



INSOLVENCY GUIDANCE NOTE GUERNSEY INSOLVENCY PRACTICE STATEMENT 3:

DISQUALIFICATION OF DIRECTORS

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 3 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 3, references to ‘company’ may also apply to other entities including an incorporated cell company.
4. GIPS 3 is based upon Statement of Insolvency Practice (SIP) 4 ‘disqualification of directors’, which applied in England and Wales until 6 October 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
7. Practitioners should follow the GIPS wherever possible and practical.

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

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. The Practitioner should, within six months of his appointment, submit a report where it appears that the conduct of a director makes him unfit to be concerned in the management of a company. The report should include an account of the Practitioner's investigations. The report should be submitted to the Guernsey Registry in respect of all companies and also to the Guernsey Financial Services Commission (GFSC) in respect of companies which are regulated by the GFSC. A suggested template for the report is in the Appendix to this GIPS.
11. The Practitioner should also consider an application to Court for a disqualification order where it appears that the conduct of a director makes him unfit to be concerned in the management of a company.

EXTENT OF WORK

12. The Practitioner is expected to base his report on information coming to light in the ordinary course of his work. GIPS 2 'a Practitioner's investigation into the affairs of an insolvent company' describes the extent of the investigation work that is expected of a Practitioner in an insolvency scenario.
13. Since the submission of a report may lead to proceedings in which he may be called to act as a witness, the Practitioner should take care to ensure that the basis of his opinion that a report should be submitted is properly documented. Where a Practitioner has formed a preliminary view that the conduct of a director renders him unfit to be concerned in the management of a company he should normally, if he has not already interviewed him in the course of his duties, consider the advisability of seeking a meeting with the director concerned, with a view to confirming his understanding of the facts upon which he based his preliminary view.

Content of Reports

14. Practitioners should have regard to the grounds for making a disqualification as detailed in Section 428 of the Law and should also consider the following matters listed below. These matters are not exhaustive and the Practitioners should include in his report other matters which he believes to be relevant:
 - a) Attempted concealment of assets or cases where assets have disappeared or a deficiency is unexplained;
 - b) appropriation of assets to other companies for no consideration, at an undervalue, or on the basis of unreasonable charges for services;
 - c) preferences;
 - d) personal benefits obtained by directors;

- e) overvaluing assets in accounts for the purpose of obtaining loans; or other financial accommodation, or to mislead creditors;
 - f) loans to directors in making share purchases;
 - g) dishonoured cheques;
 - h) use of delaying tactics;
 - i) non payment of Crown debts to finance trading;
 - j) recurring business failures involving the directors and officers;
 - k) misconduct in relation to operation of a factoring account;
 - l) taking of deposits for goods or services ultimately not supplied; and
 - m) cases where criminal convictions have resulted.
15. Practitioners should not take a pedantic view of isolated minor compliance failures, but should form an overall view of a director's conduct when deciding whether a report is appropriate.
16. Details of the conduct giving rise to the decision to submit a report should be included, and specific examples of alleged failings should be given wherever possible. It is recognised that in some cases substantive information may not be available.
17. The following matters should be dealt with within the body of the report:
- a) the position on any civil recovery actions;
 - b) the adequacy of the accounting records;
 - c) evidence available in support of insolvent trading; and,
 - d) professional advice taken by the directors, and specific correspondence which sheds light on directors conduct, for example with banks, solicitors, accountants or creditors.
18. Where the Practitioner has been unable to quantify, or otherwise comment on the amounts involved in the alleged conduct due to cost or other considerations then an explanation to that effect should be included in the report.
19. The following items should be appended to every report, where the information is available together with any other information/supporting documentation considered relevant:
- a) a copy of the statement of affairs: where none has been submitted the report should include an estimate of the financial position of the company by listing known assets and liabilities;
 - b) creditors reports and notes issued for purposes of the creditors' meeting, any original notes signed by directors from which the final issued note was prepared, and any record of the proceedings at the meeting;
 - c) copy accounts as available: last statutory accounts and any other draft, management, or interim accounts;
 - d) a summary of asset realisations, unrealised assets yet to be dealt with and claims notified;
 - e) dividend prospects; and,
 - f) aged creditor analysis, if readily available from the company's records.
20. When fulfilling his reporting duties, a Practitioner should have regard to the laws of defamation and should ensure that he has followed the procedures set out above. A defamation action, even if it has no prospect of success, can be time-consuming to deal

with. He should bear in mind that if disqualification proceedings are brought the report will form the basis of the affidavit evidence and may be subject to discovery by the respondent director in the proceedings.

21. Dictation of the report to, or its discussion with, members of the Practitioner's staff is protected by qualified privilege. Practitioners should stress to staff the need to maintain strict confidentiality and not to discuss the contents of reports with people not involved in its preparation. Certain forms of communication within the Practitioner's own office (such as e-mail) may also amount to 'publication', which might lead a director to consider a defamation claim.

Affidavit evidence

22. Where proceedings are instituted the evidence may be by affidavit. Although there is no statutory obligation for a Practitioner to swear an affidavit he will normally be the most appropriate person to do so, as he will be the best witness as to facts.
23. The Practitioner who swears the affidavit is a witness of fact and is not an expert witness. It is for the Court to draw inferences as to a director's conduct from the Practitioner's evidence as to the facts. Phrases in the Practitioner's affidavit such as 'in my view' or 'in my opinion' may lead to confusion as to the role of the Practitioner; such phrases should therefore be avoided.
24. It is advisable that those preparing and swearing affidavits in disqualification proceedings are careful to distinguish between the facts which they are able to establish by direct evidence, the inferences which they invited the court to draw from those facts, and the matters which were said to amount to unfitness on the part of the respondent.
25. The contents of the Practitioner's affidavit should be confined to matters of fact and simple conclusions drawn therefrom. The Practitioner should ensure that he only deposes to matters within his knowledge and belief. It is important that the Practitioner's affidavit should deal with all evidence which he considers to be relevant to the court's consideration of the directors' conduct, and should not omit evidence which might favour the director.
26. There is no requirement for an affidavit to be sworn by the Practitioner himself if there is another member of his staff with the appropriate knowledge to do so. However, Practitioners should be aware that any person swearing an affidavit may be called upon to give oral evidence in the proceedings.

Effective Date: May 3rd 2017

DIRECTORS' CONDUCT REPORT TO THE GUERNSEY REGISTRY AND (IN RESPECT OF REGULATED COMPANIES ONLY) THE GUERNSEY FINANCIAL SERVICES COMMISSION

PLEASE REFER TO THE GUIDANCE NOTES CONTAINED IN GUERNSEY INSOLVENCY PRACTICE STATEMENT 3: DISQUALIFICATION OF DIRECTORS

NAME OF COMPANY

SECTION 1: OFFICE-HOLDER

1. NAME OF OFFICE-HOLDER(S)

2. NAME OF THE FIRM AND ADDRESS OF THE OFFICE-HOLDER(S)

3. ARE YOU REPORTING AS:

LIQUIDATOR IN A VOLUNTARY LIQUIDATION
LIQUIDATOR IN A COMPULSORY LIQUIDATION
LIQUIDATOR OF AN INCORPORATED CELL COMPANY
ADMINISTRATOR

4. DATE OF APPOINTMENT

5. NAME AND CONTACT DETAILS OF THE MEMBER OF YOUR STAFF WITH DAY TO DAY RESPONSIBILITY FOR THE CASE:

SECTION 2: COMPANY

1. NAME OF THE COMPANY: (Please include details of all registered names and trading styles of the company used in the last two years)

2. COMPANY REGISTERED NUMBER:

3. GUERNSEY FINANCIAL SERVICES COMMISSION REFERENCE NUMBER (IF REGULATED):

4. CURRENT REGISTERED OFFICE ADDRESS:

5. ANY OTHER REGISTERED OFFICE IN THE SIX MONTHS PRIOR TO YOUR APPOINTMENT:

6. PRINCIPAL TRADING ADDRESS(ES):

7. NATURE OF THE COMPANY'S BUSINESS:

8. WHEN DID THE COMPANY COMMENCE TO TRADE?

9. DETAILS OF ANY OTHER INSOLVENCY PROCESS IN RELATION TO THE COMPANY:
(Stating type, name of office-holder(s) and date of appointment (if appropriate))

SECTION 3: COMPANY DIRECTORS

PLEASE COMPLETE BELOW, FOR:

Any person who appears to you to be or have been a director or shadow director (as defined in Section 132 of the Companies (Guernsey) Law, 2008) of the company whose conduct, either considered in relation to this company alone or taken together with conduct as a director of any other company, makes him unfit to be concerned in the management of a company. Details of the conduct leading you to this view should be set out in section 5; and

Any other person who appears to you to have been a director or shadow director of the company at the relevant date or at any time in the three years before that date.

'DIRECTOR' includes any person occupying the position of director, by whatever name called, and

'THE RELEVANT DATE' means the date of insolvency

ADDITIONAL COPIES OF THIS SECTION SHOULD BE USED AS APPROPRIATE.

<p>a. FULL NAME: (including other known names)</p> <p>b. CURRENT OR LAST KNOWN ADDRESS:</p> <p>c. DATE OF BIRTH:</p> <p>d. OCCUPATION, TRADE OR PROFESSION:</p> <p>e. BRIEFLY, WHAT WERE THE DIRECTOR'S DUTIES IN THE COMPANY?</p> <p>f. IS THIS A PERSON WHOSE CONDUCT MAKES IT APPEAR TO YOU THAT THEY ARE UNFIT (as described above)? <input type="checkbox"/></p> <p>If Yes, please answer both parts of section 5</p> <p>g. PERIOD AS DIRECTOR:</p>
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<p>a. FULL NAME: (including other known names)</p> <p>b. CURRENT OR LAST KNOWN ADDRESS:</p> <p>c. DATE OF BIRTH: (important for identification purposes at Companies House)</p> <p>d. OCCUPATION, TRADE OR PROFESSION:</p> <p>e. BRIEFLY, WHAT WERE THE DIRECTOR'S DUTIES IN THE COMPANY?</p> <p>f. IS THIS A PERSON WHOSE CONDUCT MAKES IT APPEAR TO YOU THAT THEY ARE UNFIT (as described above)? <input type="checkbox"/></p> <p>If Yes, please answer both parts of section 5</p> <p>g. PERIOD AS DIRECTOR:</p>

SECTION 4: CONNECTED COMPANIES

PLEASE GIVE DETAILS OF ANY OTHER COMPANY WITH WHICH THE DIRECTOR(S), IN RESPECT OF WHOM YOU HAVE ANSWERED YES AT SECTION 3 MAY HAVE HAD AN INVOLVEMENT WHICH YOU CONSIDER MAY BE RELEVANT TO THE CONSIDERATION OF HIS OR THEIR CONDUCT:

COMPANY NAME	COMPANY REGISTERED NUMBER	INFORMATION WHICH MAY BE RELEVANT

SECTION 5: UNFIT CONDUCT

PLEASE GIVE DETAILS (ATTACHING ADDITIONAL PAGES IF NECESSARY) OF THE CONDUCT OF THE DIRECTOR(S) WHICH MAKES IT APPEAR TO YOU THAT THEY ARE UNFIT. PLEASE ALSO REFER TO GUERNSEY INSOLVENCY PRACTICE STATEMENT 3: DISQUALIFICATION OF DIRECTORS. IF YOU HAVE ALREADY PREPARED A REPORT WHICH DETAILS THIS, ATTACH A COPY AND SUMMARISE YOUR FINDINGS BELOW.

DETAILS OF UNFIT CONDUCT	NAME OF DIRECTOR(S) AND NATURE OF SUPPORTING EVIDENCE

b. ARE THERE ANY OTHER RELEVANT MATTERS? (e.g. Ill health, personal guarantees, personal insolvency)

If yes, give brief details

SECTION 6: STATEMENT OF AFFAIRS, ACCOUNTS AND REPORT TO CREDITORS**STATEMENT OF AFFAIRS**

PLEASE ATTACH A COPY OF THE STATEMENT OF AFFAIRS TO THIS FORM.

If a copy is not attached, please state why not and attach details of the known assets and liabilities of the company.

IF THERE IS A MATERIAL DIFFERENCE BETWEEN THE STATEMENT OF AFFAIRS AND THE EXPECTED FINAL POSITION, PLEASE PROVIDE DETAILS OF THE AMOUNT AND THE REASON FOR ANY DISCREPANCY:

ACCOUNTS

PLEASE ATTACH TO THIS FORM A COPY OF THE LAST TWO SETS OF THE AUDITED/UNAUDITED ACCOUNTS OF THE COMPANY AND ANY DRAFT OR MANAGEMENT ACCOUNTS PREPARED THEREAFTER.

If none are attached, please state why not: (e.g. None prepared, none in your possession, etc.)

REPORT TO CREDITORS

PLEASE ATTACH A COPY OF ANY REPORTS TO CREDITORS TO THIS FORM.

If you are not able to provide a copy of the report to creditors, please attach a report detailing the company's history.

SECTION 7: OTHER PROCEEDINGS

PLEASE PROVIDE DETAILS OF ANY ACTION COMMENCED, OR LIKELY TO BE COMMENCED, BY YOU AGAINST OFFICERS OF THE COMPANY: (e.g. for recovery of assets, wrongful trading or to enforce co-operation)

ARE THERE ANY OTHER CIVIL OR CRIMINAL PROCEEDINGS IN RELATION TO THE COMPANY TAKEN OR LIKELY TO BE TAKEN AGAINST ANY DIRECTOR? (e.g. by Law Enforcement, tax authorities, etc.)

If yes, please provide details of those proceedings and, where relevant, the name and telephone number of the officer/official dealing with the case.

THE DETAILS GIVEN IN THIS FORM ARE CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

PLEASE SIGN THE FORM:

DATE:

PLEASE ENSURE THAT COPIES OF THE FOLLOWING ARE ATTACHED:

- (a) Statement of Affairs (or details of assets and liabilities);**
- (b) Last two sets of audited/unaudited accounts and draft or management accounts subsequently prepared, if any;**
- (c) Report to creditors (or report detailing the company's history); and**
- (d) Questionnaire(s), if any, completed by director(s).**

NOW SEND THE COMPLETED FORM, TOGETHER WITH ENCLOSURES TO:

(For all regulated and unregulated companies)

Guernsey Registry
Market Building
PO Box 451
Fountain Street
St Peter Port
Guernsey
GY1 3GX

(For Guernsey Financial Services Commission regulated companies only)

Guernsey Financial Services Commission
PO Box 128
Gategny Court
Gategny Explanade
St Peter Port
Guernsey
GY1 3HQ