These notes refer to the Deregulation Act 2015 (c.20)
which received Royal Assent on 26 March 2015

DEREGULATION ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Schedule 6: Insolvency and company law

Part 1: Deeds of arrangement

556. *Paragraphs 1 and 2* repeal the Deeds of Arrangement Act 1914 ("DOAA 1914") and make consequential amendments to other legislation. A deed of arrangement is an alternative to bankruptcy. It is a contract between a debtor and the debtor's creditors that provides for the assignment of the debtor's assets for the benefit of the creditors or a composition where some or all creditors agree to accept a lesser sum in full satisfaction of their claims. The DOAA 1914 sets out the statutory scheme whereby an individual can execute a deed or other instrument.

557. In June 1982 *The Report of the Review Committee* ("the Cork Committee") recommended that the DOAA 1914 be repealed and be replaced by introduction of a formal voluntary arrangement. This recommendation was based on the grounds that deeds of arrangement were legally complex, unreliable in practice and therefore little used. Individual voluntary arrangements were introduced by the Insolvency Act 1986, although the DOAA 1914 was not repealed at that time.

558. Since 1986, individual voluntary arrangements have increased in popularity and in 2014 there were 52,190 such arrangements. They have effectively replaced deeds of arrangement. There is only one deed of arrangement still in existence, which was registered in 2004. This deed of arrangement will have the benefit of the saving provision at *paragraph 3*. Individual voluntary arrangements better meet debtors' requirements because they are binding on all creditors, even where a creditor was unaware of the proposal at the time it was approved.

559. The DOAA 1914 forms part of the law of England and Wales only and its repeal will have the same extent. Paragraphs 1 to 3 will come into force on a day to be appointed by the Secretary of State in a commencement order.

Part 2: Administration of companies

Appointment of administrators

560. Administration is an insolvency proceeding where the affairs, business and property of the company are managed by an administrator. The primary aim of an administration is to ensure the company's survival as a going concern, and failing that to achieve a better result for the company's creditors than would be likely if the company was wound up. An administrator may be appointed, in an out-of-court procedure, by the company, directors or a qualifying floating charge holder by giving notice and filing prescribed documents at court. Alternatively, an administrator may be appointed by the court on application by the company, directors or creditors.

561. *Paragraph 5* inserts a new paragraph 25A into Schedule B1 to the Insolvency Act 1986 to enable a company or the directors of a company to appoint an administrator despite the presentation of a winding-up petition, if the petition was presented during an interim moratorium. Like that Schedule to that Act, paragraph 5 forms part of the law of England and Wales and Scotland. The act of filing with the court notice of intent to appoint an administrator under paragraph 27 of Schedule B1 to the Insolvency Act 1986 commences an interim moratorium in respect of the company (paragraph 44(4) of that Schedule). The interim moratorium prevents other insolvency proceedings or legal processes against the company being instituted or continued. The new paragraph 25A clarifies that the prohibition (under paragraph 25(a) of Schedule B1) on appointing an administrator when a winding-up petition has been presented and not yet disposed of applies only to a petition presented before an interim moratorium comes into effect.

562. *Paragraph 6* removes a requirement in paragraph 26(2) of Schedule B1 to the 1986 Act to give notice of intention to appoint an administrator to persons who are not themselves entitled to appoint an administrative receiver or administrator in certain circumstances. Paragraph 6 forms part of the law of England and Wales and Scotland.

563. At present a company or its directors intending to appoint an administrator must give notice of the intention to appoint to anyone entitled to appoint an administrative receiver of the company, to any holder of a qualifying floating charge entitled to appoint an administrator, and to other prescribed persons. The prescribed persons are set out in rule 2.20 of the Insolvency Rules 1986, and include the company (if the company is not intending to make the appointment) and a supervisor of a company voluntary arrangement under Part 1 of the Insolvency Act 1986. Unlike those entitled to appoint a receiver or administrator, the prescribed persons cannot block the appointment of an administrator.

564. The requirement to give notice to these prescribed persons can lead to unnecessary delays in the administrator's appointment where there is no one else to whom notice of intention to appoint must be given and so the requirement is being removed by paragraph 6. The prescribed persons will in any event receive notice of the appointment when it is made.

565. Paragraph 5 comes into force at the end of the period of 2 months beginning with the day on which the Act is passed and paragraph 6 comes into force on a day to be appointed by the Secretary of State in a commencement order.

Release of administrator where no distribution to unsecured creditors other than by virtue of section 176A(2)(a)

566. *Paragraph 7* amends paragraph 98 of Schedule B1 to the Insolvency Act 1986 and like that Schedule forms part of the law of England and Wales and Scotland. The amendment makes it clear that where an administrator of a company has been appointed by a floating charge holder or by the company or its directors and there are insufficient assets to enable a distribution to be made to the unsecured creditors (other than under section 176A(2)(a) of the Insolvency Act 1986 - the "prescribed part"), there is no requirement for all of the creditors to resolve to give the administrator his/her release. Release is the release of an office-holder from liability in respect of his or her acts and omissions as an office-holder. (The "prescribed part" is a proportion of a company's assets over which a floating charge holder has security which can nonetheless be applied in certain circumstances to unsecured creditors.)

567. Currently paragraph 98(2)(b) of Schedule B1 to the Insolvency Act 1986 provides that such an administrator obtains his release by a resolution of a creditors' committee or by a resolution of the creditors. Paragraph 98(3) of Schedule B1 to that Act goes on to provide that where such an administrator makes a statement under paragraph 52(1)(b) of Schedule B1 (company has insufficient property to make a distribution to unsecured creditors), a resolution requires the approval of every secured creditor and (where distributions to preferential creditors have been or may be made) the approval of

at least 50% of the preferential creditors by value. This implies that a normal resolution of all the creditors is required plus a resolution of all of the secured creditors.

568. The amendments made by paragraph 7 distinguish paragraph 52(1)(b) cases from non-paragraph 52(1)(b) cases. Thus, where the unsecured creditors have no interest in the administration (other than by virtue of the "prescribed part"), it will be clear that the unsecured creditors are not involved in the administrator's release - the release only needs to be given by (all of) the secured creditors (together with at least 50% of the preferential creditors where relevant) and is effective from the time they decide. It will not be necessary for the secured creditors to hold a meeting.

569. Paragraph 7 will come into force on a day to be appointed by the Secretary of State in a commencement order. Paragraph 7 is deregulatory because it will avoid the calling of unnecessary creditors' meetings at which the creditors formally resolve to give administrators their release.

Part 3: Winding up of companies

Removal of power of court to order payment into Bank of England of money due to company

570. *Paragraph 9* repeals section 151 of the Insolvency Act 1986, a provision which provides the court with a power to order any contributory (that is a person liable to contribute to the assets of a company in the event of its being wound up), purchaser or other person from whom money is due to a company that is the subject of a winding-up order to pay the amount due into the Bank of England to the account of the liquidator instead of to the liquidator. The role of a liquidator of a company which is being wound up by the court is to secure, realise and distribute assets and distribute any surplus.

571. The origins of the provision date back to the Companies Act 1862 and it appears that its purpose was to have been a method for protecting creditors' interests from an unregulated insolvency profession. Since 1986, there has been a strong regulatory framework in place to monitor and control the activities of liquidators and so this provision no longer serves any useful purpose. The last recorded use of the power was in 1991.

572. Section 151 applies to companies that are being wound up by the court in England and Wales and in Scotland. The repeal of the section forms part of the law of England and Wales and Scotland. Paragraph 9 will come into force on a day to be appointed by the Secretary of State in a commencement order.

Release of liquidator where winding-up order rescinded

573. The amendment made by *paragraph 10* will form part of the law of England and Wales and Scotland. The amendment will not apply in Scotland, however. This is because the amendment concerns a liquidator's release upon the rescission of a winding-up order and in Scotland the courts do not rescind winding-up orders. The amendment will come into force on a day to be appointed by the Secretary of State in a commencement order. It is deregulatory because it will mean that, where a court in England and Wales rescinds a winding-up order, the liquidator's release should be addressed at the same time, as opposed to being the subject of a subsequent, separate court application. A winding-up order may be rescinded where, for instance, it is shown that the company's circumstances are markedly more favourable than they were when the winding-up order was made or where the court did not have the full facts when it made the order.

574. Liquidators are liable for their acts in the winding-up unless and until released from that liability. It is important to liquidators to obtain their release as this provides significant protection against being sued for their acts and omissions in the winding-up. There is nonetheless currently no specific statutory provision concerning the release of a liquidator when a court order is rescinded. The release of liquidators in all other

circumstances is already addressed – see section 174 of the Insolvency Act 1986. Paragraph 10 remedies this omission. It inserts a new subsection into section 174 which provides that the liquidator when a winding-up order is rescinded has his or her release with effect from the time the court may determine.

Part 4: Disqualification of unfit directors of insolvent companies

575. *Paragraph 11* amends section 7(4) of the Company Directors Disqualification Act 1986 and like that section of that Act forms part of the law of England and Wales and Scotland. The amendments will enable the Secretary of State or the official receiver to request information relevant to a person's conduct as a director of a company that has been insolvent directly from any person, including from officers of the company themselves. The amendments will also ensure that books, papers and other records are to be produced when the Secretary of State or official receiver consider the respective documents to be relevant.

576. Currently, where the Secretary of State or official receiver is considering whether to make an application for a disqualification order against a director, the Secretary of State or the official receiver may require only office-holders of a company (a liquidator, administrator or administrative receiver) to provide information or books, papers etc. about any person's conduct as a director.

577. This approach creates an administrative burden on the office-holder and can give rise to delays in information and document provision. Furthermore, office-holders also sometimes refuse or delay requests for information as they do not deem it "relevant" to the person's conduct as director (see s.7(4)(b) CDDA 1986). This can have the effect of delaying the Secretary of State's or the official receiver's decision as to whether to make a disqualification application.

578. The amendments made by paragraph 11 permit the Secretary of State or the official receiver to obtain information about any person's conduct as a director of a company direct from any person, including officers of the company, and ensures that the Secretary of State and the official receiver may request any document which they consider to be relevant to their decision as to whether to make an application for disqualification.

579. Paragraph 11 will come into force on a day to be appointed by the Secretary of State in a commencement order.

Part 5: Bankruptcy

Appointment of insolvency practitioner as interim receiver

580. *Paragraphs 13 and 14* form part of the law of England and Wales only. They will come into force on a day to be appointed by the Secretary of State in a commencement order. Their effect is deregulatory because they will allow a wider choice of individuals to act as an interim receiver. Importantly, that individual could subsequently be appointed as trustee in bankruptcy. An interim receiver is someone appointed to preserve a debtor's assets in the period between the dates that a bankruptcy petition is presented and heard by the court.

581. Both official receivers (who are civil servants) and insolvency practitioners (who operate in the private sector) can act as trustees of bankruptcy estates. Creditors often wish to appoint an insolvency practitioner to act as both interim receiver (where one is appointed) and the subsequent trustee. Except in limited circumstances however, the court may now only appoint the official receiver as interim receiver. The exception is where, a debtor petitions for their own bankruptcy under section 272 of the Insolvency Act 1986, and the court appoints an insolvency practitioner to prepare a report under section 273 of that Act stating whether the debtor is able to make a proposal for a

voluntary arrangement. In such a case, the court may appoint the insolvency practitioner who prepared the report as interim receiver.

582. Paragraph 13 amends section 286 of the Insolvency Act 1986 to permit the court to appoint the official receiver or any insolvency practitioner as interim receiver in all circumstances. Paragraph 14 makes consequential amendments to section 370 of that Act to provide that any interim receiver may make an application to the court for the appointment of a "special manager" (someone, usually with specific sector expertise, to assist the interim receiver).

Statement of affairs

583. *Paragraph 15* amends section 288 of the Insolvency Act 1986 and like that section of that Act forms part of the law of England and Wales only. The amendments replace the requirement on every person subject to a bankruptcy order on a creditor's petition to deliver a statement of affairs to the official receiver, with a discretionary power for the official receiver to require a statement of affairs from that person.

584. At present there is a requirement for a statement of affairs to be submitted in every bankruptcy. A debtor who petitions for their own bankruptcy is required to submit a statement of affairs with their petition. Where a creditor petitions the bankrupt person is required to submit a statement of affairs within 21 days of the bankruptcy order, unless either the official receiver or the court releases him from doing so or extend the 21 day period. Failure to comply with this requirement without reasonable excuse constitutes contempt of court under section 288(4) of the Insolvency Act 1986.

585. In the latter case, the bankrupt person will not usually provide a statement of affairs due to lack of awareness of the requirement. Currently a person made bankrupt on a creditor's petition is only likely to submit a statement of affairs when the official receiver requests it, for example if further investigations are being undertaken. The official receiver often obtains the required information by other means but may not formally release the bankrupt from the requirement.

586. The amendments to section 288 seek to reduce the burden on bankrupt individuals by providing that a statement of affairs is not required in a case where a creditor presented the petition unless requested by the official receiver. This mirrors the position where a company has been wound up by the court (see section 131 of the Insolvency Act 1986).

587. The statement of affairs may be requested by the official receiver at any time until the bankrupt person's discharge from bankruptcy. It must be submitted in a prescribed form and, unless the official receiver or the court extends the period, within 21 days of the official receiver requiring it.

588. Paragraph 15 will come into force on a day to be appointed by the Secretary of State in a commencement order.

After-acquired property of bankrupt

589. *Paragraph 16* amends section 307 of the Insolvency Act 1986 to facilitate banks offering accounts to undischarged bankrupts. There is some uncertainty at present about the way in which section 307 operates in relation to bank accounts and the amendments seek to reduce a burden by removing that uncertainty. Paragraph 16, like section 307, forms part of the law of England and Wales only. It will come into force on a day to be appointed by the Secretary of State in a commencement order.

590. Section 307 allows a trustee in bankruptcy to claim by notice after-acquired property which becomes the property of the bankrupt before they are discharged (usually 12 months after the bankruptcy order was made). Where that property is or becomes money that passes through a bank account, and the trustee is unable to recover it from the bankrupt or ultimate recipient, the trustee may claim against the bank for its loss to the

bankruptcy estate. Currently the trustee can consider such a claim as the bank would have been aware of the bankruptcy order.

591. Section 307(4) of the Insolvency Act 1986 prevents the trustee from taking action against certain persons who have dealt with after-acquired property in good faith and without notice of the bankruptcy – namely persons acquiring property for value and bankers entering into transactions. The amendment takes bankers outside the scope of section 307(4) and instead provides protection for them by means of a new subsection (4A) inserted into section 307. The new subsection (4A) prevents a trustee making a claim against a bank in circumstances where the bank has not been served with notice by the trustee specifically regarding the after-acquired property he or she wishes to claim, regardless of whether the bank has notice of the bankruptcy.

Part 6: Authorisation of insolvency practitioners

Repeal of provision for authorisation of nominees and supervisors in relation to voluntary arrangements

592. *Paragraphs 18 and 19* repeal sections 389(1A) and 389A of the Insolvency Act 1986. These provisions allow individuals to be authorised to act solely as nominees or supervisors in voluntary arrangements. No body has ever been recognised for the purpose of authorising such persons and therefore these provisions have never been used. The introduction of a regime for the partial authorisation of insolvency practitioners contained in section 17 is an evolution of the idea embodied in sections 389(1A) and 389A and therefore these provisions are no longer required.

593. *Paragraph 20* makes amendments to primary legislation that are consequential on the repeals made by paragraphs 18 and 19.

Repeal of provision for authorisation of insolvency practitioners to be granted by competent authority

594. *Paragraph 21* repeals sections 392 to 398 of, and Schedule 7 to, the Insolvency Act 1986 which provide for a competent authority to grant, refuse and withdraw authorisation to act as an insolvency practitioner. As no other competent authority has been designated, the Secretary of State is currently the only competent authority. The effect of the repeal will be that the Secretary of State will no longer be able to authorise individuals to act as an insolvency practitioner. Individuals will only be able to obtain authorisation from one of a number of professional bodies recognised by the Secretary of State for that purpose. The vast majority of insolvency practitioners are already authorised by one of these bodies. The changes will reduce inconsistency of regulation by ensuring that all insolvency practitioners are authorised by one of the recognised professional bodies. The repeal of the provisions also removes a perceived conflict of interest with the Secretary of State's role as an oversight regulator of the professional bodies.

595. *Paragraph 22* makes a number of amendments to primary legislation that are consequential to the repeals made by paragraph 21. These amendments include removal of references to the Insolvency Practitioners Tribunal. The Insolvency Practitioners Tribunal exists only to consider objections to a competent authority's decision to refuse an application for authorisation or withdraw a person's authorisation to act as an insolvency practitioner. Consequently, the Insolvency Practitioners Tribunal will become redundant once the repeals made by paragraph 21 take full effect.

596. *Paragraph 23* is a transitional and savings provision for two categories of individuals: those who are authorised by the Secretary of State to act as an insolvency practitioner at the date the repeals made by paragraph 21 take effect; and those who have applied to the Secretary of State for authorisation by that date but whose application has not been dealt with. Those who are already authorised will continue to be authorised during the transitional period. Those who apply to the Secretary of State for authorisation before

the repeals made by paragraph 21 take effect will have their applications determined in accordance with the existing provisions.

597. The main amendments made by Part 6 of the Schedule form part of the law of England and Wales and Scotland, in line with the enactments that they amend. Part 6 will come into force on a day to be appointed by the Secretary of State in a commencement order.

Part 7: Liabilities of administrators and administrative receivers of companies and preferential debts of companies and individuals

Treatment of liabilities relating to contracts of employment

598. *Paragraphs 24 to 28* repeal one element of the priority given to employees' wages in certain insolvency proceedings, because the type of employment contract to which it relates no longer exists.

599. In administration and administrative receiverships a company can continue to trade under the direction of the administrator or the administrative receiver, usually pending a sale of the business or assets. All debts incurred by the company after entry into such insolvency proceedings are classified as an expense of the insolvency proceedings and are payable ahead of the fees of the insolvency practitioner. For an employee to become entitled to have their wages paid as an expense, the insolvency practitioner would have to adopt their contract. As well as including salary for actual days worked, the definition of wages extends to cover payment for holiday entitlement, absence and payment in lieu of holiday. Certain employment contracts ('year-in-hand' schemes) earned an employee holiday entitlement for the year ahead. Social security legislation provides that this holiday is counted as being accrued in the year it was earned.

600. In order not to discriminate against employees on these schemes, sections 19(10) (for pre-Schedule B1 administration which continues in force for some purposes) and 44(2D) (for administrative receiverships) of the Insolvency Act 1986, and paragraphs 99(6)(d) of Schedule B1 (administration) and 15 of Schedule 6 (categories of preferential debts) to that Act, provide that "wages or salary" includes, in respect of a period, a sum which would be treated as earnings for that period for the purposes of an enactment about social security. This enables a claim for this earned holiday entitlement to be made after entry into insolvency proceedings. However, such provision is now redundant as 'year in hand' schemes are no longer legally possible since the coming into force of the Working Time Regulations 1998. Removing unnecessary provision from the statute book reduces a burden.

601. Paragraphs 24 to 28 form part of the law of England and Wales and Scotland, in line with the provisions that they amend. However, the change made by paragraph 25 applies only to administrative receivers appointed in England and Wales, as does the provision it amends. These paragraphs will come into force at the end of the period of 2 months beginning with the day on which the Bill becomes an Act.

Part 8: Requirements of company law: proxies

Proxies at a poll taken 48 hours or less after it was demanded

602. *Paragraphs 29 and 30* repeal two minor drafting errors in the Companies Act 2006 in relation to the notice provisions for appointing a proxy or terminating a proxy's authority. The provisions to be repealed are redundant and were never commenced.

603. These paragraphs form part of the law of England and Wales, Scotland and Northern Ireland. They come into force at the end of the period of 2 months beginning with the day on which the Act is passed.