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SCOTTISH STATUTORY INSTRUMENTS

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**2018 No. 347**

**The Insolvency (Scotland) (Receivership  
and Winding up) Rules 2018**

**PART 3**

**MEMBERS' VOLUNTARY WINDING UP**

**CHAPTER 1**

**Statutory declaration of solvency (section 89)**

[Note: a document required by the Act or these Rules must also contain the standard contents required as set out in Part 1.]

**Statutory declaration of solvency: requirements additional to those in section 89**

[Note: the “official rate” referred to in paragraph (1)(b) is defined in section 251 as the rate referred to in section 189(4). Also see section 189(5) and rule 7.26.]

**3.1.—**(1) The statutory declaration of solvency required by section 89 must identify the company and state—

- (a) the name and a postal address for each director making the declaration (which may be the director's service address provided for by section 163 of the Companies Act);
- (b) either—
  - (i) that all of the directors; or
  - (ii) that a majority of the directors,

have made a full inquiry into the company's affairs and that, having done so, they have formed the opinion that the company will be able to pay its debts in full together with interest at the official rate within a specified period (which must not exceed 12 months) from the commencement of the winding up; and

- (c) that the declaration is accompanied by a statement of the company's assets and liabilities as at a date which is stated (being the latest practicable date before the making of the declaration as required by section 89(2)(b)).
- (2) The statement of the company's assets and liabilities must contain—
- (a) the date of the statement;
  - (b) a statement that the statement shows the assets of the company at estimated realisable values and liabilities of the company expected to rank as at the date referred to in subparagraph (1)(c);
  - (c) a summary of the assets of the company, setting out the estimated realisable value of—
    - (i) any assets specifically secured,
    - (ii) any assets subject to a floating charge,

- (iii) any assets not secured; and
- (iv) the total value of all the assets available to preferential creditors;
- (d) the value of each of the following secured liabilities of the company expected to rank for payment—
  - (i) liabilities secured on specific assets, and
  - (ii) liabilities secured by floating charges;
- (e) a summary of the unsecured liabilities of the company expected to rank for payment;
- (f) the estimated expenses of the liquidation;
- (g) the estimated amount of interest accruing until payment of debts in full; and
- (h) the estimated value of any surplus after paying debts in full together with interest at the official rate.

## CHAPTER 2

### The liquidator

[Note: a document required by the Act or these Rules must also contain the standard contents required as set out in Part 1.]

#### **Appointment by the company**

[Note: under section 109 and paragraph 23 of schedule 8 of the Scotland Act 1998 a liquidator must also, within 14 days, publish in the Gazette and deliver to the Accountant in Bankruptcy notice of the liquidator's appointment.]

**3.2.—**(1) This rule applies where the liquidator is appointed by the company.

(2) The chair of the meeting, or a director or the secretary of the company in the case of a written resolution of a private company, must certify the appointment when the appointee has provided to the person certifying the appointment a statement to the effect that the appointee is an insolvency practitioner qualified under the Act to be the liquidator and consents to act.

(3) The certificate must be authenticated and dated by the person who certifies the appointment and must contain—

- (a) identification details for the company;
- (b) identification and contact details for the person appointed as liquidator;
- (c) the date the liquidator was appointed; and
- (d) a statement that the appointee—
  - (i) provided a statement of being qualified to act as an insolvency practitioner in relation to the company,
  - (ii) has consented to act, and
  - (iii) was appointed liquidator of the company.

(4) Where 2 or more liquidators are appointed the certificate must also specify (as required by section 231) whether any act required or authorised under any enactment to be done by the liquidator is to be done by all or any one or more of them.

(5) The person who certifies the appointment must deliver the certificate as soon as reasonably practicable to the liquidator.

(6) Not later than 28 days from the liquidator's appointment, the liquidator must deliver notice of the appointment to the creditors of the company.

(7) The liquidator may within 28 days of the liquidator's appointment advertise notice of it (otherwise than in the Gazette) in such manner as the liquidator thinks fit.

(8) The notice referred to in paragraph (7) must state—

- (a) that a liquidator has been appointed; and
- (b) the date of the appointment.

### **Meetings in members' voluntary winding up of authorised deposit-takers**

**3.3.**—(1) This rule applies to a meeting of the members of an authorised deposit-taker at which it is intended to propose a resolution for its winding up.

(2) Notice of such a meeting of the company must be delivered by the directors to the Financial Conduct Authority and to the scheme manager established under section 212(1) of the Financial Services and Markets Act 2000(1).

(3) The notice to the Financial Conduct Authority and the scheme manager must be the same as delivered to members of the company.

(4) The scheme manager is entitled to be represented at any meeting of which it is required by this rule to be given notice.

### **Appointment by the court (section 108)**

[Note: under section 109 and paragraph 23 of schedule 8 of the Scotland Act 1998 a liquidator must also, within 14 days, publish in the Gazette and deliver to the Accountant in Bankruptcy notice of the liquidator's appointment.]

**3.4.**—(1) This rule applies where the liquidator is appointed by the court under section 108.

(2) The court must not make the appointment unless and until the person being appointed liquidator has lodged in court a statement to the effect that that person is qualified to act as an insolvency practitioner in relation to the company and consents to act as liquidator.

(3) The liquidator's appointment is effective from the date of the order of appointment.

(4) Not later than 28 days from the liquidator's appointment, the liquidator must deliver notice of the appointment to the creditors of the company.

### **Liquidator's resignation**

**3.5.**—(1) A liquidator may resign only—

- (a) on grounds of ill health;
- (b) because of the intention to cease to practise as an insolvency practitioner;
- (c) because the further discharge of the duties of liquidator is prevented or made impractical by—
  - (i) a conflict of interest, or
  - (ii) a change of personal circumstances;
- (d) where 2 or more persons are acting as liquidator jointly and it is the opinion of both or all of them that it is no longer expedient that there should continue to be that number of joint liquidators.

(2) Before resigning, the liquidator must deliver a notice to the members of the company—

- (a) stating the liquidator's intention to resign; and

(b) calling a meeting for the members to consider whether a replacement should be appointed, except where the resignation is under sub-paragraph (1)(d).

(3) The notice may suggest the name of a replacement liquidator.

(4) The notice must be accompanied by a summary of the liquidator's receipts and payments.

(5) The date of the meeting must be not more than 5 business days before the date on which the liquidator intends to give notice of resignation to AiB under section 171(5).

(6) The resigning liquidator's release is effective 21 days after the date of delivery of the notice of resignation to AiB under section 171(5), unless the court orders otherwise.

### **Removal of liquidator by company meeting**

[Note: in relation to release of the liquidator following removal from office by a general meeting of the company, see section 173(2)(a)(i)(2).]

**3.6.** A liquidator removed by a meeting of the company must as soon as reasonably practicable deliver notice of the removal to AiB.

### **Removal of liquidator by the court**

[Note: in relation to release of the liquidator following removal from office by the court see section 173(2)(b)(ii) (3).]

**3.7.—(1)** This rule applies where an application is made to the court for the removal of the liquidator, or for an order directing the liquidator to summon a company meeting for the purpose of removing the liquidator.

(2) The court may require the applicant to make a deposit or give caution for the expenses to be incurred by the liquidator on the application.

(3) The applicant must, at least 14 days before the hearing, deliver to the liquidator—

(a) a notice of the hearing stating the venue;

(b) a copy of the application; and

(c) a copy of any evidence on which the applicant intends to rely.

(4) The expenses of the application are not payable as an expense of the liquidation unless the court orders otherwise.

(5) Where the court removes the liquidator the order of removal may include such provision as the court thinks fit with respect to matters arising in connection with the removal.

(6) The person removed must as soon as reasonably practicable after receiving a copy of the order of removal deliver a copy of the order of removal to AiB.

(7) If the court appoints a new liquidator, rule 3.4 (appointment by the court) applies.

### **Deceased liquidator**

[Note: in relation to release of a deceased liquidator, see section 173(2)(a)(iii) and paragraph 23 of schedule 8 of the Scotland Act 1998.]

**3.8.—(1)** If the liquidator dies a notice of the fact and date of death must be delivered as soon as reasonably practicable to—

(2) A new section 173(2)(a) is prospectively inserted by paragraph 44(2) of schedule 9 of the Small Business, Enterprise and Employment Act 2015 (c.26) ("the 2015 Act").

(3) A new section 173(2)(b) is prospectively substituted by paragraph 44(2) of schedule 9 of the 2015 Act.

- (a) one of the company's directors; and
  - (b) AiB.
- (2) One of the following must deliver the notice—
- (a) a surviving joint liquidator;
  - (b) a member of the deceased liquidator's firm (if the deceased was a member or employee of a firm);
  - (c) an officer of the deceased liquidator's company (if the deceased was an officer or employee of a company); or
  - (d) an executor of the deceased liquidator.
- (3) If such notice has not been delivered within the 21 days following the liquidator's death then any other person may deliver the notice.

### **Loss of qualification as insolvency practitioner**

[Note: in relation to release of the liquidator where the liquidator vacates office on ceasing to be a person qualified to act as an insolvency practitioner in relation to the company (section 171(4)), see section 173(2)(b)(iii).]

- 3.9.**—(1) This rule applies where the liquidator vacates office on ceasing to be qualified to act as an insolvency practitioner in relation to the company.
- (2) A notice of the fact must be delivered as soon as reasonably practicable to AiB by one of the following:—
- (a) the liquidator who has vacated office;
  - (b) a continuing joint liquidator; or
  - (c) the recognised professional body which was the source of the vacating liquidator's authorisation to act (immediately before the liquidator vacated office).
- (3) The notice must be authenticated and dated by the person delivering the notice.

### **Application by former liquidator to the Accountant of Court for release (section 173(2)(b))(4)**

- 3.10.**—(1) This rule applies to a liquidator who—
- (a) is removed by the court;
  - (b) vacates office on ceasing to be qualified to act as an insolvency practitioner in relation to the company; or
  - (c) vacates office in consequence of the court making a winding-up order against the company.
- (2) Where the former liquidator applies to the Accountant of Court for release the application must contain—
- (a) identification details for the insolvency proceedings;
  - (b) identification and contact details for the former liquidator;
  - (c) details of the circumstances under which the former liquidator has ceased to act as liquidator; and
  - (d) a statement that the former liquidator is applying to the Accountant of Court for a certificate of the former liquidator's release as liquidator as a result of the circumstances specified in the application.

- (3) The application must be authenticated and dated by the former liquidator.
- (4) When the Accountant of Court gives a release, the Accountant of Court must deliver—
  - (a) a certificate of the release to the former liquidator; and
  - (b) a notice of the release to AiB.
- (5) Release is effective from the date of the certificate or such other date as the certificate specifies.

#### **Delivery of draft final account to members (section 94)**

**3.11.**—(1) The liquidator must deliver a notice to the members accompanied by the draft final account required by section 94(1)(5) and rule 7.9 giving them a minimum of 8 weeks' notice of a specified date on which the liquidator intends to deliver the final account as required by section 94(2).

- (2) The notice must inform the members that when the company's affairs are fully wound up—
  - (a) the liquidator will make up the final account and deliver it to the members; and
  - (b) when the final account is delivered to the registrar of companies and AiB under section 94(3)(6) the liquidator will vacate office under section 171(6)(7) and be released under section 173(2)(d)(8).

(3) However the liquidator may conclude that the company's affairs are fully wound up before the period referred to in paragraph (1) has expired if every member confirms in writing to the liquidator that they do not intend to make any such request or application.

#### **Final account prior to dissolution (section 94)**

**3.12.**—(1) The final account which the liquidator is required to make up under section 94 must comply with the requirements of rule 7.9.

- (2) When the account is delivered to the members under section 94(2) it must be accompanied by a notice which states that—
  - (a) the company's affairs are fully wound up;
  - (b) the liquidator having delivered copies of the account to the members must, within 14 days of the date on which the account is made up, deliver a copy of the account to the registrar of companies and AiB; and
  - (c) the liquidator will vacate office under section 171(6) and be released under section 173(2)(d) on delivering the final account to the registrar of companies and AiB.

(3) The copy of the account which the liquidator must deliver to the registrar of companies and AiB under section 94(3) must be accompanied by a notice stating that the liquidator has delivered the final account of the winding up to the members in accordance with section 94(2).

#### **Liquidator's duties on vacating office (hand-over of assets etc.)**

**3.13.**—(1) This rule applies where a person appointed as liquidator ("the succeeding liquidator") succeeds a previous liquidator ("the former liquidator") as the liquidator.

(2) When the succeeding liquidator's appointment takes effect the former liquidator must as soon as reasonably practicable deliver to the succeeding liquidator—

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(5) A new section 94 is prospectively inserted by paragraph 18 of schedule 9 of the 2015 Act (c.26).  
 (6) Section 94(3) is modified by paragraph 23 of schedule 8 of the Scotland Act 1998 (c.46).  
 (7) A new section 171(6) is prospectively inserted by paragraph 42(4) of schedule 9 of the Small Business, Enterprise and Employment Act 2015.  
 (8) Section 173(2)(d) is prospectively amended by paragraph 44 of schedule 9 of the Small Business, Enterprise and Employment Act 2015.

- (a) the assets (after deduction of any expenses properly incurred, and distributions made, by the former liquidator);
  - (b) the records of the winding up, including correspondence, statements of claim, evidence of debts and other documents relating to the winding up; and
  - (c) the company's documents and other records.
- (3) In doing so, the former liquidator must hand over—
- (a) such information relating to the affairs of the company and the course of the winding up as the succeeding liquidator considers reasonably required for the effective discharge of the succeeding liquidator's duties as liquidator; and
  - (b) all records and documents in the former liquidator's possession relating to the affairs of the company and its winding up.

### **Taking possession and realisation of company's assets**

**3.14.**—(1) The liquidator must—

- (a) as soon as reasonably practicable after the liquidator's appointment take possession of—
  - (i) the whole assets of the company; and
  - (ii) any property, books, papers or records in the possession or control of the company or to which the company appears to be entitled; and
- (b) make up and maintain an inventory and valuation of the assets of the company.

(2) The liquidator is entitled to have access to, and to make copies of, all documents or records relating to the assets, property, business or financial affairs of the company—

- (a) sent by or on behalf of the company to a third party; and
- (b) in that third party's hands.

(3) If a person obstructs the liquidator in the liquidator's exercise, or attempted exercise, of a power conferred by paragraph (2), the court may, on the liquidator's application, order the person to cease obstructing the liquidator.

(4) The liquidator may require delivery to the liquidator of any title deed or other document of the company, even if a right of lien is claimed over it.

(5) Paragraph (4) is without prejudice to any preference of the holder of the lien.

### **Realisation of the company's heritable property**

**3.15.**—(1) This rule applies to the sale of any part of the company's heritable property over which a heritable security is held by a creditor or creditors if the rights of the secured creditor are preferable to those of the liquidator.

(2) The liquidator may sell that part only with the concurrence of every such creditor unless the liquidator obtains a sufficiently high price to discharge every such security.

(3) Subject to paragraph (4), the following acts are precluded—

- (a) the taking of steps by a creditor to enforce the creditor's security over that part after the liquidator has intimated to the creditor an intention to sell it;
- (b) the commencement by the liquidator of the procedure for the sale of that part after a creditor has intimated to the liquidator that the creditor intends to commence the procedure for its sale.

(4) Where the liquidator or a creditor has given intimation under paragraph (3) but has unduly delayed in proceeding with the sale, then, if authorised by the court in the case of—

- (a) paragraph (3)(a), any creditor to whom intimation has been given may enforce the creditor's security;
  - (b) paragraph (3)(b), the liquidator may sell that part.
- (5) The validity of the title of any purchaser is not challengeable on the ground that there has been a failure to comply with a requirement of this rule.

#### **Power of court to set aside certain transactions entered into by liquidator**

**3.16.**—(1) If in the course of the liquidation the liquidator enters into any transaction with a person who is an associate of the liquidator, the court may, on the application of any interested person, set the transaction aside and order the liquidator to compensate the company for any loss suffered in consequence of it.

(2) This does not apply if either—

- (a) the transaction was entered into with the prior consent of the court; or
- (b) it is shown to the court's satisfaction that the transaction was for value, and that it was entered into by the liquidator without knowing, or having any reason to suppose, that the person concerned was an associate.

(3) Nothing in this rule is to be taken as prejudicing the operation of any rule of law relating to a trustee's dealings with trust property, or the fiduciary obligations of any person.

#### **Rule against improper solicitation by or on behalf of the liquidator**

**3.17.**—(1) Where the court is satisfied that any improper solicitation has been used by or on behalf of the liquidator in obtaining proxies or procuring the liquidator's appointment, it may order that no remuneration be allowed as an expense of the liquidation to any person by whom, or on whose behalf, the solicitation was exercised.

(2) An order of the court under this rule overrides any resolution of the members, or any other provision of these Rules relating to the liquidator's remuneration.

### CHAPTER 3

#### Special manager

#### **Application for and appointment of special manager (section 177)**

**3.18.**—(1) An application by the liquidator under section 177 for the appointment of a special manager must be supported by a report setting out the reasons for the application.

(2) The report must include the liquidator's estimate of the value of the business or property in relation to which the special manager is to be appointed.

(3) The court's order appointing a special manager must specify the duration of the special manager's appointment, being one of the following—

- (a) for a fixed period stated in the order;
- (b) until the occurrence of a specified event; or
- (c) until the court makes a further order.

(4) The appointment of the special manager may be renewed by order of the court.

(5) The special manager's remuneration will be fixed from time to time by the court.

(6) The acts of the special manager are valid notwithstanding any defect in the special manager's appointment or qualifications.



## **Caution**

**3.19.**—(1) The appointment of the special manager does not take effect until the person appointed has found (or, if the court allows, undertaken to find) caution for the appointment to be given to the liquidator.

(2) A person appointed as special manager may find caution either specifically for a particular winding up, or generally for any winding up in relation to which that person may be appointed as special manager.

(3) The amount of the caution must be not less than the value of the business or property in relation to which the special manager is appointed, as estimated in the applicant's report which accompanied the application for appointment.

(4) When the special manager has found caution for the appointment to be given to the applicant that person must lodge with the court a certificate as to the adequacy of the caution.

(5) The cost of finding the caution must be paid in the first instance by the special manager, but the special manager is entitled to be reimbursed as an expense of the liquidation.

## **Failure to find or maintain caution**

**3.20.**—(1) If the special manager fails to find the required caution within the time allowed for that purpose by the order of appointment, or any extension of that time that may be allowed, the liquidator must report the failure to the court, which may discharge the order appointing the special manager.

(2) If the special manager fails to maintain the caution, the liquidator must report the failure to the court, which may remove the special manager, and make such order as to expenses as it thinks just.

(3) If the court discharges the order appointing the special manager, or makes an order removing the special manager, the court must give directions as to whether any, and if so what, steps should be taken for the appointment of another special manager.

## **Accounting**

**3.21.**—(1) The special manager must produce accounts, containing details of the special manager's receipts and payments, for the approval of the liquidator.

(2) The accounts must be for—

- (a) each 3 month period for the duration of the special manager's appointment; and
- (b) any shorter period ending with the termination of the special manager's appointment.

(3) When the accounts have been approved, the special manager's receipts and payments must be added to those of the liquidator.

## **Termination of appointment**

**3.22.**—(1) If the liquidator is of the opinion that the appointment of the special manager is no longer necessary or beneficial for the company, the liquidator must apply to the court for directions, and the court may order the special manager's appointment to be terminated.

(2) The liquidator must make the same application if the members pass a resolution requesting that the appointment should be terminated.

## CHAPTER 4

### Conversion to creditors' voluntary winding up

#### **Statement of affairs (section 95)**

**3.23.** The rules in Chapter 2 of Part 4 apply to the statement of affairs made out by the liquidator under section 95(1A)(9) where the liquidator is of the opinion that the company will be unable to pay its debts in full (together with interest at the official rate) within the period stated in the directors' declaration under section 89.

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(9) Section 95(1A) is prospectively inserted by paragraph 19(2) of schedule 9 of the Small Business, Enterprise and Employment Act 2015 (c.26) ("the 2015 Act") which also omitted subsections (2) to (3) and (5) to (7). Section 95(4A) inserted by S.I. 2010/18 is prospectively amended by S.S.I. 2016/141, article 8.