meetings should be held within a period of one month from the date of the statutory declaration made pursuant to Section 255 of the Companies Act.
6. This Guidance Note concentrates on the requirements of Sections 255 and 260 of the Companies Act, and the practice to be adopted in respect of meeting of the company and its creditors. The creditors' meeting referred to is the meeting of creditors convened pursuant to Section 260 of the Companies Act, as declared in the statutory declaration made pursuant to Section 255 of the Companies Act to have been summoned, for the purposes of effectuating a creditors' voluntary winding up.

This Guidance Note does not purport to cover the practice to be adopted in respect of all other creditors' meetings under the Companies Act or the Companies Winding Up Rules, 1972.

Definitions

7. 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 Note:

"Advising member" means the member who has received instructions from the company, or the company's directors or creditors ("the client") for advisory services in relation to the winding up of an insolvent company voluntarily.

"Books and records" means 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 Companies Act.

"Companies Act" means the Companies Act, 1965 (as amended) including the Companies (Winding Up) Rules, 1972.

"Court" means the Courts in Malaysia or a judge thereof.

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Instructions for Advisory Services

8. Instructions to act in such advisory capacity should be properly defined and be accepted only where there are good grounds for believing that a creditor's voluntary winding up is possible. Although creditors' voluntary winding up is a permissible mode of winding up an insolvent company voluntarily the creditors themselves cannot effect a voluntary winding up. Their rights to be exercised in the creditors' meeting comes into existence only when the insolvent company takes steps to wind up voluntarily by having convened a meeting to pass a special resolution to that effect. In the absence of this action by the shareholders, a creditors' voluntary - winding up cannot take place, and the meeting pursuant to Section 260 of the Companies Act cannot be convened.

The advising member should ascertain from the client whether the shareholders will pass the special resolution to wind up voluntarily. Where a petition has been presented to the Court to wind up the company on the ground that it is unable to pay its debts or on any other grounds, the client should be advised not to take any step to wind up the company voluntarily.

9. The directors should be advised of their responsibility to lodge the statutory declaration pursuant to Section 255 of the Companies Act with the Registrar and the Official Receiver and to appoint a provisional liquidator and convene meetings of shareholders and creditors. The advising member must therefore satisfy himself that the directors are aware of their responsibilities.
10. If the advising member receives instructions which would require him to act in a manner contrary to this Guidance Note, he should only accept those instructions after careful consideration of the implications of accepting and/or discharging those instructions. Where the directors act contrary to the guidance contained in this Guidance Note or to the provisions of the Companies Act, the advising member may be exposed to the extent that he may be called upon to show that the directors' actions were undertaken either without his knowledge or against his advice.
11. A member who is unable or may not want to accept an appointment as a provisional liquidator of a company on the basis that he or his firm has held a continuing professional relationship with the company during the preceding two years may nevertheless act as an advising member.

Statutory Declaration Pursuant to Section 255 of the Companies Act

12. In order to comply with Section 255 of the Companies Act, the client should be advised to ensure that the accounting records are up to date and to prepare statement of affairs reflecting the deficiency in order to substantiate the said statutory declaration to be made by the directors in the prescribed Form 65A of the Companies Regulations, 1966.
13. The statement of affairs should be in the prescribed Form 61 of the Companies Regulations, 1966 and the client should be guided through the requirements of Form 61 together with all of the attendant schedules where relevant.
14. The said statutory declaration in the prescribed Form 65A should be made only after carefully considering the company's ability to convene the meeting of shareholders and creditors within one month of the date of the declaration.
15. The time and place of the meetings (to be stated in the Form 65A) should be convenient to the majority in value of the creditors.
16. Subject to paragraph 15, there is no objection to an advising member arranging for the meeting to be held at his own office provided it is a convenient place. He may also be able to charge the company for the use of the room.
17. It is for the advising member to advise the client whether, in all the circumstances of a particular case, it would be preferable for the creditors' meeting to be held the day next following the day on which there is to be held the meeting of shareholders.
18. If the advising member is not an approved liquidator he should assist by suggesting the name of an approved liquidator to be appointed pursuant to Section 255(1) of the Companies Act.
19. If the advising member is an approved liquidator he may also accept appointment as the provisional liquidator.
20. After taking into consideration paragraphs 13 to 19, the client should be advised to pass or procure resolutions to convene the meetings of members followed by meetings of creditors, to make or procure to be made the statutory declaration in the prescribed Form 65A, to appoint a provisional liquidator pursuant to Section 255(1) of the Companies Act, and also to nominate a director to attend the meeting of creditors.
21. Immediately after passing of the resolutions as per paragraph 20, the directors should be advised to make and lodge the said statutory declaration in Form 65A with the Registrar of Companies and with the Official Receiver and also to give notice of appointment to the provisional liquidator, forthwith to take office.
22. Notice of the appointment of a provisional liquidator and a copy of the said declaration should be advertised within fourteen days of the appointment of the provisional liquidator in at least two newspapers circulating generally throughout Malaysia.

Notices of Meeting

23. The date, time and venue of the meetings to be stated in the notices to shareholders and creditors should be the same as that stated in Form 65A.
The notices to shareholders and creditors shall be sent simultaneously, and preferably on the same day the Form 65A is lodged with the Registrar of Companies.

Meeting of Shareholders

24. The creditors and the company secretary may be fully conversant with the practice to be adopted in respect of shareholders' meeting as the usual rules regulating calling and conduct of company meetings apply in relation to matters such as notice, proxy, voting and procedure. In any event, the advising member should advise the client that:
 - a. A minimum of 21 days' notice in writing is given;
 - b. If shorter notice is given, it should be predetermined with certainty that 95% in value of shareholders present in person or by proxy will consent to the shorter notice; and
 - c. The proxy form as per table A, or the proxy form as per the company's articles of association is enclosed with the notice.
25. (a) (i) The creditors may appoint another person other than that person nominated by the shareholders as liquidator. Where a liquidator is appointed by the creditors, his appointment shall take precedence over the nomination of the shareholders.
(ii) A liquidator is not deemed to have been duly appointed unless the resolution for his appointment is passed by a majority in number and in value.
(b) Shareholders should be advised to appoint a liquidator. This appointment will stay only if no appointment of liquidators were made by the creditors at the subsequent meeting of creditors. However, where an application is made to the Court upon dispute between the shareholders and the creditors on the appointment of liquidators, it will be opened for the Court if it sees fit to direct that the person appointed by the shareholders should act as the liquidator or jointly with the person appointed by the creditors. If the Court makes no order, then paragraph (a) (i) applies.
26. The client should also be advised to nominate up to five of their own number to act in the Committee of Inspection, subject to the creditors' consent.

Meeting of Creditors Pursuant to Section 260 of the Companies Act

27. A covering letter should be sent to each creditor stating briefly the purpose of the meeting and the following should be enclosed:
 - a. Notice of meeting of creditors;
 - b. Detailed list of names of creditors and the amounts of their claims;
 - c. Instrument of appointment of proxy or representative; and
 - d. A formal proof of debt form.

There is no prescribed form for notice of meeting of creditors pursuant to Section 260 of the Companies Act and, as such, any suitable form may be used. The notice of meeting of creditors should clearly state the object and purpose of the meeting and at the foot of the notice of meeting should state that the proof and proxy forms should be lodged with the person convening the meeting not later than twelve o'clock noon of the day before the meeting.

28. The advising member should advise client to take all reasonable steps to ensure that the list of creditors provided by the directors is complete. Thus, for example, he should advise the company to identify and send notices to such creditors as hire purchase companies, lessors and former lessors, bankers, public utility companies, Inland Revenue Board, Customs Department, EPF Department, SOCSO Department, Registrar of Companies, solicitors acting for creditors, land office, employees, workers, etc.
29. Although the legal requirement is to give a minimum of seven clear days' notice, in effect 21 days notice is given because the notices to creditors should be sent simultaneously with the notices to the shareholders. If, 95% of the shareholders have consented to shorter notice of the shareholders' meeting, the legal requirement of a minimum of 7 clear days' notice to creditors may be given.

The notice of meeting should also be advertised at least 7 days before the date of the meeting in a newspaper circulating generally throughout Malaysia.

Statement & Forms to be sent with the Notice of Meeting of Creditors

30. The directors should prepare a detailed statement of creditors and the amounts of their claims and the advising member should take steps to ensure that:
- The list provides details of the names of all known creditors and the amounts due to them;
 - The name should be arranged in alphabetical order for ease of reference; and
 - Sufficient copies are available to be sent with the notices to creditors.
31. The advising member should also ensure that sufficient proof forms and proxy forms in accordance with Forms 77 and 78 of the Companies Regulations, 1966 and Forms 73 and 74 of the Winding Up Rules, 1972 respectively are available to be sent with the notices to creditors.

Proxies / Appointment of Representatives

32. The forms of proxy or appointment of representatives accompanying the notice should state the name of the company and the date of the meeting before dispatch in order to reduce the possibility of errors by creditors in completing the forms. No name of the provisional liquidator or any other person shall be inserted or printed in the forms before it is sent.
33. Proxies to be used at the meeting are valid only if they are lodged by the time stated in the notice convening the meeting at the place specified in the notice.
34. Proxies which are lodged out of time should be treated as invalid. Proxies which are incorrectly completed in a material way should in general be rejected. There is a requirement for proxy forms to be filled by a witness in his own handwriting and to certify at the foot of the proxy form where the creditor is blind or incapable of writing. Proxies which are unsigned or which do not explain the authority under which they are signed will therefore be invalid. However, proxies should not be rejected simply because of a minor error in their completion provided:
- The form of proxy sent with the notice of the meeting (or a substantially similar form) has been used; and
 - The identify of the creditor and the proxy holder, the nature of the proxy holder's authority and any instructions given to the proxy holder are clear.
35. The chairman or the provisional liquidator appointed as general or special proxy is valid.
- A general proxy should be given by a creditor to a person who is in his regular employment and the standing of the person to the creditor should be stated, otherwise it will be invalid. A minor appointed as a proxy will be invalid.
36. Where a person is appointed as representative for a corporation he should produce to the chairman of the meeting a certificate under Section 147(5) of the Companies Act. If there is an authority letter to be a representative of a corporation the formalities of appointing a proxy are not necessary.
37. When advising the chairman of the meeting on the validity of proxies, the advising member should bear in mind, that he has a personal interest if he intends to seek nomination as liquidator. Where circumstances so demand, he should suggest that the chairman takes advice on the validity of proxies from an independent source, for example the company's solicitors.
38. There is no requirement for proxies which are considered invalid to be returned to the creditors who have lodged them.
39. Any person entitled to attend the meeting may inspect the proxies and proofs, either immediately before or during the meeting. Proxies and proofs consist of those which have been validly lodged including those rejected for voting purposes. In this context, the words "immediately before" should be taken to mean during the 30 minutes immediately preceding the meeting.

Proof of Debt

40. It is recommended to insist on proof of debt by creditors notwithstanding that the account books of the company contain entries, which prima facie establish the indebtedness of the company of the creditors.
41. Creditors may submit proofs at any time before voting, even during the course of the meeting itself. The amount for which the chairman of the meeting should be advised to admit the proof for voting purposes, should normally be the lower of:
- The amount stated in the proof; and
 - The amount considered by the company to be due to the creditor.

However, if the amount stated in the proof is indisputable such as in a situation where the book entry in the company's book is manifestly in error, the chairman should be advised to accept the amount in the proof.

Proofs from secured creditors shall be admitted for voting purposes for only the balance amount after deducting the value of the security. The amount for which the proof is admitted for voting purposes should be endorsed on it. Proof received before the meeting should be made available for inspection, with the proxies, by any person entitled to attend the meeting.

Attendance at the Creditors's Meeting

42. One of the directors of the company appointed by the directors and the secretary of the company should attend the meeting. In addition, the advising member should consider whether any other director or employee of the company will be able to provide information which is relevant to the meeting and if so, he should advise that the relevant notice to attend be served.
43. The provisional liquidator should attend the meeting of creditors, and give any explanations, if required, on his statement of receipts and payments from date of his appointment to date of meeting.
44. Creditors and their authorised representatives are entitled to attend. In addition, a person who holds himself out as representing a creditor should, in the absence of evidence of the contrary, be allowed admittance. If any person claims to be the representative of a body corporate, proof of his identity and of the resolution authorising him to act may be required where any doubt is raised.
45. The chairman of the meeting should be advised that he must decide whether to allow any third parties, such as shareholders, the press or the police, to attend, after taking into account the views of the creditors present.

Information to be Provided to the Meeting

42. The advising member should ensure that a copy of the directors' sworn Statement of Affairs in the prescribed Form 61 of the Companies Regulations, 1966 is handed to all those attending the meeting.
43. Information to be given to the meeting should include:
 - a. Details of any prior involvement with the company or its directors by the advising member or, if a different person, the proposed liquidator;
 - b. A report on the previously held shareholders' meeting, stating the date the notice of the meeting was issued, the date and time that the meeting was held and if it was held at short notice, the reasons therefore and the fact the required consents were received. The resolutions passed at the meeting should be reported and if the liquidator has not yet consented to act, that fact should be stated. If the shareholders' meeting was adjourned without a resolution for voluntary winding up being passed, there should be reported:
 - i. the date and time to which the meeting had been adjourned;
 - ii. the fact that any resolutions passed at the Section 260 of the Companies Act meeting will come into effect, if and when the winding up resolution is passed;
 - c. The date on which the directors gave instructions for the meeting of creditors to be convened and the date on which the notices were dispatched;
 - d. A brief report on the company's relevant trading history which should include:
 - i. date of incorporation and registration number;
 - ii. names of all persons who have acted as directors of the company or as its company secretary at any time during the three years preceding the meeting;
 - iii. names of shareholders together with details of their shareholdings;
 - iv. details of all classes of shares issued;
 - v. nature of the business conducted by the company;
 - vi. location of the business and the address of the registered office;
 - vii. details of parent, subsidiary or associated companies;
 - viii. the directors' reasons for the failure of the company;
 - ix. extracts from any audited or draft accounts produced for periods covering the previous three years or for any earlier period which is relevant to the failure of the company. As a minimum, the extract should include details of turnover, net result, directors' remunerations, shareholders' funds, dividends paid, reserves carried forward at year end and the date of the auditor's report and any qualification therein;
 - x. a deficiency account reconciling the position shown by the most recent balance sheet to the deficiency in the Statement of Affairs;
 - xi. the names and professional qualifications of any valuers whose valuations have been relied upon for the purpose of the Statement of Affairs, together with the basis or bases of valuation;
 - xii. such other information as the advising member considers necessary in the circumstances to give the creditors a proper appreciation of the company's affairs;
 - e. If the company is in receivership, the meeting should be provided with a report on the conduct of the receivership to date, including a summary of the receiver's receipts and payments. Where any member is a licensed practitioner and is a receiver of a company whose shareholders pass a resolution for voluntary winding up, that member should assist the advising member by providing this information, and also provide such information to any other licensed practitioner who may be acting in the capacity of advising member.
 - f. An explanation of the contents of the Statement of Affairs.

Conduct of the Meeting

48. Creditors and their representatives attending the meeting are required to sign an attendance list. This list should be made available for inspection to anyone attending the meeting. In addition, any creditor or creditor's representative wishing to speak, ask questions, or make a nomination, should be asked to identify himself and the creditor he represents.
49. The creditors may appoint one of their member to be the chairman, failing which the director appointed to attend the meeting shall preside.
50. The chairman should be advised that he has to make a ruling that the meeting is held at a time and place convenient to the majority in value of the creditors and that his decision shall be final.
51. Creditors and their representatives should be given the opportunity to ask questions. Whilst every effort should be made to give a reasonable answer to such questions within the context of the meeting, the chairman may be advised to refuse a question to be put if, for example:
 - a. The questioner refuses to give the name of the creditor he represents and his own name or that of his firm;
 - b. The questioner does not claim to be or to represent a creditor;
 - c. The information sought could be construed as defamatory if subsequently proved incorrect.
52. The chairman should be advised to state the grounds on which he refuses to allow a question. Creditors are entitled to information on the causes of the company's failure but it is not appropriate for a detailed investigation of the company's affairs to be undertaken at a meeting of creditors.
53. If at the shareholders' meeting a liquidator has been nominated, the chairman should be advised to inform the creditors of the said nomination and also as to whether the person nominated to be liquidator is an approved liquidator or not an approved liquidator.
54. If the creditors wish to nominate some other person as liquidator instead of the liquidator nominated by the shareholders, the chairman should be advised that the creditor's nomination prevails and that any director, member or creditor may within seven days after the date of the creditors' nomination apply to the Court for an order directing that the person nominated as liquidator by the company be liquidator instead of or jointly with the person nominated by the creditors.
55. The chairman should be advised that if a person nominated to be appointed as a liquidator is not an approved liquidator, a vote should be taken first to determine whether the majority in value of the creditors approve the appointment of a person as liquidator who is not an approved liquidator.
56. Nominations for the appointment of a liquidator should be requested before any vote is taken. The holder of a proxy, requiring him to vote for the appointment of a particular liquidator, is required to nominate that person, and it is therefore possible that the chairman or any other holder of such proxies may need to make more than one nomination.
57. The chairman must accept all nominations and put them to the meeting, unless he has good grounds for supposing that the person nominated is not qualified to act as an insolvency practitioner in relation to the company, or is not prepared to act as liquidator if appointed.
58. The procedure to be followed when voting for the appointment of a liquidator should be explained to the meeting. It is acceptable in the first instance for a vote to be taken on an informal show of hands and if the result is accepted by all interested parties, the chairman of the meeting may conclude that a resolution has been passed. If a formal veto becomes necessary it should be conducted by stating the names of all those nominated and by the issue of voting papers on which those wishing to vote will be required to show their name, the name of the creditor they are representing, the amount of the creditor's claim and the name of the nominated person for whom they wish to vote.
59. When all votes have been counted, the chairman should announce the result to the meeting, giving details of the total value of votes cast in favour of each nomination. He should also give details of votes which have been rejected, either in whole or in part, and should also state which nomination those creditors supported and the reasons for the rejection.
60. An absolute majority is required and if the first poll is not conclusive, the nominee receiving the least votes is excluded on the next poll where no other nominee has withdrawn. In the event of the withdrawal of at least one nominee, then the nominee with the least votes remains in the next poll. The same procedure should be followed in all successive polls.
61. The meeting should always be invited to establish a Committee of Inspection. If it wishes to do so, the meeting should be advised of any shareholders' nominations to the committee and of the voting procedure which will be followed. It is accepted that, where the constitution of the committee is not contentious, a resolution may be passed on a show of hands and may also appoint a committee en bloc. If there are more than five nominations for appointment to the committee of inspection, it is recommended that the creditors should be issued with voting papers on which they should enter their own name, the name of the creditor they represent and the amount of his claim. Each creditor should be allowed to vote for up to five members of the committee and in doing so a creditor may vote for his own.
62. When declaring the result the chairman should follow the same procedures as those outlined in paragraphs 58 to 60 above.
63. Voting papers should be made available for inspection by any creditor or creditor's representative whose claim has been admitted for voting purposes at any time during the meeting or during the business hours on the business day following the meeting.
64. The admission or rejection of claims for voting purposes is the responsibility of the meeting. In most instances it is expected that, prior to the meeting, the chairman will mark on each proof the amount for which it is admitted. The advising member may assist the chairman to decide the amounts for which claims should be admitted, in accordance with the guidance given in para 41 above; but if he intends to seek appointment as liquidator he should bear in mind that his own personal interest might create a conflict, in which case the chairman should be advised independently.

Minutes of Meeting

65. The minutes of meeting of shareholders and creditors should be prepared immediately after the close of meetings setting out details of the decisions reached and the chairman of the respective meeting should be asked to sign and date the respective minutes. The minutes should then be kept with the liquidation papers.

Compliance with Section 254(2) of the Companies Act

66. The directors should be advised to lodge the printed copy of the resolution for voluntary winding up in Form 11 with the Registrar of Companies within seven days from date of resolution and to give notice of the resolution in a newspaper circulating generally throughout Malaysia within 10 days from date of resolution.

Provision of Information to Liquidator

67. In instances where the advising member has not been appointed to be the liquidator of the company, he must provide reasonable assistance to the liquidator.

This will include handing over such of the company's books and papers as are held by him, together with documents he has received in relation to the meeting of creditors (e.g. proofs, proxies, Statement of Affairs, shareholders' resolution, attendance lists and minutes of the creditors' meeting). It is expected that this information will be handed over as quickly as possible and, in any event, within seven days of the creditors' meeting. Likewise all sums received by the advising member cum provisional liquidator from the company or on its behalf, less any proper disbursements which he has made, duly vouched, should also be handed over.

Solicitation to Obtain Nomination

68. Members are reminded of the provisions of Section 301 of the Companies Act and Rule 136 of the Winding Up Rules, 1972.