

**EXPLANATORY MEMORANDUM TO
THE INSOLVENCY (AMENDMENT) RULES 2015**

2015 No. 443

1. This explanatory memorandum has been prepared by the Insolvency Service and is laid before Parliament by Command of Her Majesty.

2. **Purpose of the instrument**

- 2.1 The Insolvency (Amendment) Rules 2015 (“the Amendment Rules”) insert new provisions, and amends existing provisions, in the Insolvency Rules 1986 (SI 1986/1925) (“the 1986 Rules”). These amendments introduce two changes.
- 2.2 The first is to enable the High Court to transfer winding-up cases to the County Court at Central London.
- 2.2 The second introduces a new requirement for an insolvency practitioner (IP) acting as the appointed office-holder in certain insolvency procedures to provide an estimate of the fees (also known as remuneration) to creditors for approval and to provide them with information regarding expenses they anticipate they will incur.
- 2.3 The amendments do not apply to the fees charged by the Official Receiver, which are set out separately in legislation.

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

- 3.1 The 1986 Rules are currently being consolidated into a new comprehensive and modernised set of Rules (“the Modernised Rules”). The intention is that these will come into force in April 2016. Given the ongoing concern regarding these two particular matters and the Minister’s commitment to bring about change in this Parliament, the Amendment Rules are being brought in ahead of the Modernised Rules. They will be made and laid in this Parliament but will come into force in October 2015 to give IPs an opportunity to adapt their systems and processes to allow for the requirement for estimates to be given.
- 3.2 The Amendment Rules contain two commencement dates. The rules enabling the High Court to transfer winding-up cases to the Country Court at Central London (Rules 1 and 12) will commence on 6 April 2015. The remaining rules introducing a requirement for an insolvency practitioner to provide an estimate of the fees to creditors (Rules 2-11 and 13) will commence on 1 October 2015 in line with the commitment given to stakeholders that we would commence these provisions in October.

4. **Legislative Context**
County Court Changes

- 4.1 As a result of the amendments made to section 411 of the Insolvency Act 1986 by the Constitutional Reform Act 2005, where the rules made under that section affect court procedure, it is a requirement that the Lord Chief Justice concur in the making of the instrument. However, because the rule being amended by this

instrument does not affect court procedure, there is no need for the concurrence of the Lord Chief Justice and, accordingly, he has not signed it.

- 4.2 Rule 7.11(3) of the 1985 Rules provides that where winding-up proceedings are transferred by the High Court to the County Court the transfer must be to a hearing centre in which winding-up proceedings can be commenced. Winding-up proceedings cannot be commenced in County Court at London. These Rules amend rule 7.11(3) to enable cases additionally to be transferred to the County Court at Central London although it will continue to be the case that such cases cannot be commenced there.

IP Fee Changes

- 4.3 The 1986 Rules set out the requirement for creditors to set the basis of remuneration for an IP, for almost all insolvency procedures. At present an IP's remuneration can be set a) on a time-cost basis, b) as a percentage of realisations or c) since 2010, as a fixed remuneration. These provisions are found at R2.106 (administration), R4.127 (liquidation) and R.6.138 (bankruptcy) of the 1986 Rules. The IP proposes which basis they wish to take their remuneration under and the creditors vote on the proposal. There is no requirement to provide an estimate where the IP proposes to take his fees on a time-cost basis.
- 4.4 The Amendment Rules do not change this process but add an additional requirement to provide an estimate of fees and an estimate of expenses to all creditors where the IP proposes the basis or one of the basis for their remuneration should be time-cost. It will still be for the same body, whether that is a creditors' committee or creditors via a resolution, to approve the basis and, where the basis involves an element of time-costs, approve that estimate of fees..
- 4.5 Where the IP does not propose time-cost as a basis, the IP will be required to provide details of the work that the IP proposes to undertake and an estimate of expenses. These will not require creditor approval but are for information only.
- 4.6 The IP will be required to seek approval from the creditors in order to exceed that estimate of fees.

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 negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

County Court Changes

- 7.1 The 1986 Rules allows for any court with the ability to commence winding up proceedings to have a case transferred to it from the High Court. The County Court at Central London is not one of these.

- 7.2. As a result of the County Court at Central London having extra resource and the ability to deal with winding-up cases, it has been requested that it is given the ability to have cases transferred to it. This will not result in it having the ability to commence proceedings.

IP Fee Changes

- 7.3 The 1986 Rules set out the requirement for creditors to fix the way in which an IP can charge his fee, for almost all insolvency procedures. This can be on time-cost, percentage of realisations or a fixed fee. Currently, there is no statutory obligation on the IP to provide information about the likely level of the total fees charged, what work the creditors can expect the IP to do, or details of likely expenses. Creditors will generally find out about the costs of a case (both in terms of fees and expenses) at the end, by which time a creditor's only route of appeal is to the court, which case be both expensive and time-consuming.
- 7.4 There is little effective oversight by unsecured creditors of the work undertaken by IPs. At worst this can result in over-charging by the IP and at best can result in inefficiencies, which leads to remuneration being higher than they might otherwise have been. This has been a concern for Ministers.
- 7.5 Stakeholder consultation has revealed that creditors believe the key issue is the need for meaningful information at an early stage about how much a case is likely to cost and therefore, whether they are likely to get any money back. The Amendment Rules therefore seek to address this by requiring an IP to provide an estimate of his/her fees and the costs of a case at an early stage and certainly prior to any fees being taken.
- 7.6 The provision of this will give creditors a better and earlier idea of the cost of dealing with an insolvency and allow them to exercise greater influence over the IP's remuneration.
- 7.8 The provisions contained in the Amendment Rules apply to insolvency procedures where the issue of insufficient information on remuneration and expenses is problematic, namely: administration, creditors' voluntary liquidation, compulsory liquidation and bankruptcy.

8. Consultation outcome

County Court Changes

- 8.1 No formal consultation has been undertaken. As this is a technical regulatory change which imposes no cost on business or civil society, it was confirmed that no consultation or collective agreement would need to be carried out.

IP Fee Changes

- 8.2 The Insolvency Service consulted the insolvency profession, creditors and other interested parties on proposals to improve transparency of remuneration and the provision of an estimate of the duration and cost of the process in 2011.
- 8.3 This was followed by the independent review of IP remuneration undertaken by Elaine Kempson and reported on in July 2013. A wide range of interested parties were consulted including IPs, the insolvency regulators, creditor organisations, other Government departments and individuals.

- 8.4 In February 2014, the Government held a 6 week public consultation on draft amendment rules to limit the use of charging on a time-costs basis. A large number of responses were received (79), the majority from IPs and their regulatory bodies, but also some from creditor organisations. The responses revealed that the consultation proposal was not the preferred way of proceeding and measures increasing transparency through the provision of better information were seen as a more effective way of addressing shortcomings in the current regime. Further targeted consultation with key stakeholders resulted in the provisions contained in the Amendment Rules.

9. Guidance

County Court Changes

- 9.1 This instrument will be of interest to debtors and creditors and also for IPs and lawyers. The Insolvency Service will publish details of the changes on its website. HM Court and Tribunals Service will also publish guidance to staff and court users and the Ministry of Justice will place information on the Judicial and Ministry of Justice channels of the government website.

IP Fees Changes

- 9.2 As the changes will not come into force until October 2015, the intention is to draw the Amendment Rules to the attention of all interested parties when they are made by way of a press notice, written ministerial statement, email notification to all stakeholders and articles in the Insolvency Service's newsletter to stakeholders.
- 9.3 The Insolvency Service will also be working with the insolvency profession and trade associations (often representing those who may become creditors) to update the information about insolvency procedures for creditors. This will include what creditors can expect from an IP and why costs are incurred.

10. Impact

County Court Changes

- 10.1 The impact on business, charities or voluntary bodies is nil.
- 10.2 The impact on the public sector is nil.
- 10.3 An Impact Assessment has not been prepared for this instrument. It was confirmed at all levels that these were unnecessary due to the types of changes being made.

IP Fee Changes

- 10.4 The ongoing net cost to business is estimated to be £0.49m per annum.
- 10.5 The impact on charities, voluntary bodies or the public sector is nil.
- 10.6 An Impact Assessment is attached to this memorandum.

11. Regulating small business

County Court Changes

- 11.1 This instrument does not impose any additional regulation on small business.

IP Fee Changes

- 11.2 This instrument imposes additional regulation on IP small businesses. As a significant number of IP firms are small or micro businesses, to exempt these firms from providing an estimate would have the effect of making the new system ineffective. It would also be inequitable to allow smaller firms not to provide transparent cost estimates to creditors as this would give them an unfair commercial advantage over larger firms.
- 11.3 The impact assessment describes how creditors, including small businesses, will be better off with these changes. Numerous micro and small businesses have an interest in insolvency outcomes both as creditors and debtors in insolvencies. The amendments aim to reduce the harm suffered by unsecured creditors, many of whom are micro and small businesses, as a result of their weak market power. As a result the changes are expected to lead to better, fairer and more consistent outcomes for creditors, debtors and all those with an interest in insolvency cases.

12. Monitoring & review

County Court Changes

- 12.1 The Insolvency Service monitors the efficient working of the insolvency framework and evaluates legislative changes to the insolvency legislation. The Insolvency Service will monitor this change as it is required to do so.

IP Fee Changes

- 12.2 The success of this new requirement will be the extent to which creditors use this new information to negotiate down IP remuneration. It will also be the extent to which it improves confidence in the insolvency profession. Both of these aspects will be fully evaluated.

13. Contact

- 13.1 For both measures within the Amendment Rules, Sam Roberts from the Insolvency Service (Tel: 020 7291 6740) or email: Policy.Unit@insolvency.gsi.gov.uk can answer any queries regarding the instrument.