



INSOLVENCY GUIDANCE NOTE GUERNSEY INSOLVENCY PRACTICE STATEMENT 2:

A PRACTITIONER'S INVESTIGATION INTO THE AFFAIRS OF AN INSOLVENT COMPANY

INTRODUCTION

1. This Guernsey Insolvency Practice Statement (GIPS) is one of a series of guidance notes issued to 'insolvency practitioners'¹ ("Practitioners"), by the Association of Restructuring and Insolvency Experts (ARIES), the Channel Islands professional body for those practising or interested in restructuring and insolvency. GIPSs are issued to Practitioners with a view to maintaining standards by setting out basic principles and best practice procedures in order to harmonise Practitioners' approach to particular aspects of insolvency.
2. GIPS 2 applies to all Guernsey insolvency processes including:
 - a) Administration under Part XXI of The Companies (Guernsey) Law, 2008 ("the Law");
 - b) Insolvent voluntary winding up under Part XXII of the Law;
 - c) Insolvent compulsory winding up under part XXIII of the Law;
 - d) Insolvent winding up of an incorporated cell company under part XXVIII of the Law; and,
 - e) Administration under Part I of The Protection of Investors (Administration and Intervention) (Bailiwick of Guernsey) Ordinance, 2008.
3. For the purpose of GIPS 2, references to 'company' may also apply to other entities including an incorporated cell company.
4. GIPS 2 is based upon Statement of Insolvency Practice (SIP) 2 'a liquidator's investigation into the affairs of an insolvent company', which applied in England and Wales until 6 April 2016.
5. GIPSs should not be relied upon as definitive statements of the Law. No liability attaches to ARIES or to any body or person involved in the preparation or promulgation of GIPSs.

REGULATORY STATUS

6. GIPS are a voluntary industry initiative issued by ARIES and set best practice principles and key compliance standards with which Practitioners are encouraged to comply.

¹ Such persons undertaking the appointment of liquidator, administrator or administration manager of an insolvent entity in Guernsey

7. Practitioners should follow the GIPS wherever possible and practical.
8. **GIPS set out best practice, but they are not statements of the law. Where a Practitioner is in doubt about any of the requirements contained in the GIPS, they should obtain appropriate guidance from their professional body.**
9. **No liability attaches to any body or person that prepares, issues or distributes GIPS. The decision whether to comply with GIPS rests solely upon the Practitioner.**

THE PRACTITIONER'S DUTY

10. In general, a Practitioner should investigate what assets can be realised and what other recoveries can be made. The creditors have an interest in the Practitioner's investigations, because both the level of recoveries and the costs of the investigations will directly affect the funds available for distribution to them. When considering the scope and detail of his investigations the Practitioner should therefore bear in mind their impact on the creditors' interests. He should, subject to the considerations set out below, maintain appropriate communication with the creditors to ascertain their views about actual and prospective investigations, and to keep them informed of their progress and likely outcome. The Practitioner should also consider the conduct of the directors and whether to pursue a disqualification order under Part XXV of the Law.
11. In a voluntary winding up, Section 400(1)(a) of the Law requires the Liquidators to state in their account of the liquidation whether or not any state of affairs described in Section 422(1), 433(1) or 434(2) have come to their attention. The Liquidators' account is to be presented to the shareholders at the final meeting prior to dissolution in accordance with Section 400(1)(b) of the Law.
12. In a compulsory winding up, Section 417(5) of the Law requires the Liquidators to state in their account of the liquidation whether or not any state of affairs described in Section 422(1), 433(1) or 434(2) have come to their attention. The Liquidators' account is to be presented to the Commissioner of the Court prior to conclusion of the winding up in accordance with Section 417(1) of the Law.
13. Sections 422(1), 433(1) and 434(2) of the Law refer to delinquent conduct of the company's officers and wrongful or fraudulent trading.

RECORDS

14. At the outset of his appointment the Practitioner should ascertain the location and safeguard and list the company's books (including the statutory books and minutes), records and other accounting information (including computerised records). If the Practitioner encounters non-co-operation he should clearly record the steps taken by him.

INITIAL REVIEW

15. In conducting investigations, the Practitioner should have regard to the size of the case, the level of assets available to fund any further investigations or actions, and the materiality of the matters disclosed. Practitioners should use their professional judgment to determine the extent of investigations that are to be undertaken.

16. At the outset of the appointment the Practitioner should conduct an analytical review, based on the initial information available, in order to assess whether there is a prima facie case for further, more detailed, investigation into any aspect of the company's affairs. In order to carry out this review the Practitioner may consider undertaking the following preliminary enquiries:
 - a) Where a creditors' meeting is held in accordance with GIPS 4, the Practitioner should, both at the meeting and in his report to creditors, invite creditors to bring to his attention any particular matters which they consider require investigation.
 - b) The Practitioner should make enquiries of the officers of the company and other senior officials as to the company's affairs, including the reasons for failure and the location of its records and property. If the Practitioner encounters non-co-operation he should clearly record the steps taken by him.
 - c) The Practitioner should request the directors to prepare a statement of affairs or to approve a statement of affairs drafted by the Practitioner, and this should be compared with the last audited, signed or management accounts in order to ascertain whether all significant fixed and current assets can be identified and material movements in fixed and current assets can be properly explained.
 - d) The Practitioner should conduct a preliminary review of the books, records and minutes for the last six months in order to identify any unusual or exceptional transactions.
17. The Practitioner should consider whether the initial review discloses any matters that suggest there are grounds for more detailed investigation, or possible rights of action which the company or the Practitioner may have against third parties. In conducting this exercise the Practitioner should have regard to the size of the case, the level of assets available to fund any further investigations or actions, and the materiality of the matters disclosed.
18. Where the Practitioner has previously been instructed to assist the directors in putting the company into an insolvency process, some of the work contemplated above may have been done in advance of the appointment. Where this is not the case, it should be undertaken as soon as possible after the Practitioner's appointment.

CONSULTATION WITH CREDITORS

19. Where the Practitioner believes there are grounds for further investigation or possible action, he should seek the views of the creditors in order to ascertain and assess their views on such further work. Such consultation should either be by correspondence or by way of a creditors' meeting, or, where this is impracticable, by discussion with the major creditors. The Practitioner should provide creditors with any information they may reasonably require to enable them to provide their views.
20. This assessment will need to take into account the possible benefit to the estate and the likely costs of the exercise.
21. If the Practitioner decides that further investigation should be undertaken, the Practitioner should consider the scope of the work and funding issues. In the case of a potential action, account will need to be taken of the availability of adverse costs insurance.

MATTERS FOR DETAILED INVESTIGATION

22. Where it is agreed to conduct further investigations, the following points may usefully be borne in mind, depending on the circumstances of the case and the nature of the investigations:

Questioning directors and other key personnel

23. The question of which individuals are relevant to the Practitioner's investigations is likely to depend on the information which the Practitioner believes they may hold. The individuals who may be relevant will normally include:

- a) all directors (by whatever name called), including directors who held office during the three years prior to the appointment;
- b) the company secretary;
- c) other senior officials and employees; and,
- d) the company's professional advisers, including corporate service providers.

24. Other individuals who may be relevant may include persons listed as follows:

- a) those who are or have at any time been officers of the company;
- b) those who have taken part in the formation of the company at any time within one year prior to appointment;
- c) those who are in the employment of the company, or have been in its employment (including employment under a contract for services) at any time within one year prior to appointment, and are in the Practitioner's opinion capable of giving information which he requires;
- d) those who are, or have within that year been, officers of, or in the employment (including employment under a contract for services) of, another company which is, or within that year was, an officer of the company in question; and,
- e) Any person who has acted as administrator, receiver or liquidator of the company.

25. Practitioners may find it useful to issue questionnaires to obtain factual information.

Statutory books and minutes

26. In most cases where further investigation is deemed appropriate, the statutory books of the company, including the minute book, should be examined and compared with a search obtained from public records including the Guernsey Registry. Particular attention should be given to the identity of directors who held office during the three years prior to the appointment.

Records

27. Can changes in the financial position of the company be satisfactorily accounted for from the records of the company (including, inter alia, bank statements) covering the period since the date of the last audited or signed accounts, or if none since the incorporation of the company? Is there a material difference between the deficiency disclosed in the statement of affairs and the last audited or signed accounts, or, if none, since the last management accounts or since the incorporation of the company, after taking into account matters such as writing down asset values? If so, consideration may

be given to the preparation of trading and profit and loss accounts for the final trading period, or such time as the Practitioner considers appropriate

Transactions with associated companies or connected persons

28. Have there been any transactions with associated companies (as defined in Section 529 of the Law)? If so, the books and records of the company should be examined to ensure that they were carried out at arm's length, and any transactions the Practitioner considers material should be examined. Particular attention should be paid to transactions involving directors, including any reduction in loan accounts, overdrafts or other debts supported by personal guarantees.
29. Have there been any transactions (other than in the ordinary course of business) between the company and any company of which it is an associate during the period of two years prior to the appointment? If so, the Practitioner should satisfy himself as to the validity of the transactions. He should similarly satisfy himself in relation to any transactions with any one or more of its directors or any other associate of him or them during the same period. In addition, the Practitioner should have special regard to any information supplied by creditors or others which concern transactions between directors and associated companies or connected parties.

GENERAL

Rights of action

30. The Practitioner's investigations may disclose possible rights of action which the company or the Practitioner may have against third parties. Rights may arise, for example, under the following provisions within the Law, though this list is not exhaustive:

Section 422	Remedy against delinquent officers
Section 433	Civil liability for fraudulent trading
Section 434	Civil liability of directors for wrongful trading
Section 424	Preferences in or prior to winding up

CRIMINAL OFFENCES

31. It is not the duty of a Practitioner to investigate criminal conduct, but if it should come to his notice that any past or present officer (or member) of the company may have been guilty of any offence in relation to the company for which he is criminally liable, then the Practitioner ought to report the matter forthwith to the relevant law enforcement agency.

Effective Date: May 3rd 2017

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