
EXPLANATORY NOTE

(This note is not part of the Order)

This Order is made under section 17 of the Public Services Reform (Scotland) Act 2010. It amends the Insolvency Act 1986 (“the Act”) and the Small Business Enterprise and Employment Act 2015 (“the 2015 Act”). Articles 2 and 3 come into force on 1st April 2016, as do the other amendments for the limited purpose of allowing subordinate legislation to be made, including corporate Insolvency Rules under section 411 of the Act.

The amendments in articles 4 to 13 come fully into force on the day to be appointed for the coming into force, for all remaining purposes, of section 122(2) of the 2015 Act in Scotland (abolition of requirements to hold meetings – decisions by creditors and contributories and deemed consent procedure).

Article 2 amends the rules on appointment by a floating charge holder (or by a court on the application by a floating charge holder) of a receiver of property of an incorporated company, other than a company which the Court of Session has jurisdiction to wind up. It removes the restriction requiring such an appointment to be only in respect of property situated in Scotland.

Article 3 repeals an element of the priority given to employees’ wages in receivership, as the type of employment contract to which it relates no longer exists. A company can continue to trade under the direction of the receiver, usually pending sale of the business or assets, at which point the receiver is personally liable for certain debts incurred by the company which are payable ahead of the fees of the receiver. For an employee to become entitled to have 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 accrued in the year it was earned. In order not to discriminate against employees on these schemes, section 57(2D) of the Act provides that “wages or salary” includes, in respect of a holiday 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 receivership. This provision is redundant as ‘year in hand’ schemes are no longer legally possible since the coming into force of the Working Time Regulations 1998 (S.I. 1998/386).

Articles 4, 8, 9 and 10 remove requirements (in 4 sections of the Act) for documents to be sworn by affidavit and replaces them with requirements for the documents to contain a statutory declaration. Provision for statutory declarations is made in the Statutory Declarations Act 1835 (c.62).

Articles 5 and 6 replace provision for the general meeting of the company and meeting of creditors at year’s end for both members’ voluntary winding up (see section 93 of the Act) and creditors’ voluntary winding up (see section 105 of the Act) with progress reports to the company and to the company and creditors respectively. The effect is that the requirement imposed on liquidators to summon annual meetings of members and creditors for the purpose of laying an account of the liquidator’s acts and dealings and of the conduct of the winding up during the preceding year is replaced with a requirement to provide a progress report relating to matters prescribed in the Insolvency Rules 1986(1) to the members and creditors of the company as the case may be (sections 92A and 104A of the Act). Article 7 makes repeals in the 2015 Act and about limited liability partnerships in consequence of articles 5 and 6.

(1) S.I. 1986/1915, as amended.

Article 11 clarifies that an application for early dissolution of a company under section 204(2) of the Act can be made at any time after the appointment of a liquidator.

Article 12 applies provisions in the Act relating to communications and meetings in insolvency proceedings to receivership and winding up in Scotland. It applies section 246B (use of websites) where a company is wound up in Scotland or a receiver is appointed under section 51 of the Act (power to appoint receiver under the law of Scotland). Section 246B allows an office-holder to use a website as a means of sending documents and information to others in the course of insolvency proceedings.

Article 13 amends section 436B (references to things in writing) of the Act which provides that references in the Act to documents or information “in writing” include documents or information in electronic form. The amendment applies section 436B in relation to a receiver’s report under section 67(2) of the Act and, in the case of a winding up of a company registered in Scotland, section 111(4) (regarding provisions of Companies Clauses Consolidation (Scotland) Act 1845).

Articles 14 and 15 contain savings provision in relation to the introduction of the amendments made by the Order.

The amendments made to the Act by this Order apply to limited liability partnerships by virtue of:—

- regulation 5(1) of the Limited Liability Partnership Regulations 2001 ([S.I. 2001/1090](#)), which apply Part IV of the First Group of Parts, and the Third Group of Parts, of the Act, and
- regulation 4(1) and schedule 2 of Limited Liability Partnership (Scotland) Regulations 2001 ([S.S.I. 2001/128](#)) which apply sections 50 to 52, 55 to 58, 63 to 66 and 91 to 93, 95, 104 to 105 and 131 of the Act.