



## **GUIDELINES FOR CORPORATE RESCUE MECHANISM UNDER DIVISION 8 PART III OF THE COMPANIES ACT 2016**

This guideline is issued pursuant to section 20C of the Companies Commission of Malaysia 2001.

2. This guideline serves to inform the general requirements relating to Corporate Voluntary Arrangement (CVA) and Judicial Management (JM) under Division 8 Part III of the Companies Act 2016 (CA 2016), the Companies (Corporate Rescue Mechanism) Rules 2018 and Practice Directive No. 4/2018.

### **BACKGROUND**

3. On 1 March 2018, the Companies Commission of Malaysia (SSM) has enforced Division 8 Part III of the CA 2016 as part of the insolvency framework to help companies in financial difficulties to be rehabilitated either through CVA or JM procedures.

4. With the enforcement of Division 8 Part III of the CA 2016, SSM had also introduced and enforced on the same date the Companies (Corporate Rescue Mechanism) Rules 2018 (CCRM 2018) and Practice Directive No. 4/2018 (PD No. 4/2018) to complete the overall process of the corporate rescue mechanism.

5. The CCRM 2018 sets out the process and procedure of the Court under Division 8 Part II of the CA 2016 whilst PD No. 4/2018

states the general requirements for the documents to be lodged with the Registrar.

6. In addition to the above, any lodgement of documents under Division 8 Part III of the CA 2016 shall also be subject to Practice Directive No. 1/2017 (PD No. 1/2017) and/or any other requirements issued by the Registrar from time to time.

### **GENERAL APPLICATION OF DIVISION 8 PART III OF THE CA 2016**

7. Section 395 of the CA 2016 states that CVA shall not be applicable to:

- (a) a public company;
- (b) a company which is a licensed institution, or an operator of a designated payment system regulated under the laws enforced by the Central Bank of Malaysia;
- (c) a company which is subject to the Capital Markets and Services Act 2007; and
- (d) a company which creates a charge over its property or any of its undertaking.

8. Section 403 of the CA 2016 states that JM shall not be applicable to:

- (a) a company which is a licensed institution or an operator of a designated payment system regulated under the laws enforced by the Central Bank of Malaysia; and
- (b) a company which is subject to the Capital Markets and Services Act 2007.

9. To ensure other due processes are in compliance with the relevant provisions in the CA 2016, an applicant must ensure that a company in the striking off process shall not initiate a CVA or JM process.

**Pre-condition before preparing a proposal for voluntary arrangement or making an application for judicial management order**

10. Before a proposal for a voluntary arrangement or an application for a judicial management order can be made, the applicant must ensure that:

- (a) there is no pending query with SSM (query status is available at [http://www.ssm.com.my/Pages/Quick\\_Link/e-Query.aspx](http://www.ssm.com.my/Pages/Quick_Link/e-Query.aspx)); and
- (b) all of the company's information with SSM are up-to-date.

**A. CORPORATE VOLUNTARY ARRANGEMENT (CVA)**

**What is CVA?**

11. CVA enables company experiencing financial difficulties to enter into a plan or an arrangement with the creditors without the need to have the plan or arrangement being approved by Court.

12. A moratorium for voluntary arrangement commences automatically when the directors of a company, judicial manager, Official Receiver or liquidator files the relevant documents to the Court pursuant to section 398 of the CA 2016.

13. The moratorium shall remain in force for twenty-eight days. The period may be extended for up to a maximum of sixty days counted from the commencement of the moratorium. For avoidance of doubt, the extended moratorium shall not exceed thirty-two days.

### **Who can propose a CVA?**

14. Under section 396 of the CA 2016, the application for voluntary arrangement may be proposed by:

- (a) the directors of a company;
- (b) in the case of company under judicial management order, the judicial manager; and
- (c) in the case of company being wound-up, the liquidator or Official Receiver.

### **The proposal for CVA**

15. The proposal for CVA is prepared by the director(s), judicial manager, Official Receiver or liquidator (as the case may be). The proposal must also include:

- (a) a nomination of a nominee<sup>1</sup> either as a trustee or a supervisor under section 396(2) of the CA 2016; and
- (b) a statement that:
  - (i) the company's information has been updated; and
  - (ii) the company is not under any striking off process.

16. In preparing the proposal, the main documents and key information required, among others, are as follows:

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<sup>1</sup> Section 394 of the CA 2016

- (a) Proposal setting out the terms of the proposed voluntary arrangement;
- (b) Statement of company's affairs containing the company's creditors, debts, liabilities and assets;
- (c) Statement of consent to act by the nominee;
- (d) Statement of nominee indicating his opinion whether or not the proposed plan has a reasonable prospect of being approved and implemented;
- (e) Statement of nominee indicating his opinion that the company is likely to have sufficient funds available for the company during the proposed moratorium to enable the company to carry on its business;
- (f) Statement of nominee indicating his opinion that the meetings of the company and its creditors should be summoned to consider the proposed voluntary arrangement;
- (g) Details of creditors;
- (h) If any person is proposed to be a supervisor of the voluntary arrangement, the powers, duties and responsibilities of the supervisor;
- (i) The actual financial proposal to be put to the creditor and the distribution of funds;
- (j) Action to be taken in the event of default;
- (k) Future performance to support the proposal;
- (l) Funds, if any, including injection of third party funds; and
- (m) Any other relevant documents or information required on a case by case basis.

## **Nominee**

17. For the purpose of lodgement with the Registrar, the nominee shall lodge any documents relating to the CVA on behalf of the company. In the case where there is more than one nominee, only one nominee shall be designated to make the lodgement.

## **The effect once the moratorium for voluntary arrangement commences**

18. During the moratorium, a company is protected from all actions listed under paragraph 17 of the Eighth Schedule of the CA 2016 as follows:

- (a) no petition may be presented for the winding up of the company;
- (b) no meeting of the company may be called or requisitioned except with the consent of the nominee or the leave of the Court and subject to, where the Court gives leave, such terms as the court may impose;
- (c) no resolution may be passed or order may be made for the winding up of the company;
- (d) no application for judicial management order may be made against the company;
- (e) no judicial manager of the company may be appointed under Subdivision 2 of the Division 8 of Part III;
- (f) no landlord or other person to whom rent is payable may exercise any right of forfeiture by peaceable re-entry in relation to premises let to the company in respect of a failure by the company to comply with any term or condition of its tenancy of such premises, except with

the leave of the Court and subject to such terms as the Court may impose;

- (g) no other steps may be taken to impose any security over the company's property, or to repossess goods in the company's possession under any hire-purchase agreement, except with the leave of the Court and subject to such terms as the Court may impose;
- (h) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the leave of the Court and subject to such terms as the Court may impose; and
- (i) no steps shall be taken to transfer any share of the company or to alter the status of any member except with the leave of the Court and, where the Court gives leave, subject to such terms as the Court may impose.

19. During the moratorium, companies are not allowed to lodge any documents with the Registrar except for the documents relating to the CVA, the Annual Return, Financial Statements and applications for extension of time relating to the lodgement of the Annual Return and Financial Statement.

### **Status of the company in the register kept by SSM**

20. Once the "Notification of Commencement of the Moratorium for Voluntary Arrangement" is lodged with the Registrar, the status of the company will be reflected to be under voluntary arrangement throughout the moratorium.

21. If there is no further lodgement to extend the moratorium, upon the expiry of twenty-eight days, a grace period of seven days

will be given before the status of the company is reverted to its original status.

22. In the case where the moratorium has been extended pursuant to paragraph 13 of this guideline, the status of the company will revert to its original status upon the expiry of that extended period.

### **Creditors' meeting and meeting of members**

23. When a moratorium is in force, the nominee shall summon a meeting of its members and creditors either to approve or disapprove the proposal for voluntary arrangement or extend the moratorium. No modification on the proposal is allowed in a meeting.

24. There are four possible outcomes from the meetings:

- (a) The proposal is approved;
- (b) The proposal is disapproved;
- (c) The proposal to extend the moratorium is approved and the establishment of a moratorium committee (if relevant); or
- (d) The proposal to extend the moratorium is disapproved.

### **Calling of creditors' meeting/meeting of members in CVA**

25. The nominee shall summon a creditors' meeting and meeting of members by sending a notice of the meeting to:

- (a) Every creditor of the company; and
- (b) Every member of the company.

26. The notice shall be sent by the nominee to the last known address of the creditor/member –

- (a) in the case of a creditors' meeting, at least fourteen days before the date of the meeting; and
- (b) in the case of a meeting of members, at least fourteen days before the date of the meeting or any longer period specified in the company's constitution provided that the notice period shall not exceed the moratorium period.

27. The meeting shall be held at such place as the nominee considers most convenient to the majority in numbers of the creditors/members.

28. All meetings summoned by the nominee shall be presided by the nominee or any other person nominated by the nominee.

29. The proposal for CVA or the extension of the moratorium—

- (a) in a creditors' meeting, must be passed by a majority of seventy-five percent of the total value of the creditors present and voting either in person or by proxy; and
- (b) In a meeting of members, must be passed by a majority of members present and voting either in person or by proxy.

### **Moratorium Committee**

30. The meeting summoned in paragraph 23 may resolve that the moratorium be extended and with the consent of a nominee to establish a moratorium committee to perform specific functions determined in the meeting. The meeting shall determine and

approve an estimation of the expenses to be incurred by the moratorium committee in carrying out its function.

31. The moratorium committee shall cease to exist when the moratorium comes to an end.

32. Constitution of the moratorium committee:

- (a) Where it is resolved by a creditors' meeting to establish a moratorium committee for the purposes of extending the moratorium, the committee shall consist of at least three and not more than five creditors of the company elected at the meeting or any such composition agreed by the creditors in the meeting;
- (b) Any creditor of the company is eligible to be a member of the moratorium committee, so long as his claim has not been rejected for the purpose of his entitlement to vote; and
- (c) A representative of a body corporate which have been approved by the nominee may be a member of the moratorium committee.

33. Functions and meetings of the moratorium committee:

- (a) The moratorium committee may assist the nominee in assessing the possibility of extending the moratorium including assessing the viability of the proposal;
- (b) Meetings of the moratorium committee shall be determined by the nominee; and
- (c) The nominee shall give three days' written notice of the venue of any meeting to every member of the moratorium committee, unless in any case the

requirement of notice has been waived by or on behalf of any member. Waiver may be signified either at or before the meeting.

34. The meetings of the moratorium committee shall be chaired by the nominee or person nominated by him.

35. A meeting of the moratorium committee is duly constituted if due notice has been given to all members, and at least the minimum number of members of the moratorium committee, or at least two of the members of the moratorium committee, whichever is applicable, are present or represented.

36. Procedure at moratorium committee meetings:

- (a) At any meeting of the moratorium committee, each member or his proxy shall have one vote and a resolution is passed when majority of the members present or represented have voted in favour of it;
- (b) Every resolution passed shall be recorded in writing, either separately or as part of the minutes of the meeting; and
- (c) A record of each resolution shall be signed by the chairman and placed in the company's minute book within seven days from the date the resolution was passed.

37. Information from the nominee to the moratorium committee:

The nominee shall inform the meeting of the moratorium committee of the actions he has taken in order to comply with his duty under the Seventh Schedule of the CA 2016 and the costs incurred as a

result of his actions for the company. The nominee is also required to inform the meeting of any plans he intends to carry out to continue to comply with that duty if the moratorium is extended and the expected costs of his actions.

38. Expenses of members of the moratorium committee:

The nominee shall defray out of the assets of the company any reasonable travelling expenses directly incurred by members of the moratorium committee or their representatives in relation to their attendance at the committee's meetings, or otherwise on the committee's business, as an expense of the administration.

### **Situations that can end the moratorium**

39. The moratorium will end on occurrence of any one of the following situations:

- (a) If a nominee withdraws his consent to act or is no longer a member of a recognised professional body under section 433(3) of the CA 2016;
- (b) The proposal has been approved or disapproved by the creditors and members; or
- (c) No notification to extend the moratorium has been filed in Court upon its expiry.

### **Filing of subsequent CVA**

40. CVA can be proposed more than once. However, the filing of subsequent notifications shall only be made after the "Notice of End of Moratorium Period in Voluntary Arrangement" of the previous CVA

has been filed to the Court and the “Notification for Advertisement of the End of Moratorium” lodged with the Registrar.

## **B. JUDICIAL MANAGEMENT (JM)**

### **What is JM?**

41. JM is a Court supervised rescue plan that:

- (a) places the management of a company under a judicial manager (insolvency practitioner) appointed by the Court;
- (b) the judicial manager shall prepare a workable proposal to achieve one of the objectives mentioned in section 405(1)(b) of the CA 2016; and
- (c) the plan shall be implemented after being approved by seventy-five per centum of the total value of the creditors.

42. The judicial management order shall remain in force for six (6) months and may be extended for another period of not more than six (6) months.

### **Who may apply for a JM?**

43. Under section 404 and 405 of the CA 2016, the application for JM may be made by a company or its directors, under a resolution of its members or the board of directors, or a creditor, including any contingent or prospective creditor, or all or any of those parties.

## **Judicial Manager**

44. For the purposes of lodgement to the Registrar, the judicial manager shall lodge any documents relating to the JM on behalf of the company. In the case where there is more than one judicial manager, only one judicial manager shall be designated to make the lodgement.

45. The office of a judicial manager must not be left vacant and an application to the Court to fill up the vacancy, shall be made within seven days from the date of the discharge, release or casual vacancy of the previous judicial manager.

### **The effects after the application for the judicial management order is filed but before the order is granted**

46. Upon the application of the judicial management order but before the making of such order, the following shall take effect:

- (a) No resolution shall be passed or order made for the winding up of the company;
- (b) No steps shall be taken to enforce any charge on or security over the company's property or to repossess any goods in the company's possession under any hire purchase agreement, chattels leasing agreement or retention of title agreement, except with leave of the Court and subject to such terms as the Court may impose; and
- (c) No other proceedings and no execution or other legal process shall be commenced or continued, and no distress may be levied against the company or its

property except with leave of the Court and subject to such terms as the Court may impose.

### **The effects after the judicial management order is granted**

47. Once the judicial management order is granted, the moratorium for judicial management commences and the company shall observe the restrictions stated under subsection 411(4) of the CA 2016 as follows:

- (a) No resolution shall be passed or order made for winding up of the company;
- (b) No receiver or receiver and manager of the kind referred to in section 374 shall be appointed;
- (c) No other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the company or its property except with the consent of the judicial manager or with the leave of the Court and, if the Court grants leave, subject to such terms as the Court may impose;
- (d) No steps shall be taken to enforce security over the company's property or to repossess any goods in the company's possession under any hire purchase agreement, chattels leasing agreement or retention of title agreement, except with consent of the judicial manager or leave of the Court and subject to such terms as the Court may impose; and
- (e) No steps shall be taken to transfer any share of the company or to alter the status of any member of the company except with the leave of the Court and, if the

Court grants leave, subject to such terms as the Court may impose.

48. During the moratorium, all lodgement with the Registrar are allowed only with the consent of the judicial manager or leave of the Court, whichever is applicable.

### **Status of the company in the register kept by SSM**

49. Once the "Notification of Application for Judicial Management Order" is lodged with the Registrar, the status of the company will be reflected to be under judicial management. Once the judicial management order is granted, the JM status will remain on the lodgement of the "Notification of judicial management order" and throughout the moratorium.

50. If there is no document lodged subsequent to the lodgement of "Notification of Application for Judicial Management Order", upon the expiry of sixty days, a grace period of seven days will be given before the status of the company is reverted to its original status.

51. Upon the expiry of the moratorium or on the lodgement of the discharge of judicial management order the status of the company will revert to its original status.

### **Meetings under JM**

52. All meetings to consider decisions must be done in accordance with the provisions of the CA 2016 and the CCRMR 2018.

## **PROOF OF FILING**

53. All forms required to be lodged with the Registrar pursuant to the CCRMR 2018 and PD No. 4/2018 must be accompanied with a proof of filing to the Court (where applicable).

## **TIME FRAME**

54. The time frame for filing or lodgement of documents for the voluntary arrangement and judicial management are as prescribed in:

- (a) Division 8 of Part III of the CA 2016 and the relevant Schedules of the Act;
- (b) CCRMR 2018;
- (c) PD No. 1/2017;
- (d) PD No. 4/2018; and
- (e) any updates and amendments made by the Registrar from time to time.

**COMPANIES COMMISSION OF MALAYSIA**

**5 DECEMBER 2018**