



INSOLVENCY GUIDANCE NOTE GUERNSEY INSOLVENCY PRACTICE STATEMENT 5:

PRE-PACKAGED SALES OF BUSINESSES

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 5 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 5, references to ‘company’ may also apply to other entities including an incorporated cell company.
4. GIPS 5 is based upon Statement of Insolvency Practice (SIP) 16 ‘pre-packaged sales in administrations’, which applies in England and Wales, effective 1 November 2015. While SIP 16 is not binding under statute in Guernsey, the Royal Court in *Re Application for an Administration order in respect of Esquire Realty Holdings Ltd* (Royal Court, 17 April 2014, unreported) recommended that its principles and spirit should be adhered to in this jurisdiction. Pre-pack administration applications in Guernsey should therefore be supported by a statement prepared in accordance with SIP 16, unless there are overwhelming reasons not to do so.
5. GIPS 5 has been extended to apply to insolvent liquidations as well.
6. 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.

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

REGULATORY STATUS

7. 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
8. Practitioners should follow the GIPS wherever possible and practical.
9. **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.**
10. **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.**

PRE-PACKAGED SALE

11. The term 'pre-packaged sale' refers to an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator or liquidator and the administrator or liquidator effects the sale immediately on, or shortly after, appointment.
12. The particular nature of a Practitioner's position in these circumstances renders transparency in all dealings of primary importance. Administration and liquidation are collective insolvency proceedings - creditors and other interested parties and stakeholders should be confident that the Practitioner has acted professionally and with objectivity; failure to demonstrate this clearly may bring the Practitioner and the profession into disrepute.
13. A Practitioner should recognise the high level interest the public and the business community have in pre-packaged sales. The Practitioner should assume, and plan for, greater interest in and possible scrutiny of such sales where the directors and/or shareholders of the purchasing entity are the same as, or are connected parties of, the insolvent entity.
14. It is equally important that the Practitioner acts and is seen to be acting in the interests of the company's creditors as a whole and is able to demonstrate this.

PRINCIPLES

15. A Practitioner should differentiate clearly the roles that are associated with an administration or liquidation that involves a pre-packaged sale, that is, the provision of advice to the company before any formal appointment and the functions and responsibilities of the administrator or liquidator following appointment. The roles are to be explained to the directors and the creditors.
16. For the purposes of this GIPS only, the role of "Practitioner" is to be read as relating to the advisory engagement that a Practitioner or their firm and or/any associates may have with a company in the period prior to the appointment of the administrator or liquidator. A Practitioner should recognise that a different Practitioner may be the eventual administrator or liquidator. While there is no statutory requirement in Guernsey that an administrator or liquidator be a qualified insolvency Practitioner, the administrator or liquidator (at least one in the case of a joint appointment) should be locally based and must satisfy the Court that he is appropriately experienced and suitably qualified for the appointment, in the circumstances of a Court appointment.

17. The administrator or liquidator should provide creditors with sufficient information (the 'GIPS 5 Statement') such that a reasonable and informed third party would conclude that the pre-packaged sale was appropriate and that the administrator or liquidator has acted with due regard for the creditors' interests as a whole. In a connected party transaction the level of detail may need to be greater.

KEY COMPLIANCE STANDARDS

Preparatory work

18. A Practitioner should be clear about the nature and extent of the role of advisor in the pre-appointment period. When instructed to advise the company or companies in a group, the Practitioner should make it clear that the role is not to advise the directors or any parties connected with the purchaser, who should be encouraged to take independent advice. This is particularly important if there is a possibility that the directors may acquire an interest in the business or assets in a pre-packaged sale.
19. A Practitioner should bear in mind the duties and obligations which are owed to creditors in the pre-appointment period. The Practitioner should recognise the potential liability which may attach to any person who is party to a decision that causes a company to incur credit and who knows that there is no good reason to believe it will be repaid. Such liability is not restricted to the directors. The Practitioner should ensure that any connected party considering a pre-packaged purchase is aware of their ability to prepare a viability statement for the purchasing entity (see Appendix to the GIPS) and the potential for enhanced stakeholder confidence.
20. A Practitioner should keep a detailed record of the reasoning behind both the decision to undertake a pre-packaged sale and all alternatives considered.
21. The Practitioner should advise the company that any valuations obtained should be carried out by appropriate independent valuers and/or advisors, carrying adequate professional indemnity insurance for the valuation performed.
22. If the administrator or liquidator relies on a valuation or advice other than by an appropriate independent valuer and/or advisor with adequate professional indemnity insurance this should be disclosed and the reason for doing so and the reasons that the administrator or liquidator was satisfied with the valuation, explained.

Marketing

23. Marketing a business is an important element in ensuring that the best available consideration is obtained for it in the interests of the company's creditors as a whole, and will be a key factor in providing reassurance to creditors. The Practitioner should advise the company that any marketing should conform to the marketing essentials as set out in the Appendix to this GIPS.
24. Where there has been deviation from any of the marketing essentials, the administrator or liquidator is to explain how a different strategy has delivered the best available outcome.

After appointment

25. When considering the manner of disposal of the business or assets the administrator or liquidator should be able to demonstrate that the duties of an administrator or liquidator under relevant legislation have been met, including the Law.

Disclosure

26. An administrator or liquidator should provide creditors with a detailed narrative explanation and justification (the 'GIPS 5 Statement') of why a pre-packaged sale was undertaken and all alternatives considered, to demonstrate that the administrator or

liquidator has acted with due regard for their interests. The information disclosure guidelines in the Appendix to this GIPS should be included in the GIPS 5 Statement unless there are exceptional circumstances, in which case the administrator or liquidator should explain why the information has not been provided. In any sale involving a connected party, it is very unlikely that commercial confidentiality alone would outweigh the need for creditors to be provided with this information.

27. The explanation of the pre-packaged sale in the GIPS 5 Statement should be provided to creditors as soon as reasonably practicable after the making of the administration order or the appointment of the liquidator. In any event, it should be provided within 28 days (unless the Court orders otherwise) of the administrator's or liquidator's appointment.
28. Where reasonably practicable, the proposed administrator or liquidator should include the GIPS 5 Statement (or a draft thereof) along with the notice that an application for an administration winding up order will be made and have it delivered to the Registrar at least two clear days before the making of the application to the Royal Court. In any event, a draft GIPS 5 Statement should be provided to the Court upon hearing of the application.

Effective date: May 3rd 2017

Appendix to Guernsey Insolvency Practice Statement 5: Pre-packaged sales of business

Marketing essentials

Marketing a business is an important element in ensuring that the best available consideration is obtained for it in the interests of creditors, and will be a key factor in providing reassurance to creditors. Any marketing should conform to the following:

- **Broadcast:** The business should be marketed as widely as possible proportionate to the nature and size of the business. The purpose of the marketing is to make the business's availability known to the widest group of potential purchasers in the time available, using whatever media or other sources are likely to achieve this outcome.
- **Justify the marketing strategy:** The statement to creditors should not simply be a list of what marketing has been undertaken. It should explain the reasons underpinning the marketing and media strategy used.
- **Independence:** Where the business has been marketed by the company prior to the Practitioner being instructed, this should not be used as a justification in itself to avoid further marketing. The administrator or liquidator should be satisfied as to the adequacy and independence of the marketing undertaken.
- **Publicise rather than simply publish:** Marketing should have been undertaken for an appropriate length of time to satisfy the administrator or liquidator that the best available outcome for creditors as a whole in all the circumstances has been achieved. Creditors should be informed of the reason for the length of time settled upon.
- **Connectivity:** Include online communication alongside other media by default. The internet offers one of the widest populations of any medium. If the business is not marketed via the internet, this should be justified.
- **Comply or explain:** Particularly with sales to connected parties where the level of interest is at its highest, the administrator or liquidator needs to explain how the marketing strategy has achieved the best available outcome for creditors as a whole in all the circumstances.

Information disclosure requirements in GIPS 5 Statement

The administrator or liquidator should include a statement explaining the statutory purpose pursued, confirming that the transaction enables the statutory purpose to be achieved and that the outcome achieved was the best available outcome for creditors as a whole in all the circumstances.

The following information should be included in the administrator or liquidator's explanation of a pre-packaged sale, as far as the administrator or liquidator is aware after making appropriate enquiries:

Initial introductions

The source (to be named) of the initial introduction to the Practitioner and the date of the administrator's or liquidator's initial introduction.

Pre-appointment matters

The extent of the administrator or liquidator's (and that of their firm, and/or any associates) involvement prior to appointment.

The alternative options considered, both prior to and within formal insolvency by the Practitioner and the company, and on appointment the administrator or liquidator with an explanation of the possible outcomes.

Whether efforts were made to consult with major or representative creditors and the upshot of any consultations. If no consultation took place, the administrator or liquidator should explain the reasons.

Why it was not appropriate to trade the business and offer it for sale as a going concern during the administration or liquidation. Practitioners advising an ICC must be mindful to consider that any pre-packaged sale would not prejudice the underlying assets or business of its incorporated cells.

Details of requests made to potential funders to fund working capital requirements. If no such requests were made, explain why.

If the business or business assets have been acquired from an insolvency process within the previous 24 months, or longer, if the administrator or liquidator deems that relevant to creditors' understanding, the administrator or liquidator should disclose both the details of that previous transaction and whether the administrator or liquidator, administrator or liquidator's firm or associates were involved.

Marketing of the business and assets

The marketing activities conducted by the company and/or the administrator or liquidator and the effect of those activities. Reference should be made to the marketing essentials above. Any divergence from these essentials is to be drawn to creditor's attention, with the reasons for such divergence, together with an explanation as to why the administrator or liquidator relied upon the marketing conducted.

Valuation of the business and assets

The names and professional qualifications of any valuers and /or advisors and confirmation that they have confirmed their independence and that they carry adequate professional indemnity insurance. In the unlikely event that valuers and /or advisors who do not meet these criteria have been employed, the reasons for doing so should be explained.

The valuations obtained for the business or its underlying assets. Where goodwill has been valued, an explanation and basis for the value given.

A summary of the basis of valuation adopted by the administrator or liquidator or the valuers and/or advisors.

The rationale for the basis of the valuations obtained and an explanation of the value achieved of the assets compared to those valuations.

If no valuation has been obtained, the reason for not having done so and how the administrator or liquidator was satisfied as to the value of the assets.

The transaction

The date of the transaction.

Purchaser and related parties:

- The identity of the purchaser.
- Any connection between the purchaser and the directors, shareholders or secured creditors of the company or their associates.
- The names of any directors, or former directors (or their associates), of the company who are involved in the management, financing, or ownership of the purchasing entity, or of any other entity into which any of the assets are transferred.
- In transactions impacting on more than one related company (e.g. a group transaction) the administrator or liquidator should ensure that the disclosure is sufficient to enable a transparent explanation (for instance, allocation of consideration paid).
- Whether any directors had given guarantees for amounts due from the company to a prior financier and whether that financier is financing the new business.

Assets

- Details of the assets involved and the nature of the transaction.

Sale consideration

- The consideration for the transaction, terms of payment and any condition of the contract that could materially affect the consideration.
- The consideration disclosed under broad asset valuation categories and the method by which this allocation of consideration was applied.
- Any options, buy-back agreements, deferred consideration or other conditions attached to the transaction.
- Details of any security taken by the administrator or liquidator in respect of any deferred consideration. Where no such security has been taken, the administrator or liquidator's reasons for this and the basis for the decision that none was required.
- If the sale is part of a wider transaction, a description of the other aspects of the transaction, including in relation to any cells if the insolvent company is an ICC.

Connected Party transactions only

Where the sale has been undertaken to a connected party the additional details should be included in the GIPS 5 Statement. In this context, although there is no statutory definition in Guernsey of a "connected party" as might apply under SIP 16 in the UK, a connected party would include any person that has any significant direct or indirect proprietary, financial or other interest in or connection with the company and any person with such interest or connection with both that person and the company. This would include, amongst others, directors of the insolvent company and their spouses, shareholders, associated companies as defined in Section 529 of the Law and directors and shareholders of such associated companies.

Viability statement

A viability review can be drawn up by a connected party wishing to make a pre-packaged purchase, stating how the purchasing entity will survive for at least 12 months from the date of the proposed purchase. The connected party should consider providing a short narrative detailing what the purchasing entity will do differently in order that the business will not fail (the 'Viability Statement').

The administrator or liquidator should request that the connected party considering a pre-packaged purchase provide a copy of their Viability Statement.

- If provided, it should be attached to the GIPS 5 Statement.
- If the Viability Statement has been requested but not provided, the administrator or liquidator should notify creditors of this in the GIPS 5 Statement.