# EXPLANATORY MEMORANDUM TO

# THE INVESTMENT BANK SPECIAL ADMINISTRATION (ENGLAND AND WALES) RULES 2011

## 2011 No. 1301

**1.** This explanatory memorandum has been prepared by Her Majesty's Treasury and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

## 2. Purpose of the instrument

2.1 The instrument introduces the insolvency rules for the investment bank special administration procedures established in the Investment Bank Special Administration Regulations 2011 ("the Regulations").

## 3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

## 4. Legislative context

4.1 The Investment Bank Special Administration (England and Wales) Rules 2011 ("the Rules") are being introduced under section 411(1A) (a), (2), (2C) and (3) of the Insolvency Act 1986[1] (as modified by regulation 15(6) of the Regulations). It follows the introduction of the Regulations which were made on 7 February 2011 under section 233, 234 and 259(1) of the Banking Act 2009.

## 5. Territorial extent and application

5.1 This instrument applies to England and Wales.

## 6. European Convention on Human Rights

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

## 7. Policy background

7.1 These Rules set out the procedure for the Investment Bank Special Administration process under the Regulations.

7.2 The main features of Investment Bank Special Administration are that:

- the investment bank enters the procedure by court order;
- the order appoints an administrator;

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**1** 1986 c. 45. Subsections (1A) and (2C) were inserted by, and subsections (2) and (3) were amended by, section 125 of the Banking Act 2009 (c. 1).

- the administrator is to pursue the special administration objectives in accordance with the statement of proposals approved by the meeting of creditors and clients or, in certain circumstances, the Financial Services Authority; and
- in other respects the procedure is similar as to administration under Schedule B1 of the Insolvency Act 1986.

7.3 Where the investment bank is also a deposit-taking bank, the Rules also apply in relation to the Special Administration (Bank Insolvency) and Special Administration (Bank Administration) processes as established under Schedules 1 and 2 to the Regulations.

7.4 These Rules are based on the rules applicable to administration set out in the Insolvency Rules 1986, the Bank Insolvency (England and Wales) Rules 2009[2] and the Bank Administration (England and Wales) Rules 2009[3], and many of these existing rules have been applied with little or no modification.

7.5 New rules, and modifications to existing rules, have been introduced in order to facilitate the achievement of the unique objectives of the special administration procedures set out in the Regulations. The most significant new rules are set out below.

**Client voting procedure and establishment of creditors' committee (part 3 of the Rules)**

7.6 The statement of proposals drawn up by the administrator sets out the priority to be given to the three objectives set out in the Regulations. The statement of proposals must be approved by the meeting of creditors and clients. The rules set out how such approval is to be achieved.

7.7 In normal administration proceedings, creditors must be given notice of the meeting of creditors and then, in order to be able to vote at the meeting, must give the administrator details of their claim and have that claim accepted wholly or in part by the administrator.

7.8 The creditor's vote is calculated according to the amount of their claim as of the date the investment bank went into special administration, making adjustments for any amounts already repaid.

7.9 The Rules set out that under the Regulations clients are to be notified of meetings in the same way as creditors and that:

- a client must submit his claim for client assets to the administrator prior to the meeting in the same time frame in which a creditor would have to submit his claim (note that this submission would be in a much shorter form than the submission made in response to a bar date - see paragraph 7.12 below);
- the administrator has powers to reject/ admit /object to a claim;

**2** S.I. 2009/356 (as amended by the Bank Insolvency (England and Wales) (Amendment) Rules 2010 (S.I. 2010/2579)).
**3** S.I. 2009/357 (as amended by the Bank Administration (England and Wales) (Amendment) Rules 2010 (S.I. 2010/2583)).

- if the claim is for client assets, the value of a client's vote will be based on the value of those assets. Where the assets are not money, the chair will put on the assets an estimated value based on the value of those assets as on the closing of the markets on the business day prior to the investment bank entering special administration;
- the creditors and the clients will vote separately to approve the statement of proposals (this is because the total amount of debt owed by the investment bank and the total amount of client assets due to be returned are different types of liability and should not be combined). The statement must be approved by both groups – on a simple majority basis in each case; and
- a client who is also a creditor has the right to vote in both groups provided that they have submitted their respective claims correctly in each case.

7.10 The meeting of creditors and clients will also be able to appoint a creditors' committee. In order to ensure that this committee is a reasonable reflection of the interests of creditors and clients, the administrator will be required to determine the appropriate make-up of the committee and to direct that nominees are made and then voted on by the meeting in a manner that achieves that make-up.

**Costs of the realisation of client assets (see rule 137 of part 4 of the Rules)**

7.11 In the application of paragraph 99 of Schedule B1 of the Insolvency Act 1986, the costs of the administrator in pursuing Special Administration Objective 1 (ensuring the return of client assets as soon as is reasonably practicable) shall be borne by the clients. This follows the rule laid down in case law[4] that liquidators who deal with trust assets are entitled to be paid out of those assets for the work which had been carried out. The Rules provide that the administrator shall propose in the distribution plan for client assets how the administrator is to retain certain client assets to pay the expenses of the administration in pursing Special Administration Objective 1.

**Bar dates (part 5 of the Rules)**

7.12 If the administrator decides to set a bar date, the Rules set out how claims are to be made and the process leading up to the distribution following the bar date. The decision as to what can be distributed and at what stage will be left to the administrator's discretion (which is then subject to approval by the creditors' committee and by the court), but the Rules set out the process by which this is to be achieved. The Rules include details as to:

- what the claim must contain (this applies both to clients claiming a beneficial interest or other interest in the assets held, and also to third parties claiming security interests over those assets);
- the process by which the administrator "flushes out" late claimants (i.e. those who have not submitted their claim before the bar date). If the

**4** Re Sports Betting Media Ltd [2007] All ER (D) 123 (Jul) and Berkeley Applegate (Investment Consultants) Ltd, Re, Harris v Conway [1989] Ch 32, [1988] 3 All ER 71.

administrator believes from records of the investment bank that a client may have a claim for client assets, the administrator will contact the client and put him on notice that he believes that the client has assets with the firm and that he proposes to calculate the client's claim according to the information he has unless he hears otherwise from the client; and

- the approval of a distribution plan by the creditors' committee as to the distribution of both encumbered and unencumbered assets. This enables the administrator to set out: his plan for the distribution; the amount of distributions to be made; when those distributions are to be made; the size of any buffer of assets kept back from the initial distributions; how contingent claims or disputed claims are to be dealt with; and how the expenses of the special administration in realising and returning the client assets are to be funded from the client assets (see paragraph 7.11). Court approval will then need to be sought for the distribution plan.

7.13 Note that the above applies only where the administrator sets a bar date. There is nothing to stop the administrator releasing unencumbered client assets, before setting a bar date for the more complicated claims.

7.14 As regards the treatment of a claimant who makes a late claim, the Regulations provide that if a distribution has taken place, then this claimant cannot pursue any assets that have already been distributed. If there are sufficient assets remaining to cover what the claimant should have received in the distribution, then these will be paid out before the administrator makes another distribution, and the late claimant will participate fully in subsequent distributions. However, if there are insufficient assets, then the claimant becomes an unsecured claimant against the estate of the investment bank for the value of the shortfall of his claim.

## 8. Consultation outcome

8.1 Responses to the most recent consultation paper on the Regulations, *Special administration regime for investment firms*[5], which consulted on significant proposals for the new Rules (see paragraphs 7.6-7.14 above), were broadly supportive. Responses to the consultation paper are available on HM Treasury's website[6].

8.2 The Treasury has also sought the views of its Investment Banking Liaison Panel of industry practitioners, and has worked closely with officials from the Insolvency Service, Bank of England, Financial Services Authority, and Companies House, to develop the Regulations and the accompanying Rules. The Insolvency Rules Committee has also been consulted on the Rules.

## 9. Guidance

9.1 No guidance is being issued on the instrument since it is largely based on existing insolvency rules and practice which will be familiar to insolvency practitioners and their advisers.

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**5** http://www.hm-treasury.gov.uk/d/consult_sar_160910.pdf
**6** www.hm-treasury.gov.uk/consult_investment_banks2.htm

## 10. Impact

10.1 The Rules may only be used in connection with the insolvency of an investment bank (as defined in section 232 of the Banking Act) and will be used in place of the existing general insolvency rules. There are no significant ongoing or one-off direct costs associated with the Rules. An Impact Assessment has been prepared for this instrument.

## 11. Regulating small business

11.1 These Rules apply in respect of the special administration regime put in place by the Regulations for investment banks (as defined in section 232 of the Banking Act 2009) some of which may be small businesses.

## 12. Monitoring & review

12.1 Section 236 of the Banking Act provides for HM Treasury to review the Regulations within two years of them coming into force. The review must consider how far the Regulations are achieving the objectives specified in section 233(3) and whether the Regulations should continue to have effect.

12.2 HM Treasury will ensure that arrangements for review are consistent with better regulation policy going forward.

## 13. Contact

Daniel Okubo at HM Treasury, Tel: 020 7270 6376 or email: daniel.okubo@hmtreasury.gsi.gov.uk, can answer any queries regarding the instrument.

| Title: | Impact Assessment (IA) |
|---|---|
| **The Investment Bank Special Administration (England and Wales) Rules 2011**<br><br>**The Investment Bank Special Administration (Scotland) Rules 2011** | **IA No:** |
| | **Date:** 26/04/2011 |
| | **Stage:** Final |
| | **Source of intervention:** Domestic |
| **Lead department or agency:**<br>HM Treasury | **Type of measure:** Secondary legislation |
| **Other departments or agencies:**<br>Ministry of Justice | **Contact for enquiries:**<br>Banking.reform@hmtreasury.gsi.gov.uk |

# Summary: Intervention and Options

**What is the problem under consideration? Why is government intervention necessary?**

The failure of Lehman Brothers International Europe (LBIE) in the UK, and the subsequent administration proceedings, revealed problems with the insolvency procedures under the Insolvency Act 1986 as they applied to investment banks which hold client assets. After considering the responses of three consultation papers and the advice of an Investment Banking Advisory Panel, the Government legislated for a new special administration regime for investment banks. This regime came into force on 7 February 2011. The Government now intends to introduce insolvency rules for England and Wales and for Scotland, to set out the processes which must be followed under this new regime.

**What are the policy objectives and the intended effects?**

Insolvency rules are necessary to set out the detailed processes of an insolvency procedure. By introducing specific rules to accompany the special administration regime an administrator will have clarity over the processes which need to be followed in winding up an investment bank. Otherwise the administrator would have to seek directions from the court at every stage of the special administration, which would increase costs.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

The Government has considered two options. Option 1, the Government's preferred option, is to introduce insolvency rules. Insolvency rules are a necessary part of an insolvency procedure providing clarity for all those affected on the correct processes to be followed.

Option 2 is to 'do nothing'. This option, although theoretically possible, is not practical as insolvency practitioners would be unable to conduct an administration without insolvency rules setting out the processes to be followed. In theory, if an administrator is appointed and there are no insolvency rules in place, he would have to apply to the court for direction at every step of the process. As well as increasing the costs of the special administration, this would lead to uncertainty for clients, creditors and the financial services industry about the processes to be followed in a special administration.

| | |
|---|---|
| **Will the policy be reviewed?** It will be reviewed. **If applicable, set review date:** 2/2013 | |
| **What is the basis for this review?** Duty to review. **If applicable, set sunset clause date:** Month/Year | |
| **Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?** | Yes |

**SELECT SIGNATORY Sign-off** For final proposal stage Impact Assessments:

***I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.***

Signed by the responsible SELECT SIGNATORY: ..... Date: 27/4/11



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# Summary: Analysis and Evidence

Policy Option 1

**Description:**

| Price Base Year | PV Base Year | Time Period Years | Net Benefit (Present Value (PV)) (£m) | | |
|---|---|---|---|---|---|
| | | | Low: | High: | Best Estimate: |

| COSTS (£m) | Total Transition (Constant Price) | Years | Average Annual (excl. Transition) (Constant Price) | Total Cost (Present Value) |
|---|---|---|---|---|
| Low | 0 | | 0 | **0** |
| High | 0 | | 0 | **0** |
| Best Estimate | 0 | | 0 | **0** |

**Description and scale of key monetised costs by 'main affected groups'**

**Other key non-monetised costs by 'main affected groups'**

No costs to market participants as a result of these rules. The insolvency rules set out the processes applicable to the special administration regime. Entry into the special administration regime is not compulsory for insolvent investment banks, although it is expected that it will become the preferred insolvency process as it is likely to be significantly cheaper than general insolvency processes. The rules do not create or impose any ongoing requirements on businesses.

| BENEFITS (£m) | Total Transition (Constant Price) | Years | Average Annual (excl. Transition) (Constant Price) | Total Benefit (Present Value) |
|---|---|---|---|---|
| Low | | | | |
| High | | | | |
| Best Estimate | | | | |

**Description and scale of key monetised benefits by 'main affected groups'**

**Other key non-monetised benefits by 'main affected groups'**

The benefit of these insolvency rules will be that the administrator, and market participants affected by the insolvency proceedings, will have clarity over the processes which need to be followed to wind up an investment bank under the special administration regime. This will result in a shorter and less costly administration then would be the case if these rules were not introduced. However, these benefits are not possible to quantify in the abstract.

**Key assumptions/sensitivities/risks** **Discount rate (%)** N/A

The main assumption in this impact assessment is that it would be difficult and costly for an administrator to wind up an investment bank under the special administration regime without accompanying insolvency rules setting out the processes which should be followed.

| Direct impact on business (Equivalent Annual) £m: | | | In scope of OIOO? | Measure qualifies as |
|---|---|---|---|---|
| Costs: | Benefits: | Net: | No | NA |

## Enforcement, Implementation and Wider Impacts

| | | | | | |
|---|---|---|---|---|---|
| What is the geographic coverage of the policy/option? | | | United Kingdom | | |
| From what date will the policy be implemented? | | | 31/05/2011 | | |
| Which organisation(s) will enforce the policy? | | | N/A | | |
| What is the annual change in enforcement cost (£m)? | | | 0 | | |
| Does enforcement comply with Hampton principles? | | | Yes | | |
| Does implementation go beyond minimum EU requirements? | | | No | | |
| What is the $CO_2$ equivalent change in greenhouse gas emissions? (Million tonnes $CO_2$ equivalent) | | | **Traded:** | | **Non-traded:** |
| Does the proposal have an impact on competition? | | | No | | |
| What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable? | | | **Costs:** N/A | | **Benefits:** N/A |
| Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price) | **Micro** | **< 20** | **Small** | **Medium** | **Large** |
| Are any of these organisations exempt? | No | No | No | No | No |

## Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

| Does your policy option/proposal have an impact on...? | **Impact** | **Page ref within IA** |
|---|---|---|
| **Statutory equality duties**[1] Statutory Equality Duties Impact Test guidance | No | 7 |
| **Economic impacts** | | |
| Competition Competition Assessment Impact Test guidance | No | 7 |
| Small firms Small Firms Impact Test guidance | No | 7 |
| **Environmental impacts** | | |
| Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance | No | 7 |
| Wider environmental issues Wider Environmental Issues Impact Test guidance | No | 7 |
| **Social impacts** | | |
| Health and well-being Health and Well-being Impact Test guidance | No | 7 |
| Human rights Human Rights Impact Test guidance | No | 7 |
| Justice system Justice Impact Test guidance | Yes | 7 |
| Rural proofing Rural Proofing Impact Test guidance | No | 7 |
| **Sustainable development** Sustainable Development Impact Test guidance | No | 7 |

[1] Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

# Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

### References

Include the links to relevant legislation and publications, such as public impact assessments of earlier stages (e.g. Consultation, Final, Enactment) and those of the matching IN or OUTs measures.

| No. | Legislation or publication |
|---|---|
| 1 | *The Investment Bank Special Administration Regulations 2011* made by Parliament on 7 February 2011. These Regulations set out the special administration regime for investment banks to which the insolvency rules in this impact assessment relate to.<br>http://www.legislation.gov.uk/uksi/2011/245/contents/made<br><br>Accompanying impact assessment to the Regulations:<br>http://www.hm-treasury.gov.uk/d/consult_sar_ia_031210.pdf |
| 2 | Summary of responses to HM Treasury's consultation on the special administration regime for investment banks.<br>http://www.hm-treasury.gov.uk/d/consult_investmentfirm_special_admin_regime_summary_responses.pdf |
| 3 | HM Treasury consultation paper on the special administration regime for investment banks.<br>http://www.hm-treasury.gov.uk/d/consult_investmentbank161209.pdf |
| 4 | |

**+ Add another row**

### Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

### Annual profile of monetised costs and benefits* - (£m) constant prices

| | $Y_0$ | $Y_1$ | $Y_2$ | $Y_3$ | $Y_4$ | $Y_5$ | $Y_6$ | $Y_7$ | $Y_8$ | $Y_9$ |
|---|---|---|---|---|---|---|---|---|---|---|
| **Transition costs** | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| **Annual recurring cost** | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| **Total annual costs** | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| **Transition benefits** | | | | | | | | | | |
| **Annual recurring benefits** | | | | | | | | | | |
| **Total annual benefits** | | | | | | | | | | |

* For non-monetised benefits please see summary pages and main evidence base section

Microsoft Office
Excel Worksheet

# Evidence Base (for summary sheets)

## Introduction

This section sets out the assumptions supporting this impact assessment. The insolvency rules which this impact assessment relates to are linked with *The Investment Bank Special Administration Regulations 2011* (the "Regulations"), which came into force on 7 February 2011. The Regulations set out a new special administration regime for investment banks. A separate impact assessment was prepared for the Regulations (see References section 1 for link). As with the Regulations the insolvency rules are outside the scope of one in one out due to the systemic financial risk exemption.

## Policy intention

The policy intention of these rules is to provide clarity to the administrator, and those affected by the special administration proceedings, over the correct procedures which need to be complied with in special administration. This will ensure that the costs of the administration are kept as low as possible.

## Options considered

### Option 1 – Introduce insolvency rules

The Government's preferred option is introducing insolvency rules to accompany the Regulations to provide clarity over the legal processes which need to be followed. There are no significant ongoing or one-off direct costs associated with introducing these rules.

The Government has considered the possibility of transitional costs, however, these potential costs are believed to be negligible because:

- many of the rules are based on existing insolvency rules, which are familiar to market participants;
- as the special administration regime has a limited scope, focused on investment banks which hold client assets, only a small number of insolvency specialists who operate in this area will be required to review the new provisions;
- the Government has consulted on the key new provisions of the new rules which should help ensure that insolvency practitioners are aware of the changes to normal insolvency processes for investment banks;
- the insolvency profession regularly budgets for staff training and development and the costs of absorbing the implications of these rules could be incorporated into existing budgets without significant additional costs;
- members of the insolvency profession are under an obligation to keep themselves up to date on developments in their specialist field for CPD (Continuing Professional Development); and
- during the consultation process on the Regulations no respondents raised concerns over the transitional cost of introducing insolvency rules.

The benefit of introducing these insolvency rules would normally be calculated against the cost of not introducing them. However, as set out in the analysis of the cost of option 2 (see page 7), this is difficult to quantify in the abstract and would be completely dependent on the circumstances of the administration.

To support the analysis that these insolvency rules do not impose any additional costs, this impact assessment considers the impacts of the main new provisions in the rules:

- allowing the administrator to set a bar date;
- charging the cost of returning client assets against client assets;
- allowing clients to be represented on the creditors' committee; and
- enabling an investment bank to be put into special administration as soon as reasonably practicable.

The other provisions in the rules replicate, with minor modifications, existing insolvency rules and will therefore not impose any additional cost.

Setting a bar date

The Regulations give an administrator the power to set a bar date (deadline) for claims to client assets. The insolvency rules are required to set out the safeguards and processes attached to this procedure. These rules are particularly important for detailing what happens if someone fails to submit a client asset claim by the bar date.

Usually, if there is a shortfall in a particular type of client asset, meaning that clients are legitimately claiming for more assets of that type then the administrator has in his possession to distribute, then all the clients who are claiming for that particular type of asset will bear the shortfall pro rata, and they will all have an unsecured claim against the estate for the value of the shortfall they have borne.

However, if the administrator sets a bar date under the Regulations, then the administrator can, following the expiry of the bar date, calculate whether or not there is a shortfall based on the claims received and then distribute the assets accordingly.

If someone puts in a client assets claim after the administrator has distributed the assets, and there are no assets left to satisfy the client's claim due to a shortfall, that person would have a larger unsecured claim than he would have had if he had submitted a claim before the expiry of the bar date.

So in essence, the insolvency rules introduce a provision which ensures that there is a cut off date after which the administrator's distribution of client assets may not be challenged. This is to give certainty to clients who receive back their assets following the bar date process that they will not be challenged at a later date by a third party for the return of those same assets.

To minimise the possibility of there being a late claimant the insolvency rules set out that an administrator has to ensure that the bar date allows for:

- sufficient time for the fact of administration to be publicised;
- sufficient time for affected clients to calculate and submit their claims; and
- practical difficulties in establishing claims, particularly where arrangements are complex.

In addition, the administrator needs to proactively approach any client who is on the books and records of the firm as having a potential claim and no distribution can be made by the administrator following the bar date until the creditors' committee has approved the administrator's distribution plan and court approval has been obtained.

These safeguards mean that it is not expected that clients will lose out from the bar date process set out in the insolvency rules to a greater extent than they would under normal insolvency procedures.

Cost of returning client assets

The insolvency rules provide that the administrative cost of returning client assets, in accordance with the first special administration objective, will be charged against client assets, rather than the estate of the investment bank. This follows the rule laid down in case law, that an administrator who deals with trust assets is entitled to be paid out of those assets for the work which had been carried out (see Re Sports Betting Media Ltd [2007] All ER (D) 123 (Jul) and Berkeley Applegate (Investment Consultants) Ltd, Re, Harris v Conway [1989] Ch 32, [1988] 3 All ER 71). Clarifying this precedent in the insolvency rules negates the need for the administrator to go to court on this issue, which provides certainty and reduces costs.

Clients to be represented on the creditors' committee

As the return of client assets is now a statutory objective for the administrator under the Regulations, the insolvency rules make provisions which enable clients to vote at the meeting to approve the administrator's statement of proposals and to be represented on the creditors' committee. This may have some impact on creditors as it is possible that the general interests of clients, to have their assets returned promptly, may conflict with the interests of some creditors, who want the administrator to focus resources solely on other areas such as resolving counterparty claims against the estate.

However, this is not expected to impose any additional costs as the rules make clear that the cost of returning client assets is charged against the client assets, so creditors will not lose out by increased focus in that area by the administrator. Finally, as clients are bearing the cost of having their assets returned it is right that they approve the statement of proposals and are represented on the creditors' committee to assist the administrator in his work.

Enabling an investment bank to be put into special administration as soon as reasonably practicable

The rules make sure that an investment bank can be put into the special administration procedure as soon as reasonably practicable. The Government has considered the impact of this expedited process on the rights of individuals to challenge proceedings; however, as there must still be a court hearing before a firm is entered into special administration, the Government is satisfied that human rights considerations have been satisfied.

**Option 2 – Do nothing**

The Government has considered the theoretical option of not providing insolvency rules to support the Regulations, this would result in there being no legal guidance over the processes attached to the special administration regime. However, this option is not considered to be practical as it would lead to uncertainty in the financial services industry as to how the special administration regime works. It would also result in significantly higher administration costs as the administrator would have to frequently go to court for direction.

It is also possible that if there were no insolvency rules to support the Regulations it maybe considered too difficult to place an investment bank into the special administration regime, with the consequence that the Regulations are never used and the benefits they bring to the administration process are not realised. In addition, given that the special administration regime is now on the statute books and is to be considered the default administration regime for investment banks, not having a set of insolvency rules in place could deter investors from using the services of UK-based investment banks.

Option 2 does not deliver the policy intention of ensuring that the administrator has clarity over the processes which need to be followed in special administration. It also does not lead to any percieved benefits. However, option 2 would result in significant additional costs compared to option 1 if an investment bank is placed in the special administration regime. These costs are extremely difficult to calulate as there is not a comparable precedent for an administrator winding up a firm under a special administration regime without accompanying insolvency rules. The additional costs could depend, in part, on:

- the size and complexity of the institution in special administration;
- the number of times the administrator had to go to court for direction on areas usually covered by the insolvency rules, and whether the court was able to give direction in all the areas required;
- the cost to the estate (which is passed onto creditors) of preparing for each court hearing;
- the cost of external legal advice to both the administrator and any affected parties who challenge the proceedings;
- the cost to the Financial Services Authority or the Bank of England in having to input into the court process;
- cost of any appeal processes; and
- costs to those directly affected by the delay in the winding up of the investment bank. For example, the delay in returning client assets and money can lead to clients suffering from financial hardship themselves.

The considerable amount of assumptions and variables have meant that it is not possible to provide a realistic estimate of the potential cost of not providing insolvency rules, however, it is assumed that it would make the administration process significantly more costly for all concerned. Option 2 is therefore not considered to be practical and option 1 is preferred.

**Risks and assumptions**

The main assumption in this impact assessment is that it would be difficult and costly for an administrator to wind up an investment bank under the Regulations without accompanying insolvency rules setting out the processes which should be followed. It is also assumed that having such insolvency rules in place will make the special administration regime introduced by the Regulations function properly, thereby benefiting creditors of the firm as well as clients.

**Wider impacts**

The Government does not consider that the proposed reforms will have any effect in relation to: race; disability; gender equality; requirements relating to Northern Ireland (which is developing its own insolvency rules for the Regulations as they apply in Northern Ireland); greenhouse gases; wider environmental issues; health; well-being; rural proofing; or sustainable development.

The insolvency rules could be beneficial for competition and small businesses as they provide clarity to the administration process for investment banks thereby enabling and encouraging a wider range of insolvency practitioners to assume responsibility for winding up investment banks, beyond the largest firms.

The possibility that the insolvency rules impact on human rights has also been considered within the context of the rules preventing a late claimant from challenging the distribution of the administrator following the setting of a bar date. However, as there is significant court oversight of the bar date process, the Government is satisfied that human right considerations regarding property rights are met. The Government also considered whether there were human right considerations regarding the expedited court process, however, as discussed above, there will still be a court hearing so the Government is satisfied that human right considerations have been met.

A justice impact assessment has been completed and approved by the Ministry for Justice as the insolvency rules create new offences. There are no additional costs from the rules.

**Summary and preferred option with description of implementation plan**

The preferred option is option 1, introducing insolvency rules to accompany *The Investment Bank Special Administration Regulations 2011*. This would be achieved by making and laying the rules under the powers in sections 411(1A), (2), (2C) and (3) of the Insolvency Act 1986. The rules are subject to the negative procedure.

In respect of the rules applicable for England and Wales, this measure will be for Ministry of Justice to take forward as the rules are to be made by the Lord Chancellor, with the concurrence of the Treasury and the Lord Chief Justice.

In respect of the rules applicable for Scotland, this measure will be for HM Treasury to take forward.

# Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added where the Specific Impact Tests yield information relevant to an overall understanding of policy options.

# Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. If the policy is subject to a sunset clause, the review should be carried out sufficiently early that any renewal or amendment to legislation can be enacted before the expiry date. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

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|---|
| **Basis of the review:** [The basis of the review could be statutory (forming part of the legislation), i.e. a sunset clause or a duty to review , or there could be a political commitment to review (PIR)];<br>For legislative measures, section 236 of the Banking Act 2009 provides for HM Treasury to review "The Investment Bank Special Administration Regulations 2011" within two years of them coming into force. |
| **Review objective:** [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?]<br>The review must consider how far the Regulations are achieving the objectives specified in section 233(3) of the Banking Act and whether the Regulations should continue to have effect. |
| **Review approach and rationale:** [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach]<br>HM Treasury will appoint one or more persons to conduct the review, as required under section 236 of the Banking Act, who have expertise in connection with insolvency law or financial services. The review will result in a report which HM Treasury will lay before Parliament. |
| **Baseline:** [The current (baseline) position against which the change introduced by the legislation can be measured]<br>See above sections on "basis of the review" and "review objective" |
| **Success criteria:** [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives]<br>See above sections on "basis of the review" and "review objective". |
| **Monitoring information arrangements:** [Provide further details of the planned/existing arrangements in place that will allow a systematic collection systematic collection of monitoring information for future policy review]<br>See above section on "basis of the review". |
| **Reasons for not planning a review:** [If there is no plan to do a PIR please provide reasons here] |