

POLICY NOTE

THE INSOLVENCY (SCOTLAND) AMENDMENT RULES 2014

SSI 2014/114

1. The above instrument was made in exercise of the powers conferred by section 411 of the Insolvency Act 1986 (“the Act”). This instrument is subject to negative procedure.

Policy Objectives

2. This instrument amends the Insolvency (Scotland) Rules 1986 (S.I. 1986/1915) (“the Insolvency Rules”) by adjusting existing provisions and inserting new provisions.
3. The majority of the amendments comprise adjustments to existing provisions, to remove the application of provisions of the Bankruptcy (Scotland) Act 1985 (“the Bankruptcy Act”) from the Insolvency Rules and substitute stand-alone provisions. Accordingly, the majority of the amendments do not change the law but re-state the law, including in places the law on reserved matters, as it exists, to create a set of substantially self-contained Rules intended to be easier to apply in practice.
4. In addition, this instrument amends and inserts new provision into the Insolvency Rules in order to modernise and improve the procedures for the devolved processes of receivership and liquidation.

Background

5. The Insolvency Rules set out the detailed procedure for the process of all corporate insolvency proceedings in Scotland under the Act. Certain provisions of the Insolvency Rules apply provisions of the Bankruptcy Act. As a result the Insolvency Rules can be difficult to use, requiring cross reference to the Bankruptcy Act. This instrument aims to make the Insolvency Rules easier to apply in practice by removing references to the Bankruptcy Act and substituting stand-alone provisions, to create a set of substantially self-contained rules.
6. Corporate insolvency in Scotland is partly devolved and partly reserved. Changes to the reserved areas of corporate insolvency in Scotland were made by the UK Government via the Insolvency (Scotland) Amendment Rules 2010 (S.I. 2010/688-“the 2010 Rules”): these modernised procedures for Company Voluntary Arrangements (CVA) and administration in Scotland. The 2010 Rules did not, for the most part, affect devolved areas of corporate insolvency including receivership and the process of liquidation. As such a disparity exists between insolvency procedures in Scotland, with CVA and administration benefiting from modernisation which does not apply to liquidation and receivership. The new provision made via this instrument seeks to alleviate that disparity by replicating some of the modernisation in relation to receivership and liquidation.

7. So far as it makes new provision this instrument affects those areas of corporate insolvency devolved to the Scottish Parliament under the Scotland Act 1998 and accordingly modernises procedures for the process of liquidation and receivership only.
8. In removing the application of the Bankruptcy Act from the Insolvency Rules it restates the law on reserved matters, in reliance on paragraph 7 of Schedule 4 to the Scotland Act 1998. Insofar as it does so, it makes very limited changes only for the purposes of the devolved changes. Any such restated law remains the law on reserved matters, subject to future amendment by the UK Government.
9. This instrument has been prepared following engagement with a range of insolvency stakeholders, and with the UK Government.
10. A wider set of changes to replace the Insolvency Rules are in development with the UK Government, alongside changes to the Rules for England and Wales.

Summary of proposed policy changes

11. Amendments made by this instrument include the following:
12. Removing references to Bankruptcy Act

The majority of the provisions contained within this instrument relate to the disentangling of corporate insolvency legislation and personal insolvency legislation. The instrument removes all references, except one (Rule 4.76 concerning the effect in the rest of the UK of the Insolvency Rules), to the Bankruptcy Act from the Insolvency Rules and replaces the references with stand-alone provisions. These amendments have a minimal impact upon insolvency procedures. They will make the Insolvency Rules easier to apply in practice.
13. Block Transfer Order (Rule 11)

Provision is made to allow for the removal of a liquidator and the appointment of his replacement in some or all cases in which the liquidator acts, via a single application to the Court of Session. This provision will apply where the liquidator is no longer willing or able to act, for example where the liquidator has died, retired or changed his employment. This provision will allow the liquidator to be removed from some or all cases and a replacement appointed in one application to the Court of Session, making the process more efficient and cost effective.
14. Membership of liquidation committee (Rule 16)

Amendment is made to Rule 4.50 of the Insolvency Rules regarding termination of membership of the liquidation committee. Membership of the liquidation committee is now automatically terminated if the person is deceased, or in the case of a body corporate or partnership, where that body corporate or partnership is dissolved.
15. Limited Disclosure (Rules 24 and 25)

Provision is made to allow an office holder in a receivership or a liquidation, with the exception of the provisional liquidator, to make an application to the court for an order to limit disclosure of information within the statement of affairs, where such disclosure might reasonably lead to violence or prejudice the conduct of the

insolvency procedure: the court is empowered to order that the statement of affairs or a part of it is not to be entered in the sederunt book. This provision will provide greater protection to individuals where details of their address or whereabouts might previously have been entered in the sederunt book.

16. Electronic Submission (Rule 26)

These provisions will allow communication between receivers and liquidators, and those involved in the insolvency process, with the exception of the provisional liquidator, to be made by electronic means, where appropriate and permitted by the 1986 Act, provided there is consent between the sender and the recipient that communication may be effected that way. Electronic communication already exists in Scotland for areas reserved to the UK Government, namely CVA and administration, having been introduced by the 2010 Rules. This amendment will allow a similar level of electronic communication across all insolvency procedures in Scotland. This modernisation may result in reduced costs of administering liquidations and receivership, allowing quicker and more cost-effective delivery and exchange of information between parties. The effect of this rule is limited by specific exclusions, e.g. those detailed within section 436B(2) of the Act (see the **Annex** to this note for a list of provisions) or where some other form of delivery is required by the Act, for example section 95(2) and 98(1) (which require the sending of notices by post).

17. The instrument will also amend Rules 7.30A and 7.30B of the Insolvency Rules.

These rules relate to the submission of information in a prescribed form by any person. The rule enables information in a prescribed form to be sent electronically with the agreement of the person to whom the information is sent. Rules 7.30A and 7.30B currently apply to CVA and administration. This instrument will extend the effect of those rules to areas of receivership and liquidation.

18. To further facilitate electronic delivery of documents within receivership and liquidation, new authentication provisions are provided. Where a document or information is sent in electronic form (with the consent of the recipient), it will not need to be signed, provided that it is authenticated to the satisfaction of the recipient to confirm the identity of the sender.

19. Standard Content of notices in Edinburgh Gazette or otherwise (Rule 27)

Standard content for notices published within the Edinburgh Gazette or otherwise was introduced for CVA and administration by the 2010 Rules. This instrument extends standard content to receivership and liquidation. Where this applies in receivership and liquidation a notice required to be advertised in the Edinburgh Gazette or otherwise, will require to contain certain basic information. The standard content is in addition to any content specifically required by the Act or the Insolvency Rules. This will create a consistent approach which will ensure that users will always have the necessary information they need in respect of the insolvency event concerned. The effect of the rule is limited as detailed at Rule 27(1)(b) and (3)(b).

Consultation

20. The amendments made by this instrument largely relate to the removal of the references to the Bankruptcy Act from the Insolvency Rules and their replacement

with appropriate alternatives. Accordingly the majority of the amendments have minimal impact on the insolvency procedures, therefore no formal public consultation has been carried out. Some new provisions have been inserted which affect the process of liquidation and receivership. In May 2013 the Corporate Insolvency Working Group (CIWG) was established. The group comprised a cross-section of stakeholders including solicitors, insolvency practitioners and members of regulatory bodies. The purpose of this group was to review the Insolvency Rules and consider recommendations to improve and modernise the Insolvency Rules. Through the meetings held with the CIWG, suggestions were made and taken into consideration in the preparation of this instrument.

Impact Assessments

21. An Equality Impact Assessment (EQIA) has been completed on the changes to the Insolvency Rules.

Financial Effects

22. A Business and Regulatory Impact Assessment (BRIA) has been completed on the effects of the changes to the Insolvency Rules and will be published when this instrument is laid before Parliament.

The Accountant in Bankruptcy on behalf of the Scottish Government

29 April 2014

Annex

Section 436B of the Insolvency Act 1986

436B References to things in writing

- (1) A reference in this Act to a thing in writing includes that thing in electronic form.
- (2) Subsection (1) does not apply to the following provisions—
- (a) section 53 (mode of appointment by holder of charge),
 - (b) section 67(2) (report by receiver),
 - (c) section 70(4) (reference to instrument creating a charge),
 - (d) section 111(2) (dissent from arrangement under s. 110),
 - (e) in the case of a winding up of a company registered in Scotland, section 111(4),
 - (f) section 123(1) (definition of inability to pay debts),
 - (g) section 198(3) (duties of sheriff principal as regards examination),
 - (h) section 222(1) (inability to pay debts: unpaid creditor for £750 or more), and
 - (i) section 223 (inability to pay debts: debt remaining unsatisfied after action brought).