INSOLVENCY GUIDANCE NOTE

Members’ Voluntary Winding Up

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 members’ voluntary winding up of companies registered in Malaysia under the provisions of the Companies Act, 1965. 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. This Guidance Note sets out matters that are peculiar only to a members’ voluntary winding up and the suggested steps, procedures and duties involved. Matters which are applicable to all voluntary winding up have only been included in so far as they are relevant to the suggested steps or procedures mentioned herein.

3. This Guidance Note cannot be and does not set out to be a definitive guide on all administrative matters.

Introduction

4. A members’ voluntary winding up can only be initiated when a company is solvent and sufficient liquid funds are available to meet the fees, costs and expenses of the liquidation.

The requirement for solvency is the main factor differentiating a member’s voluntary winding up and a creditor’s voluntary winding up. Section 257 of the Companies Act provides that a majority of the directors may make a written declaration in Form 66 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 of Solvency 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.

Definitions

5. 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:

“Guidance Note” means Guidance Note (“IGN”) as approved by the Council of the Malaysian Association of Certified Public Accountants.

“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.

“ROC” means the Registrar of Companies.

“Court” means the Courts in Malaysia or a judge thereof.

Guidance Note

Preparatory Work - Pre-Appointment

6. Certain matters should be considered or attended to prior to the appointment of the liquidator so that 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

7. Before accepting the appointment, IGN 1 requires the practitioner to consider the implications of such an appointment, in the light of the Code.

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

The 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 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.

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

8. 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 of the Companies Act in an amount exceeding two thousand five hundred ringgit:

   b. If he becomes bankrupt;

   c. If he assign his estate for the benefit of his creditors or makes an arrangement with his creditors pursuant to any law relating to bankruptcy;

   d. If he is convicted of an offence involving fraud and dishonesty punishable on conviction by imprisonment for three months or more.

There is no requirement under the Companies Act, that a person must be an approved liquidator for the purpose of a member's 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, pursuant to Section 10 (4) of the Companies Act.

Review of Company's Balance Sheet

9. Steps could be taken 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 could include the payment of inter-company loan accounts and payment of creditors. The liquidator should review the tax position 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. Deposits can be uplifted about six months prior to the filing of the last tax returns.

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

10. 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. The powers of the directors cease unless the liquidators or the company in general meeting with the consent of the liquidator approves the continuance of those powers pursuant to Section 258(2) of the Companies Act.

   b. Pursuant to Section 256(1) of the Companies Act, the company, shall from the commencement of the winding up cease to carry on its business, except so far as is in the opinion of the liquidator, required for the beneficial winding up thereof. However, the corporate state and corporate powers of the company continue until it dissolves.

   c. Pursuant to Section 256(2) of the Companies Act, 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.

Initiation of a Voluntary Winding Up

Calling of Shareholders General Meeting to Pass Special Resolution

11. Subject to section 254(l)(a) of the Companies Act, in all cases of voluntary winding up a general meeting is required to be convened to pass a special resolution to wind-up the company. The special resolution should also include giving the powers to the liquidator to distribute part or the whole of the company's assets in specie or in kind.

Section 254 of the Companies Act provides that 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 or 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.

If the company to be wound up is a wholly owned subsidiary, then after the lodgment of the Declaration of Solvency with the ROC by the 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 minutes to pass a special resolution to wind up the subsidiary.

Filing of Resolution with ROC

12. Pursuant to Section 254(2)(a) of the Companies Act, within seven days after the passing of the special resolution, the company shall lodge the resolution together with the Notice of Resolution, in the prescribed form (Form II) with the ROC.

Advertisement

13. A notice of the resolution should also be advertised in a newspaper circulating generally throughout Malaysia within 10 days after the passing of the resolution pursuant to Section 254(2)(b) of the Companies Act.
Declarations of Solvency

14. Pursuant to Section 257(3)(b) of the Companies Act, within 5 weeks immediately preceding the passing of the special resolution for members' voluntary winding up, the directors must make a Declaration of Solvency.

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.

There must be attached to the declaration, a Statement of Affairs of the company 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.

The Statement of Affairs must be made up to the latest practicable date before making the declaration and the declaration must be made at a meeting of directors.

Both the declaration and the Statement of Affairs must be lodged with the ROC before the date on which notices are sent convening the general meeting at which the winding up resolution is proposed.

Commencement of Winding Up

15. A member's voluntary winding up shall commence at the time of the passing of the resolution for voluntary winding up, pursuant to Section 255(6)(b) of the Companies Act.

Immediate Steps Following Appointment

Notification that Company is in Liquidation

16. Pursuant to Section 283(l) of the Companies Act, 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.

Notice of Appointment and Address of Liquidator

17. Lodge Form 71 being the notice of appointment and situation of office with the ROC and the Official Receiver within 14 days of his appointment pursuant to Section 280(1) of the Companies Act.

Books and Records

18. 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 papers until otherwise advised by the liquidator. Section 284 of the Companies Act provides that the liquidator shall retain the books and papers for 5 years from date of dissolution of the company or earlier as the company by resolution directs. The liquidator may destroy them thereafter.

Taking Possession of Assets

19. Obtain a list of assets from directors or compile one from enquiries and observation to determine what the assets are. 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. 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 creditors, its' solicitors and Court’s bailiff, if relevant. The rights of the creditor and liquidator as to execution or attachment in these circumstances are set out in Sections 298 and 299 of the Companies Act.

Insurance

20. 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

21. Notify the company's bank(s) of the liquidator's appointment including a certified copy of the resolution and giving specific instructions on the future conduct of the account. Request the bank to release any company documents held by them to the liquidator. Initial verbal advice should be confirmed in writing. Open a liquidator's bank account. All monies received shall be banked into that bank account. Any sum exceeding RM200 shall be banked in as soon as possible and should not be later than 10 days.

Ensure that the bank balance is regularly reviewed and surplus funds placed on fixed deposit or other authorised investment in accordance with Section 285 of the Companies Act.

Professional Advisors

22. 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 Proofing of Debts

23. Advise creditors of liquidator's appointment and send notice to creditors to lodge their claims with proof of debt as specified in Rule 79, and place a copy of the notice in a daily newspaper. A claim is provable in every winding up, if it falls within the terms of Section 29 1(1) of the Companies Act.

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

24. Write to all directors advising them that pursuant to Section 258(2) of the Companies Act 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.

Notice to Debtors

25. 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

26. 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.

Section 69(i) 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 that are or will thereafter become payable in respect of the company. Similar provision exists in the Service Tax Act, 1975.

Review of Company’s Affairs

27. 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
   l. Details of personal guarantees given by directors in respect of advances to the company
   m. Details of registered business names, copyrights, trademarks and patents.

Liquidator’s Records

28. Maintain books which may be required to record entries or minutes of proceedings pursuant to Section 277(1) of the Companies Act and which will be prima facie evidence of the truth of all matters purporting to be recorded therein pursuant to Section 284(1) of the Companies Act.
Immediate Steps Following Appointment
- Where The Company Is Still Trading

29. 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.

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)
   iv. third party properties

e. In accordance with Section 256(1) of the Companies Act 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.

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 contract 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. instruction to agents as to accounting to the company and their future authority
   x. instructions to debtors on payment of amounts due and instituting a system of collection and control of debts
   xi. conforming with any licences and regulations necessary for operations that are to continue.
Other Procedures Following Appointment

30. The other procedures following appointment are:

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.

If, at any time after the appointment of the liquidator, the liquidator is of the opinion that the company will not be able to pay or provide for its debts in full within the period stated in the Declaration of Solvency, he must summon a meeting of creditors pursuant to Section 259 of the Companies Act and the winding up will henceforth be conducted as a creditors’ voluntary winding up.

e. Settle list of contributories, if necessary.

f. Ensure that shareholders are kept informed of the progress of the winding up. Pursuant to Section 271(1) of the Companies Act, the liquidator must convene a general meeting of the company within 3 months after the end of the first year of the winding up and at the end of each succeeding year and advise the meeting of his acts and dealings and of the conduct of the winding up during the year under review.

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.

However, before making any distributions to shareholders the liquidator must ensure that sufficient funds are set aside where necessary to meet:

i. debts owing to secured creditors

ii. proved debts owing to unsecured creditors

iii. debts payable pursuant to Section 292 of the Companies Act

iv. debts payable pursuant to Section 69 of the Sales Tax Act, Section 65B of the Customs Act, Section 75(2) of the Income Tax Act and any other acts applicable to other federal taxes.

v. any contingent liabilities

Interim distributions should be made after setting aside sufficient funds to meet (i) to (v) above. Nevertheless, the liquidator may deem it necessary to secure an indemnity from the company's shareholders prior to making any such distributions.

h. Lodge Income Tax return if any taxable income is derived during the liquidation.

Liquidator’s Accounts

31. If the winding up process exceeds 6 months from the commencement date within 1 month after the expiration of 6 months from the date of the appointment and within 1 month of the end of each subsequent 6 months, the liquidator, pursuant to Section 281(1) of the Companies Act, is required to file with the ROC and the Official Receiver the liquidator’s Statement of Receipts and Payments and Statement of the Position in the Winding Up, affirmed by statutory declaration.

Termination of Winding Up

32. The events culminating in termination of a members voluntary winding up include the following:

a. The payment of final dividend to the creditors

b. The distribution of surplus, if any, to the members

c. The liquidator completes the winding up of the company

The winding up is completed when the company is dissolved, or a stay of proceedings in the winding up is granted by Court. In the latter, the stay effectively brings the winding up to an end and permits the company to carry on its business and affairs as if the winding up has not been effected.
Closing Duties

33. The closing duties are:

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 Board, Customs and Excise Department, Sales Tax Department and other government authorities, if necessary, in respect of income tax, sales tax and other taxes.

c. Call final general meeting of members pursuant to Section 272 (2) of the Companies Act by giving:
   i. at least 1 month notice in a newspaper circulating throughout Malaysia specifying time, place and object of meeting.
   ii. send notice of final meeting to each member in accordance with the company’s Articles.

d. Pay liquidator's fees which may be agreed at the general meeting of members as provided for in Section 258(1) of the Companies Act and pay creditors whose proofs have been admitted by the liquidator.

e. 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.

f. Pursuant to Section 272(1) of the Companies Act, prepare the final accounts showing how the winding up has been conducted and the property of the company has been disposed of.

g. At the final meeting of members, obtain ordinary resolutions pursuant to Section 284(3) of the Companies Act for disposing of the books and records of the company and of the liquidator.

h. Pursuant to Section 284(2) of the Companies Act, if the meeting does not resolve to dispose of the books and records they must be retained for 5 years.

i. Close liquidator's bank account after paying any unclaimed funds to the Official Receiver to be placed to the credit of Companies Liquidation Account pursuant to Section 286 of the Companies Act.

j. File with:
   i. the ROC and Official Receiver, 2 copies of the Return of Final Meeting and the final accounts to members within 7 days of the final meeting of members.
   ii. the ROC and Official Receiver, the liquidator's account of receipts and payments within 1 month after he ceases to act as liquidator.
   iii. the ROC and Official Receiver, notice by liquidator of resignation with ROC within 14 days after his resignation or removal from office pursuant to Section 280 (3) of the Companies Act.

k. Forward a copy of the Minutes of the Final Meeting of Members to the client.

l. Pursuant to Section 272(5) of the Companies Act, the company is deemed to be dissolved 3 months after lodging the return of the Final Meeting with the ROC and Official Receiver.

m. Pursuant to Section 286(1)(b) of the Companies Act, where a liquidator has in his hands or under his control, after making 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.

Powers and Duties of Liquidator

34. Pursuant to Section 269(1)(b) of the Companies Act, the liquidator appointed pursuant to a members voluntary winding up may exercise any of the powers given by the Companies Act to the liquidator in a winding up by the Court. Such powers are provided for in Section 236 of the Companies Act. However, those powers set out in Section 236(1)(b), (c), (d) and (e) of the Companies Act may only be exercised with the approval of a special resolution of the company.

Other specific powers and duties of the liquidator are provided in Section 269 of the Companies Act.