

## **EXPLANATORY DOCUMENT**

### **THE PUBLIC SERVICES REFORM (CORPORATE INSOLVENCY AND BANKRUPTCY) (SCOTLAND) ORDER 2017**

#### Contents

1. Introduction
2. Background and policy objective
3. Provision to enable repeal of the Receivers (Scotland) Regulations and consolidation within the Insolvency (Scotland) Rules
4. Powers and duties of the liquidation committee in Scotland
5. Removing the restriction on remote attendance at meetings for receiverships and liquidations in Scotland
6. Further protection of essential supplies by restricting reliance on insolvency related clauses in contracts.
7. Extending the list of essential suppliers to include IT suppliers and third party suppliers (or on-sellers”) to reflect developments in commercial practice.
8. Amendments to the Public Services Reform (Insolvency) (Scotland) Order 2016 – Savings
9. The Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017 – Consultation Responses
10. Annex A – Explanatory Document – Public Services (Insolvency) (Scotland) Order 2016

## 1. INTRODUCTION

1.1 This Explanatory Document has been prepared in respect of the draft Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017 (“the Order”), which would be made in exercise of powers conferred by section 17 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”).

1.2 A proposed draft of the Order and an associated draft Explanatory Document was laid in the Scottish Parliament on 12 January 2017 for the formal 60 day consultation in accordance with section 26 of the 2010 Act (“the 60 day consultation”). During this period the Accountant in Bankruptcy on behalf of the Scottish Government sought views and representations from stakeholders representative of the interests affected by the proposals in the Order.

1.3 One substantive response to the 60 day consultation was received. Section 9 of this document provides a detailed assessment of the 60 day consultation response, action taken and details of minor changes made from the proposed draft of the Order.

1.4 This Explanatory Document, which is laid before the Scottish Parliament under section 25(2)(b) along with the Order, contains the details set out in section 27(1) of the 2010 Act.

1.5 The Order would amend the Insolvency Act 1986 (“the Insolvency Act”), the Public Services Reform (Insolvency) (Scotland) Order 2016 (“PSRO 16”) and the Bankruptcy (Scotland) Act 2016 (“BSA 2016”) to deliver two policy outcomes.

### *First policy outcome*

1.6 Firstly, the amendments to the Insolvency Act and PSRO 16 will in particular support an on-going project to make new “modernised” Insolvency (Scotland) Rules (“new ISR”) under in particular section 411(1)(b) of the Insolvency Act to replace the Insolvency (Scotland) Rules 1986 (“ISR86”). A similar project in England and Wales, led by the UK Government Insolvency Service (“IS”), to replace the Insolvency Rules 1986 with new modernised rules has just concluded with the Insolvency (England and Wales) Rules 2016 having been made and laid in the UK Parliament recently.

1.7 To facilitate the making of new ISR it was considered necessary and appropriate to make certain changes to the Insolvency Act for the purposes of modernising devolved aspects of corporate insolvency in Scotland (aspects of the process of liquidation and receivership) to bring it into line with the position in England and Wales following changes made in 2009 and 2010 by the Legislative Reform (Insolvency) (Advertising Requirements) Order 2009 and the Legislative Reform (Miscellaneous Provisions) Order 2010. This was completed principally through changes introduced by PSRO 16.

1.8 The need for further changes to devolved aspects of the Insolvency Act to facilitate the making of new ISR has now been identified and further consideration has been given to the saving provision made in PSRO 16.

1.9 Against that background the proposed amendments are:-

- amendment of section 70 of the Insolvency Act to allow provision currently contained in the Receivers (Scotland) Regulations 1986 (“RSR86”), rather than the ISR86, to be included in new ISR in future.
- amendment to break the link with bankruptcy provisions and simplify current powers by repealing subsections (4) and (6) respectively of sections 101 and 142 of the Insolvency Act (as amended by paragraphs 25 and 37 of schedule 9 of the Small Business, Enterprise and Employment Act 2015 (“SBEEA”)) which refer to liquidation committees having in addition to powers and duties as provided for in the Insolvency Act itself such powers and duties of commissioners on a bankrupt estate or in a sequestration as may be conferred or imposed on liquidation committees by the rules. A related amendment inserts section 142(3A) aligning with section 141(3A) for England and Wales (inserted by paragraph 36 of schedule 9 of SBEEA).
- amendment of section 246A of the Insolvency Act (as amended by paragraph 54 of schedule 9 SBEEA) to make broadly equivalent amendments on remote attendance at meetings as article 12 of PSRO 16 made to section 246B of the Insolvency Act on use of websites.
- amendment of PSRO 16 to make changes to the saving provision provided for in article 15.

1.10 The SBEEA amendments to sections of the Insolvency Act as noted in the bullet points in paragraph 1.9 above are not yet in force for Scotland. They will be brought into force for Scotland at the same time as the coming into force of the amendments to those sections of the Insolvency Act which would be made by the Order.

*Second policy outcome*

1.11 The second policy outcome aims to promote the on-going operation and rescue of viable businesses that are subject to insolvency proceedings.

1.12 These proposed amendments are derived from articles 3 and 5 respectively of the Insolvency (Protection of Essential Supplies) Order 2015 (“the 2015 Order”) which amended section 372 of the Insolvency Act (protection of supplies - supply of gas, water, electricity etc in personal insolvency) and added a new section 372A - (further protection of essential supplies in personal insolvency – insolvency related clauses in supply contracts where there is an approved Individual Voluntary Arrangement (“IVA”) in place). The rationale for the changes was set out in the BIS Consultation on “Continuity of supply of essential services to insolvent businesses” in July 2014 and further in the [Explanatory Memorandum](#) accompanying the 2015 Order.

1.13 The proposed amendments are:

- amendment to section 222 of BSA 2016 along similar lines to the amendments made to broadly equivalent section 372 of the Insolvency Act by article 3 of the 2015 Order.
- insertion of a new section 173A into the BSA 2016 to introduce changes in Scotland in relation to Protected Trust Deeds that broadly mirror changes in relation to IVAs in England and Wales in terms of section 372A of the Insolvency Act inserted by article 5 of the 2015 Order.

1.14 The following provides a formal assessment of the proposed amendments against the requirements of the 2010 Act.

## 2. BACKGROUND AND POLICY OBJECTIVE

2.1 There are two overarching policy objectives underpinning these proposed amendments: making changes to corporate insolvency legislation for rule making purposes in Scotland; and modernising essential supplies provisions for trading entities subject to personal insolvency procedures in Scotland.

2.2 In relation to the first overarching objective, there is a policy to modernise and consolidate the current corporate insolvency rules - ISR86 - in Scotland.

2.3 As part of that exercise an opportunity has been identified to incorporate provision on receivership in Scotland currently made in RSR86 within new ISR, making secondary legislation under the Insolvency Act easier to follow and more user friendly. The Order would, by amending section 70(1) of the Insolvency Act, allow the Scottish Ministers in future to make provision on receivership in Scotland which currently requires to be made *by regulations* - see currently RSR86 - instead by *rules* under in particular section 411(1)(b) of the Insolvency Act, i.e. in new ISR.

2.4 As is the case with ISR86, new ISR will make provision about the functions of liquidation committees in Scotland. Sections 101(4) (creditors' voluntary winding up) and 142(6) (winding up by the court) of the Insolvency Act (as respectively amended by paragraphs 25 and 37 of schedule 9 of SBEEA) provide in essence that liquidation committees in Scotland have, in addition to functions provided for by that Act, such functions of commissioners in a sequestration as may be provided for in rules (under section 411 of the Act).

2.5 To ensure appropriate flexibility and remove any doubt which might exist that the current ability to confer powers on liquidation committees in Scotland in rules is limited by reference to the powers and duties of commissioners in a sequestration the Order would amend the Insolvency Act to repeal section 101(4) and 142(6). On a related note, the Order would insert a new subsection (3A) into section 142 (mirroring section 141(3A) for England and Wales, inserted by paragraph 36 of schedule 9 of SBEEA). Repeal of section 101(4) and 142(6) would also remove an arguably unnecessary and confusing link to personal insolvency arrangements.

2.6 The net result of the proposed amendments would be that, in addition to functions conferred by the Insolvency Act, liquidation committees would have such other functions as may be conferred in rules under section 411 of that Act, in line with the position for such committees in England and Wales.

2.7 Section 246A (remote attendance at meetings) of the Insolvency Act (amended by paragraph 54 of schedule 9 SBEEA) provides that during the corporate insolvency processes in England and Wales any meeting of members of a company (excluding meetings of members of the company in a members' voluntary winding up) summoned by the office-holder can be held in such a way that those attending do not have to be present in the same place as long as they can exercise their rights to speak and vote at the meeting through the use of appropriate communications technology. In other words, section 246A provides for the possibility of 'remote attendance' at meetings of members of a company. However, section 246A(2) of the Insolvency Act specifically dis-applies remote attendance in relation to companies subject to a winding up in Scotland or receivership under section 51 of that

Act (power to appoint a receiver in Scotland). The Order would remove this restriction bringing the position in Scotland in line with England and Wales.

2.8 In relation to the second overarching objective, there is a requirement to modernise personal insolvency legislation in Scotland to reflect changes already introduced in England and Wales in relation to essential supplies to insolvent businesses.

2.9 Many business supplies (such as utilities and IT goods or services) are critical to a business' day-to-day functioning. Without these supplies, businesses cannot continue to operate. In the context of sequestration and trust deeds granted by a debtor section 222 BSA 2016 currently prevents gas, electricity, water and providers of telecoms services from demanding payment of outstanding charges as a condition of continuing supply, but allows them to make it a condition of giving the supply that the office-holder personally guarantees payment of continuing charges. The Order would amend section 222 so as to extend the section to apply to (a) 'on-sellers' of utility and telecoms services, to reflect the way the utility and telecoms markets have evolved and (b) suppliers of IT goods or services (including on-sellers of IT goods or services) not presently covered by the current provision, reflecting the essential nature of such goods and services in the modern business environment. These amendments would provide for trustees in Scotland the same conditions in which to operate as those applying in equivalent personal insolvency situations in England and Wales in particular to support the rescue of viable businesses going through a formal insolvency procedure (article 3 of the 2015 Order made similar amendments to broadly equivalent section 372 of the Insolvency Act for England and Wales).

2.10 The Order would also insert a new section 173A into BSA 2016 to introduce protections against essential utility and IT suppliers exercising insolvency related clauses where a trading entity is subject to a Protected Trust Deed for the benefit of creditors, bringing legislation in Scotland into line with changes already in force in England and Wales. In particular, article 5 of the 2015 Order inserted new section 372A into the Insolvency Act, introducing protection for those subject to an approved IVA where supply is for the purposes of a business. The policy intention is to introduce equivalent protection in Scotland for those that have granted a trust deed that gains protected status where supply is for the purposes of a business. This change is designed to further support business recovery, while at the same time providing safeguards for the supplier. These include the right to request a personal guarantee from the trustee in relation to the continued supply, the right to terminate the contract if charges incurred after the date of protection of the trust deed are not paid timeously, and the right to apply to court to be released from the supply contract on hardship grounds.

2.11 The Scottish Government has undertaken an initial consultation on the proposed changes which sought views from stakeholders including Recognised Professional Bodies, R3 Scottish Technical Committee, Law Society of Scotland, the UK Insolvency Service and utility companies.

### 3. **PROVISION TO ENABLE REPEAL OF THE RECEIVERS (SCOTLAND) REGULATIONS AND CONSOLIDATION OF THESE WITH THE INSOLVENCY (SCOTLAND) RULES.**

3.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act (removing or reducing burdens).

#### *Introduction to and reasons for the provision*

3.2 Currently, core subordinate legislation provision on receivership in Scotland under the Insolvency Act requires to be made partly by *rules* - currently ISR 86 - and partly by *regulations* - currently RSR 86. This is unnecessarily complex and the introduction of new ISR presents the opportunity to consolidate the existing RSR86 provision in new ISR. The proposed changes in article 2 of the Order would, by amending section 70(1) of the Insolvency Act, allow the Scottish Ministers to make the provision on receivership in Scotland currently made by RSR86 instead by new ISR.

3.3 Article 2 would amend section 70(1) of the Insolvency Act to repeal the current definition of “prescribed” in that section and to insert a definition of “prescribed fee”.

3.4 As matters stand the powers to prescribe in the sections of Chapter 2 of Part 3 of the Insolvency Act listed below (read with the *current* definition of “prescribed” in section 70(1) of that Act) are exercisable by the Scottish Ministers *by regulations*. The current regulation making functions of the Secretary of State under Chapter 2 of Part 3 of the Insolvency Act, insofar as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998. The amendments to section 70(1) of the Insolvency Act by article 2 of the Order would mean that in future where the term “prescribed” (alone) is used in the sections of that Act listed below, that falls to be read instead with the definitions of “prescribed” and “the rules” in section 251 of the Act – ““prescribed” means prescribed by the rules” and ““the rules” means rules under section 411 in Part [15]”. That would therefore mean that in future, these powers to prescribe fall to be exercised by the Scottish Ministers making *rules* under section 411 (rule making functions of the Secretary of State under section 411, insofar as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998) and enable all of the provision to be contained in new ISR. The sections of Chapter 2 of Part 3 of the Insolvency Act are:

- Section 53(1) (two references) and (6)
- Section 54(3)
- Section 62(1) (two references) and (5) (the latter read with section 71(1))
- Section 65(1)(a) (read with section 71(1))
- Section 66(1), (2)(e) and (4)
- Section 67(2)

3.5 As matters stand regulations made by the Scottish Ministers in exercise of these powers would be subject to no parliamentary procedure in the Scottish Parliament – i.e. would require to be laid only, by virtue of section 71(2) of the Insolvency Act and sections 30, 35 and para 8 of schedule 3 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”). In future where the powers are exercised by the Scottish Ministers by rules, under in particular section 411(1)(b) of the Insolvency Act, the negative procedure will apply, by virtue of section 411(4) of the Insolvency Act and sections 28, 35 and paragraph 2 of schedule 3 of ILRA. The Scottish Ministers consider that this is appropriate in circumstances where new ISR made by the Scottish Ministers under section 411(1)(b) of the Insolvency Act containing other provision in relation to receivership would in any event be subject to the negative procedure.

3.6 A limited *regulation* making power will remain *for the Secretary of State*. The new definition of “prescribed fee” in section 70 will in future ‘continue’ to bite on the following provisions of the Insolvency Act (in relation to fees chargeable by the registrar of companies):

- Section 53(5); and
- Section 54(4)

in so far as they empower the Secretary of State to prescribe a fee chargeable by the Registrar of Companies for entering particulars of the appointment of a receiver in the register of companies. While as noted above the current powers to prescribe by regulations set out in paragraph 3.4 above would if exercised today be exercisable by the Scottish Ministers, the powers to prescribe under sections 53(5) and 54(4) remain exercisable by the Secretary of State. So far as the Scottish Government is aware no such fees are currently prescribed.

3.7 The parliamentary procedure for such regulations in the UK Parliament remains as set out in section 71(2) of the Insolvency Act (i.e. statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament).

3.8 The result of the amendments made by article 2 of the Order would be to simplify subordinate legislation relating to receivership in Scotland.

#### *Nature of the proposed amendment*

3.9 Repeal the definition of “prescribed” in section 70(1) of the Insolvency Act.

3.10 Insert a definition of “prescribed fee” in section 70(1) of the Insolvency Act.

#### *Section 18 preconditions*

3.11 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied. The following sets out an assessment of this provision against the section 18(2) pre-conditions.



*Section 18(2)(a) - policy objective intended to be secured by the provision could not be secured by non-legislative means*

3.12 The reduction of the burden created by the requirement under the Insolvency Act to make certain subordinate legislation provision on receivership in Scotland by regulations rather than by rules cannot be achieved by non-legislative means as the burden is created by the legislation in force, which requires amendment. The amendment can only be achieved by means of legislation.

*Section 18(2)(b) - effect of the provision is proportionate to the policy objective*

3.13 The Scottish Ministers wish to ensure that legislation governing receiverships is as accessible and easy to use as possible. By amending section 70(1) of the Insolvency Act, the effect of the provision is to allow the Scottish Ministers in future to make provision on receivership in Scotland which currently requires to be made *by regulations* - see currently RSR86 - instead by *rules* under in particular section 411(1)(b) of the Insolvency Act, ie in new ISR.

3.14 This will reduce complexity and burdens on insolvency practitioners and others involved in receiverships by making secondary legislation under the Insolvency Act more accessible and easier to use.

3.15 Scottish Ministers therefore consider that the effect of this provision is proportionate to the policy objective.

*Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it*

3.16 The provision would allow for subordinate legislation relating to receivership in Scotland to be simplified and consolidated to the benefit of insolvency practitioners and all those that use the legislation. It is in the public interest that corporate insolvency processes and the legislation relating to them are as straightforward and easy to use as possible.

3.17 No adverse effect has been identified in connection with the provision.

3.18 The Scottish Ministers therefore consider that this condition is satisfied.

*Section 18(2)(d) the provision does not remove any necessary protection*

3.19 In the context of ‘necessary protections’ for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of section 18(3) to (9) of the 2010 Act.

3.20 None of the section 18(3) examples of protections are affected: - (a) independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office, (b) civil liberties, (c) health and safety of persons, (d) the environment, (e) cultural heritage.

3.21 Subsections 18(4) to (6) are not applicable to the Order.

3.22 No other necessary protection is removed. The Scottish Ministers consider that the provision therefore does not remove any necessary protection.

*Section 18(2)(e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise*

3.23 This provision in the Order would make a technical change to the form in which certain subordinate legislation provision made by the Scottish Ministers in relation to receivership will be made in future – by *rules* rather than by *regulations* – with a view to simplifying and making more accessible subordinate legislation relating to receivership in Scotland.

3.24 The provision would not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

*Removal or reduction of a burden under section 17*

3.25 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the Order would remove or reduce any burden or burdens within the meaning of section 17(1).

3.26 The burden being reduced by this provision falls under sections 17(2)(b) (administrative inconvenience) and 17(2)(d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

3.27 The provision would reduce administrative inconvenience and remove an obstacle to efficiency by consolidating core subordinate legislation provision on receivership in Scotland in rules made by the Scottish Ministers under in particular section 411(1)(b) of the Insolvency Act making subordinate legislation relating to receivership in Scotland more accessible and easier to use. Lifting this burden would bring benefit to insolvency practitioners and all those who are required to use legislation relating to receivership in Scotland.

#### **4. POWERS AND DUTIES OF THE LIQUIDATION COMMITTEE IN SCOTLAND.**

4.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act (removing or reducing burdens).

##### *Introduction to and reasons for the provision*

4.2 Currently the powers and duties of the liquidation committee in Scotland are reliant on a cross reference to the powers and duties of commissioners in a sequestration (ie in a personal insolvency, as provided for under BSA 2016).

4.3 Section 101(4) and 142(6) of the Insolvency Act (as amended by paragraphs 25 and 37 of schedule 9 of SBEEA) each refer to the powers and duties of the liquidation committee in this way – they provide in essence that liquidation committees in Scotland have, in addition to functions provided for by the Act, such functions of commissioners in a sequestration as may be provided for in rules made under section 411 of that Act (see paragraph 10 of schedule 8 for examples of the sort of provision in relation to liquidation committees which may be made in the rules).

4.4 To ensure appropriate flexibility and remove any doubt which might exist that the current ability to confer powers on liquidation committees in Scotland in rules is limited by reference to the powers and duties of commissioners in a sequestration, articles 3 and 4(b) of the Order would amend the Insolvency Act to repeal section 101(4) and 142(6) respectively. On a related note article 4(a) of the Order would insert a new subsection (3A) into section 142, mirroring section 141(3A) for England and Wales, inserted by paragraph 36 of schedule 9 of SBEEA. Repeal of section 101(4) and 142(6) would also remove an arguably unnecessary and confusing link to personal insolvency arrangements.

4.5 The net result of the proposed amendments would be that, in addition to functions conferred by the Insolvency Act, liquidation committees would have such other functions as may be conferred in rules under section 411 of that Act, in line with the position for such committees in England and Wales.

##### *Nature of the proposed amendment*

4.6 To repeal section 101(4) of the Insolvency Act (article 3 of the Order).

4.7 To insert after section 142(3) of the Insolvency Act a new section 142(3A) prescribing that a “liquidation committee” has such functions as are conferred on it by or under the Insolvency Act (article 4(a) of the Order).

4.8 To repeal section 142(6) of the Insolvency Act (article 4(b) of the Order).

##### *Section 18 preconditions*

4.9 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied. The following sets out an assessment of this provision against the section 18(2) preconditions.

*Section 18(2)(a) - policy objective intended to be secured by the provision could not be secured by non-legislative means*

4.10 The reduction of the burdens created by the link between the functions of commissioners in a sequestration and the conferral of functions on a liquidation committee in Scotland cannot be achieved by non-legislative means as the burdens are created by the legislation in force, which requires amendment.

*Section 18(2)(b) - effect of the provision is proportionate to the policy objective*

4.11 The Scottish Ministers wish to ensure that legislation in relation to the functions of liquidation committees in Scotland is fit for purpose and as clear as possible. The effect of provision in articles 3 and 4 of the Order would be to ensure appropriate flexibility and remove any doubt which might exist that the ability to confer powers on liquidation committees in Scotland in such rules is limited by reference to the powers and duties of commissioners in a sequestration. The provision would also remove an arguably unnecessary and confusing link to personal insolvency arrangements.

4.12 The Scottish Ministers consider that the effect of the provision is proportionate to the policy objective.

*Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it*

4.13 It is in the public interest that insolvency processes are effective and associated legislation easily understood.

4.14 No adverse effect has been identified in connection with the provisions.

*Section 18(2)(d) the provision does not remove any necessary protection*

4.15 In the context of ‘necessary protections’ for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of section 18(3) to (9) of the 2010 Act.

4.16 None of the section 18(3) examples of protections are affected: - (a) independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office, (b) civil liberties, (c) health and safety of persons, (d) the environment, (e) cultural heritage.

4.17 Subsections 18(4) to (6) are not applicable to the Order.

4.18 No other necessary protection is removed. The Scottish Ministers consider that the provision therefore does not remove any necessary protection.

*Section 18(2)(e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise*

4.19 The provisions would not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. The provision will not itself alter the functions of liquidation committees in Scotland. Over and above the functions of liquidation committees in Scotland for which provision is made in the Insolvency Act itself, further provision for the role and functions of liquidation committees in Scotland will be made in new ISR in due course (replacing current provision in ISR86).

*Removal or reduction of a burden under section 17*

4.20 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

4.21 The burden being reduced by this provision falls under sections 17(2)(b) (administrative inconvenience), 17(2)(c) (obstacle to best regulatory practice) and 17(2)(d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

4.22 The provisions would simplify legislation that would no longer rely on unnecessary connections between corporate and personal insolvency legislation in Scotland.

4.23 These provisions would thereby remove burdens from practitioners and others by making the legislation clearer and easier to use. This removes administrative inconvenience and a barrier to efficiency, productivity and profitability. The provisions also remove a barrier to best regulatory practice in making provision on liquidation committees in Scotland under section 411 of the Insolvency Act. In future there will be no requirement in that context to consider the functions of commissioners in a sequestration. Similarly any possible future revision to the powers and duties of commissioners in a sequestration could be undertaken without any concern about potential impact on those associated with liquidation committees in winding up proceedings.

## **5. REMOVING THE RESTRICTION ON REMOTE ATTENDANCE AT MEETINGS FOR RECEIVERSHIPS AND LIQUIDATIONS IN SCOTLAND**

5.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act (removing or reducing burdens).

### *Introduction to and reasons for the provision*

5.2 Section 246A (remote attendance at meetings) of the Insolvency Act (as amended by paragraph 54 of schedule 9 SBEEA) provides that during corporate insolvency processes, any meeting of members of a company (excluding meetings of members of the company in a members' voluntary winding up) summoned by the office-holder can be held in such a way that those attending it do not have to be present in the same place as long as they can exercise their rights to speak and vote at the meeting through the use of appropriate communications technology. In other words section 246A provides for the possibility of 'remote attendance' at meetings of members of a company. However, section 246A(2) of the Insolvency Act specifically dis-applies remote attendance in relation to companies subject to a winding up in Scotland or receivership under section 51 of that Act (power to appoint a receiver in Scotland).

5.3 Article 5 of the Order would repeal section 246A(2) of the Insolvency Act. This would provide for the possibility of remote attendance at meetings by members of companies subject to a winding up in Scotland or receivership under Section 51 of that Act. This will extend the flexibility currently available to practitioners administering those corporate insolvency proceedings in England and Wales.

5.4 The provision aims to implement winding up and receivership proceedings in Scotland that are efficient, cost effective and consistent with practices elsewhere in the UK (and in relation to other corporate insolvency proceedings in Scotland). Reducing the costs associated with the administration of corporate insolvency proceedings, including those associated with physical attendance at meetings, will result in an increase in the funds available to creditors. This may, in some cases, make the difference between the payment, or not, of a dividend or in other cases increase the amount of that dividend.

### *Nature of the proposed amendment*

5.5 Repeal section 246A(2) of the Insolvency Act to remove the restriction on remote attendance at meetings in section 246A(2) of the Insolvency Act (and consequentially amend section 246A(10)(a)).

### *Section 18 preconditions*

5.6 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied. The following sets out an assessment of this provision against the section 18(2) preconditions.

*Section 18(2)(a) - policy objective intended to be secured by the provision could not be secured by non-legislative means*

5.7 The reduction of the burden created as a result of the current restriction which excludes remote attendance at meetings in winding up and receivership in Scotland cannot be achieved by non-legislative means as the burden is created by the legislation in force which requires amendment. The amendment can only be achieved by means of legislation.

*Section 18(2)(b) - effect of the provision is proportionate to the policy objective*

5.8 The effect of the provision is to introduce a more cost effective, efficient and streamlined process and in particular to align the position in relation to winding up and receivership with the position in England and Wales. The provision is the only means by which this alignment and improved efficiency in process can be achieved. The objective is to allow members to attend meetings of a company in a winding up or receivership in Scotland otherwise by means other than physical attendance. Section 246A of the Insolvency Act as it would be amended provides for this, but also provide that a person only qualifies as attending if that person is in a position to communicate that person's view during the meeting to all those attending and can vote on resolutions, with a vote counting at the same time as other votes.

5.9 The Scottish Ministers therefore consider the effect of this provision is proportionate to the policy objective.

*Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it*

5.10 It is in the public interest that corporate insolvency proceedings are efficient and cost-effective. The provision removes a burden from the corporate insolvency process, increasing its efficiency and fitness for purpose. Enabling remote attendance will reduce the cost and burden associated with meetings of members of a company. Allowing remote attendance at meetings will not be compulsory but will be at the discretion of the convener of the meeting. If a convener proposes to proceed with a meeting by remote attendance and does not, therefore, specify a place for the meeting, 10% of members by voting rights will nevertheless have the right to demand that a place be specified for the holding of a meeting. It is not possible to say that in every case the costs saved would result in a direct increase in dividends for all creditors. However, it is the case that any cost savings would increase the funds available and that could mean higher dividends or some dividend in cases where there would not otherwise have been one. No parties have been identified who may be adversely affected by the provisions.

5.11 This condition is satisfied as there is no known adverse effect on any person affected by the provision and it is in the public interest.

*Section 18(2)(d) the provision does not remove any necessary protection*

5.12 In the context of 'necessary protections' for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of section 18(3) to (9) of the 2010 Act.

5.13 None of the section 18(3) examples of protections are affected: - (a) independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office, (b) civil liberties, (c) health and safety of persons, (d) the environment, (e) cultural heritage.

5.14 Subsections 18(4) to (6) are not applicable to the Order.

5.15 No other necessary protection is removed. The Scottish Ministers consider that the provision therefore does not remove any necessary protection.

*Section 18(2)(e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise*

5.16 The provision allows for exercise of some discretion in the means by which meetings of members of a company in a winding up or receivership in Scotland are conducted. It would not preclude participation in meetings and members will continue to have the rights to attend and vote at meetings. There is an additional safeguard for 10% of members by voting rights to require that a place be specified for the holding of the meeting to facilitate physical attendance. Participants will not be prevented from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

*Removal or reduction of a burden under section 17*

5.17 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

5.18 The burden being reduced by this provision falls under section 17(2)(d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

5.19 The provision will remove what can be costly and burdensome requirements associated with the holding of physical meetings in corporate insolvency procedures in Scotland. Lifting those burdens will reduce the costs of administering insolvency procedures and increase efficiency, bringing benefits to debtors and creditors.



## 6. **FURTHER PROTECTION OF ESSENTIAL SUPPLIES BY RESTRICTING RELIANCE ON INSOLVENCY RELATED CLAUSES IN CONTRACTS.**

6.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act (removing or reducing burdens).

### *Introduction to and reasons for the provision*

6.2 One of the primary factors in undertaking a business rescue during personal insolvency proceedings is the willingness of certain suppliers to continue to supply their services. However, currently, supplier contracts may contain insolvency-related clauses, allowing them to take action that can impede business rescue including terminating their contract with or withdrawing supplies from the insolvent customer and/or seeking to put the insolvent customer on a higher more expensive tariff. This can jeopardise the prospects of a rescue of a business, putting additional stress on the finances of the already distressed business.

6.3 The intention of this amendment is to restrict essential suppliers from enforcing insolvency clauses in their contracts against an insolvent individual or entity carrying on a business where the debtor has granted a trust deed which gains protected status under the BSA 2016 – a Protected Trust Deed. New section 173A BSA 2016 would give trustees the option to continue the current supply in contracts with essential suppliers where they believe that the continuing operation of the contract is necessary to achieve a better outcome for the creditors as a whole. There may though be occasions where the trustee would not object to the termination of the supply contract because the supply is not required. Section 173A also provides safeguards for suppliers. Accordingly, the policy is not to prevent suppliers from enforcing insolvency clauses in all situations.

6.4 This change aims to bring legislation in Scotland into line with provisions already in force in England and Wales. In particular, article 5 of the 2015 Order inserted new section 372A into the Insolvency Act introducing protection for those subject to an approved IVA where supply is for the purposes of a business. The policy intention is to introduce equivalent protection in Scotland for those that have granted a trust deed that gains protected status where supply is for the purposes of a business.

### *Nature of the proposed amendment*

6.5 Inserting a new section 173A into BSA 2016 to impose restrictions on essential utility and IT suppliers exercising insolvency related clauses in supply contracts where a trust deed granted by a debtor gains protected status and the supply is for the purposes of a business. This new section would also prescribe the circumstances under which a contract or supply can be terminated by the supplier where there is an insolvency related clause, thereby providing appropriate safeguards for suppliers.

### *Section 18 preconditions*

6.6 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied. The following sets out an assessment of this provision against the section 18(2) pre-conditions.

*Section 18(2)(a) - policy objective intended to be secured by the provision could not be secured by non-legislative means*

6.7 The effect of this provision cannot be achieved by non-legislative means as the policy of restricting suppliers from relying on insolvency related clauses in supply contracts – with safeguards for such suppliers - requires legislation to regulate contractual rights.

6.8 Similar provision was made for England and Wales by the 2015 Order, article 5 of which inserted a new section 372A to the Insolvency Act. Inserting new section 173A into the BSA 2016 would align the position in Scotland for Protected Trust Deeds with the position in England and Wales for approved IVAs.

*Section 18(2)(b) - effect of the provision is proportionate to the policy objective*

6.9 The effect of the provision is to restrict essential utility suppliers from exercising the insolvency-related clauses in their contracts with debtors that are party to a Protected Trust Deed where the supply is for the purposes of a business.

6.10 The policy objective is in particular to facilitate business rescue by ensuring that a viable business entity under a Protected Trust Deed maintains a continuation of essential supplies which may be critical to the ongoing operation of the business. Business continuity and future profitability presents the best opportunity for all creditors, including essential suppliers, to receive dividend payment under a Protected Trust Deed. The policy is also to provide appropriate safeguards for suppliers. The policy recognises the need to balance the interests of business customers and their creditors generally and the interests of suppliers. This issue was considered in some detail in the consultation that preceded the 2015 Order – in particular, paras 34 to 39 of the 2014 consultation document here:

<https://www.gov.uk/government/consultations/continuity-of-supply-of-essential-services-to-insolvent-businesses>

6.11 New section 173A will not apply to contracts entered into before that section comes into force (on 1st August 2017). Where the section does apply, safeguards are provided for suppliers. For example, the supplier may terminate the contract if charges for on-going supply are not paid timeously or may apply to the court for permission to terminate the contract on grounds of hardship. The supplier may request a personal guarantee from the trustee in relation to the continuing supply and may terminate the supply if such guarantee is not provided.

6.12 Furthermore the Scottish Government recognises that restricting suppliers from relying on insolvency related clauses in their contracts will interfere with the rights to freedom of contract. With that in mind the provision is limited to supplies for business purposes where a debtor has granted a Protected Trust Deed in order to promote business rescue. The provision does not apply where a debtor is sequestrated: insolvency-related terms may continue to be relied upon where a debtor is sequestrated, enabling a supplier to terminate a contract of supply in those circumstances.

6.13 The Scottish Ministers therefore consider the effect of this provision is proportionate to the policy objective.

*Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it*

6.14 Without the continuation of essential supplies, a viable business would likely fail to continue trading. The provision provides protections against the termination of essential utility supplies to viable businesses under a Protected Trust Deed, which facilitates business rescue and in turn, the potential for a better return to creditors.

6.15 As noted above new section 173A would not apply to contracts entered into before that section comes into force and several safeguards would be in place in the interest of providing adequate protections for suppliers. Furthermore insolvency-related terms may continue to be relied upon where a debtor is sequestered.

6.16 In these circumstances the Scottish Ministers consider that the condition is satisfied.

*Section 18(2)(d) the provision does not remove any necessary protection*

6.17 In the context of ‘necessary protections’ for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of section 18(3) to (9) of the 2010 Act.

6.18 None of the section 18(3) examples of protections are affected: - (a) independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office, (b) civil liberties, (c) health and safety of persons, (d) the environment, (e) cultural heritage.

6.19 Subsections 18(4) to (6) are not applicable.

6.20 The Scottish Ministers consider that the provision does not remove any necessary protection.

*Section 18(2)(e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise*

6.21 This proposed amendment would place certain restrictions on essential suppliers exercising insolvency related clauses where a trading entity becomes subject to a Protected Trust Deed while also providing safeguards for such suppliers.

6.22 As noted above new section 173A would not apply to contracts entered into before that section comes into force.

6.23 In terms of freedom to contract, going forward suppliers have no reasonable expectation that the conditions under which they offer supplies will not be subject to any legislative change, including appropriate and proportionate restrictions as would be introduced by the proposed new section 173A. Equivalent restrictions on suppliers’ ability to rely on insolvency related clauses in supply contracts already apply in the context of IVAs in England and Wales by virtue of section 372A of the Insolvency Act inserted by the 2015 Order, as well as in corporate insolvency across the UK. Particularly in those circumstances suppliers have no reasonable expectation they would be able to continue to rely on

insolvency-related clauses in contracts without restriction in the context of Protected Trust Deeds in Scotland – the broad equivalent of IVAs in England and Wales.

6.24 In addition, new section 173A will not prevent suppliers from relying on insolvency related clauses in contracts. Rather restrictions are placed on suppliers' reliance on such clauses, but subject to safeguards for the suppliers. For example, the supplier may terminate the contract if charges for on-going supply are not paid timeously, or apply to the court for permission to terminate the contract on grounds of hardship. The supplier may request a personal guarantee from the trustee in relation to the continuing supply and terminate the supply if such guarantee is not provided.

6.25 In these circumstances the Scottish Ministers do not consider that the provision prevents any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

*Removal or reduction of a burden under section 17*

6.26 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

6.27 The burden being reduced by this provision falls under section 17(2)(c) (an obstacle to best regulatory practice) and 17(2)(d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

6.28 With reference to section 17(4)(a) of the 2010 Act, new section 173A BSA 2016 will by making provision in relation to essential supplies in the context of Protected Trust Deeds in Scotland ensure transparent, accountable and, in particular, consistent regulation, following amendment of the Insolvency Act to insert a new section 372A in the context of IVAs in England and Wales by the 2015 Order. With reference to section 17(4)(a) and (b) of the 2010 Act, the regulation is targeted only in relation to Protected Trust Deeds in Scotland and does not apply where a debtor is sequestrated and is therefore proportionate, targeted only at the cases which require action.

6.29 When a debtor carrying on a business grants a Protected Trust Deed, suppliers may seek to take action through the exercise of insolvency related clauses in contracts that can severely impede any chances of business rescue and inhibit the trustee's prospects of continued trading. The primary aim of this provision is to remove these potential burdens and maximise the opportunity for business productivity and future profitability where it becomes subject to a Protected Trust Deed. Continued trading and business rescue present the best opportunity for return to all creditors, including essential suppliers. While the provision would restrict essential suppliers from being able to automatically invoke insolvency related clauses, as noted above several protections for suppliers are provided for. These include the right to terminate the supply if charges for the insolvency supply are not met, the right to request a personal guarantee from the trustee and the right to apply to court for permission to terminate the contract on grounds of hardship.

**7. EXTENDING THE LIST OF ESSENTIAL SUPPLIERS TO INCLUDE IT SUPPLIERS AND THIRD PARTY SUPPLIERS (OR ‘ON-SELLERS’) TO REFLECT DEVELOPMENTS IN COMMERCIAL PRACTICE.**

7.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act (removing or reducing burdens).

*Introduction to and reasons for the provision*

7.2 This change aims to bring personal insolvency legislation in Scotland relating to any business which is or has been carried on by or on behalf of a debtor into line with England and Wales. In the context of sequestration and trust deeds granted by a debtor, section 222 BSA 2016 currently prevents gas, electricity, water and providers of telecoms services from demanding payment of outstanding charges as a condition of continuing supply, but allows them to make it a condition of giving the supply that the office-holder personally guarantees payment of continuing charges. The list of essential suppliers currently included in section 222 is outdated and supplier behaviour has moved on considerably in the terms of modern day commercial practice. This has led to differences in interpretation and application surrounding existing obligations, particularly in the context of third-party providers (or ‘on-sellers’ such as landlords) of utilities and telecoms services and equipment. These suppliers are not generally considered to be covered by the current provisions in Scotland, even though they can be crucial to the continuity or rescue of an insolvent business. In addition suppliers (including ‘on-sellers’) of IT goods and services are not covered.

7.3 The Order would amend section 222 so as to extend the section to apply to (a) ‘on-sellers’ of utility and telecoms services, to reflect the way the utility and telecoms markets have evolved and (b) suppliers of IT goods or services (including on-sellers of IT goods or services).

7.4 The 2015 Order made similar amendment to equivalent provision in England and Wales (see amendments to section 372 of the Insolvency Act made by article 3 of that Order).

*Nature of the proposed amendment*

7.5 Amendment of section 222 of the BSA 2016 to add (a) ‘on-sellers’ of utility and telecoms services and (b) suppliers of IT goods or services (including on-sellers of IT goods or services) to the list of essential suppliers in that section.

*Section 18 preconditions*

7.6 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied. The following sets out an assessment of this provision against the section 18(2) pre-conditions.

*Section 18(2)(a) - policy objective intended to be secured by the provision could not be secured by non-legislative means*

7.7 The reduction of the burden created by the limited categories of essential supplier currently listed in section 222 of the BSA 2016 cannot be achieved by non-legislative means as the burden is created by the legislation in force, which requires amendment. The amendment can only be achieved by updating the categories of essential supplier to reflect modern day commercial practice (and to bring the position in Scotland in line with the position in England and Wales).

*Section 18(2)(b) - effect of the provision is proportionate to the policy objective*

7.8 In particular, the policy objective is to support where appropriate the continued trading and rescue of viable businesses that have become subject to personal insolvency proceedings. Updating the list of essential suppliers aims to ensure that supplies essential to the running of modern day businesses are covered.

7.9 Third-party providers (or ‘on-sellers’) of utilities and telecoms services and equipment are not generally considered to be covered by the current provisions, even though they can be crucial to the continuity of the insolvent business. In addition suppliers (including ‘on-sellers’) of IT goods and services are not covered.

7.10 The amendment would also bring personal insolvency legislation in Scotland relating to any business which is or has been carried on by or on behalf of a debtor into line with that in England and Wales.

7.11 The Scottish Ministers therefore consider the effect of this provision is proportionate to the policy objective.

*Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it*

7.12 It is in the public interest that legislation is up to date and that essential suppliers in modern day commercial practice are accounted for under section 222 BSA 2016. The evolution of commercial practice has resulted in the current list of suppliers becoming outdated.

7.13 Section 222 balances this public interest with the interests of suppliers: while it prevents suppliers from demanding payment of outstanding charges as a condition of continuing supply, it allows suppliers to make it a condition of giving the continuing supply that the office-holder personally guarantees payment of continuing charges.

7.14 The Scottish Ministers consider that in these circumstances the condition is satisfied.

*Section 18(2)(d) the provision does not remove any necessary protection*

7.15 In the context of ‘necessary protections’ for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of section 18(3) to (9) of the 2010 Act.

7.16 None of the section 18(3) examples of protections are affected: - (a) independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office, (b) civil liberties, (c) health and safety of persons, (d) the environment, (e) cultural heritage.

7.17 Subsections 18(4) to (6) are not applicable.

7.18 No other necessary protections are removed. The Scottish Ministers consider that the provision does not remove any necessary protection.

*Section 18(2)(e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise*

7.19 Section 222 currently prevents the suppliers of gas, electricity, water and communications services listed from making it a condition of the continued supply that any outstanding charges for supply before an insolvency event occurs are paid. This ensures that all debts accrued in connection with the supply before insolvency are treated in the same way as all other debts in the insolvency. This helps to ensure that no creditor obtains what would in effect be ‘preferential’ treatment at the expense of other creditors, undermining the basic principle of insolvency that all creditors of the same class are treated in the same way. At the same time the supplier retains the right to seek a personal guarantee from the trustee for the payment of continuing supply during the insolvency.

7.20 Extending the list of suppliers in section 222 to include third-party providers (or ‘on-sellers’) of utilities and telecoms services and equipment and suppliers (including ‘on-sellers’) of IT goods and services reflects modern day commercial practice. The amendment will provide that such suppliers would similarly be prevented from making it a condition of the continued supply to a business in a personal insolvency situation that any outstanding charges for supply prior to the insolvency are paid. The Scottish Ministers do not consider that such suppliers could reasonably expect to impose such a condition in view of the existing position for suppliers currently listed in section 222 and the overarching policy aim of ensuring that all pre-insolvency debts should be included in the insolvency and treated accordingly. Those suppliers added to section 222 will though similarly be entitled to make it a condition of giving the continuing supply that the office-holder personally guarantees payment of continuing charges.

7.21 In these circumstances the Scottish Ministers do not consider that the provision prevents any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

*Removal or reduction of a burden under section 17*

7.22 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

7.23 The burden being reduced by this provision falls under section 17(2)(c) (an obstacle to best regulatory practice) and 17(2)(d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

7.24 With reference to section 17(4)(a) of the 2010 Act, the amendments to section 222 BSA 2016 ensure transparent, accountable and, in particular consistent regulation of essential supplies in personal insolvency in Scotland. This ensures that not only traditional utilities suppliers are covered, as is currently the case, but also ‘on-sellers’ of such supplies, and suppliers of IT services. As with new section 173A, the amendment of section 222 BSA 2016 also ensures consistency with England and Wales following amendment of section 372 of the Insolvency Act for England and Wales by the 2015 Order. With reference to section 17(4)(a) and (b) of the 2010 Act, the focus of the amendment of section 222 BSA 2016 is utilities and other supplies which are considered to be essential supplies, to bring regulation up to date with modern day commercial practice. This means that regulation is proportionate and targeted only at cases as require action.

7.25 When a business enters insolvency, suppliers may seek to take action that can severely impede any chances of business rescue and inhibit the trustee’s prospects of continued trading. The primary aim of this provision is to remove the burden associated with a supplier making continuing supply conditional on payment of outstanding charges incurred pre-insolvency and maximise the opportunity for business productivity and future profitability. Continued trading and business rescue present the best opportunity for return to creditors generally, including essential suppliers. While the provision would prevent essential suppliers from being able to make it a condition of a continued supply that any outstanding charges for supply before an insolvency event occurs are paid, there are protections including rights to seek a guarantee from the trustee for the payment of on-going supply.



## 8. **AMENDMENTS TO THE PUBLIC SERVICES REFORM (INSOLVENCY) (SCOTLAND) ORDER 2016 – SAVINGS**

8.1 These provisions are made under the powers in section 17(1) and (9) of the 2010 Act (removing or reducing burdens).

### *Introduction to and reasons for the provision*

8.2 Article 8 of the Order proposes certain amendments to the savings provisions contained within PSRO 16. The primary aim of these amendments is to ensure that the approach to savings in PSRO 16 fits with the intended approach to commencement of the new ISR which is in turn informed by the approach taken to commencement of the new rules for England and Wales - the Insolvency (England and Wales) Rules 2016.

8.3 In particular article 15 of PSRO 16 made saving provision in connection with certain amendments to the Insolvency Act made by it. This had the effect of saving the relevant Insolvency Act provision as it stood for receiverships and windings up beginning before the amendments come into force. The amended Insolvency Act provision would apply only to receiverships and windings up beginning on or after the amendments come into force. The coming into force date for all purposes of the relevant PSRO 16 amendments to the Insolvency Act is set for the day appointed for the coming into force of section 122(2) of SBEEA in Scotland.

8.4 Such saving was provided for, in particular, on the assumption that when new ISR came into force in due course, they would similarly apply only to receiverships and windings up beginning on or after the coming into force date. Existing ISR86 would be saved and continue to apply to receiverships and windings up which began before that date (in line with the approach taken when changes were last made to ISR86 by the Scottish Ministers in the Insolvency (Scotland) Amendment Rules 2014).

8.5 Subsequent to the making of PSRO 16, it is proposed that a different approach should be taken when new ISR come into force and that the starting point - subject to exceptions - will be that new ISR should generally apply to all receiverships and windings up. This is in line with the starting point – including exceptions - for commencement of the new Insolvency (England and Wales) Rules 2016. This is with a view to ensuring that the benefit of modernised provision can be enjoyed in all corporate insolvency processes, regardless of whether those processes begin before or after the coming into force of the new rules, where appropriate. In these circumstances the Scottish Ministers have reviewed the savings provided for in article 15 PSRO 16. The Order therefore amends PSRO 16 to make changes to those savings.

### *Nature of the proposed amendments*

8.6 The proposed amendments to the savings provisions in article 15 of PRSO 16 by article 8 of the Order are summarised as follows:

- *Articles 5, 6, 7(2) and 7(3) of PSRO 16 – Progress reports in members' voluntary winding up and creditors' voluntary winding up with application to Limited Liability Partnerships (LLPs).* The proposed amendment to PSRO 16 would replace the general saving which would as matters stand apply with

a more limited saving to the amendments to the Insolvency Act made by articles 5 and 6 of PSRO 16 (and consequential amendments made to LLP Regulations by article 7(2) and (3) of that Order). Broadly, articles 5 and 6 of PSRO 16 replace requirements for annual ‘progress’ meetings in members’ and creditors’ voluntary winding up with requirements for progress reports. The proposed amendment would provide that, in a winding up which is on-going at the date the change in the law comes into force, the old law on annual progress meetings will continue to apply in relation to any *particular* annual progress meeting where the ‘trigger date’ for the meeting in a winding up which is continuing arises before the change in the law comes into force but where the process of summoning the meeting has not begun or the meeting has not taken place before that date. The trigger date is the end of one year starting with the date of commencement of winding up; or the end of each subsequent year. In this scenario the Insolvency Act – in particular sections 93 and 105 - would continue to apply to that particular annual progress meeting as if the amendments made by articles 5, 6, 7(2) and 7(3) of PSRO 16 had not been made (but the saving does not save obligations which otherwise may have arisen in relation to holding future annual progress meetings in the same winding-up). Where in an on-going winding up the ‘trigger date’ has not arisen before the coming into force of the new law (and once the obligations in relation to the holding of particular annual progress meetings have been fulfilled in any on-going winding up where the limited saving does initially bite), sections 92A and 104A on progress reports would apply. Further provision will be made in new ISR in due course to give effect to those sections, including as necessary transitional provision to deal with on-going cases.

- *Article 11 of PSRO 16 – Application for early dissolution of a company.* The PSRO 16 amendment to the Insolvency Act clarified the existing law so it is beyond doubt on the face of the legislation that an application can be made to the court for early dissolution at any time. This aligned the legislation for Scotland with the provision in England and Wales. As it stands, article 15 of PSRO 16 provides that this amendment would not apply to a winding up beginning before the amendment comes into force. Having reviewed the approach to savings currently provided for in PSRO 16 it is considered that a different approach is appropriate in relation to this clarifying amendment to ensure that the law is clarified for all cases. Article 8 of the Order would therefore amend article 15 of PSRO 16 so as to apply this amendment not only to windings up beginning on or after the amendment comes into force but also to windings up beginning before that date.
- *Article 12 of PSRO 16 – Use of websites.* The PSRO 16 amendment to the Insolvency Act removed restrictions on the use of websites to send notices or information in liquidation and receivership procedures in Scotland. This aligned the position in Scotland with England and Wales following similar changes already introduced there. The amendment seeks to improve the efficiency of such corporate insolvency procedures in Scotland. As it stands article 15 of PSRO 16 provides that this amendment would not apply to a receivership or winding up beginning before the amendment comes into force. Having reviewed the approach to savings currently provided for in

PSRO 16 it is considered that a different approach is appropriate in relation to this amendment. Article 8 would therefore amend article 15 of PSRO 16 so as to apply this amendment once in force to not only receiverships and windings up beginning on or after the amendment comes into force but also those beginning before that date. Together with provision to be made in new ISR in due course, this will facilitate potential efficiencies in both new and on-going receiverships and windings up.

- *Article 13 of PSRO 16 – References to things in writing: receiver’s report and provisions of Companies Clauses Consolidation (Scotland) Act 1845.* Section 436 of the Insolvency Act makes provision for “things in writing” to include documents in electronic form. However, section 436B(2)(b) and 436B(2)(e) of the Insolvency Act excluded the report by a receiver in terms of section 67(2) of that Act and the provisions of a winding up of a company in Scotland in relation to the Companies Clauses (Consolidation (Scotland) Act 1845 in terms of section 111(4) of the Insolvency Act. As a consequence, receivers and liquidators involved in insolvency proceedings in Scotland are precluded from including electronic documents as “things in writing” for the purposes of the Insolvency Act. Article 13 of PSRO 16 repeals paragraphs (b) and (e) of section 436B(2) of the Insolvency Act to remove these exclusions. As it stands article 15 of PSRO 16 provides that these amendments would not apply to receiverships or windings up beginning before the amendment comes into force. Having reviewed the approach to savings currently provided for in PSRO 16 it is considered that a different approach is appropriate in relation to this amendment. Article 8 of the Order would therefore amend article 15 of PSRO 16 so as to apply this amendment once in force not only to receiverships and windings up beginning on or after the amendment comes into force but also those beginning before that date.

### *Section 18 preconditions*

8.7 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied. The following sets out an assessment of this provision against the section 18(2) pre-conditions.

8.8 The proposed amendments relate to savings provisions applied to amendments already introduced by PSRO 16. The Explanatory Document accompanying PSRO 16 is included at Annex A. This Explanatory Documents provides detailed assessment of each amendment in relation to the 2010 Act pre-conditions. The articles impacted by the proposed amendment to savings are explained in sections 3, 5, 6 and 9 of Annex A.

8.9 The following explanations consider only the impact of the proposed saving amendment rather than the substantive changes already dealt with in PSRO 16.

8.10 For the purposes of the explanations provided, the proposed amendments are described as follows:

- “Category 1” – the introduction of the ‘limited saving’ as described at Point 8.6 (1<sup>st</sup> bullet) above in relation to progress reports in members’ voluntary winding up and creditors’ voluntary winding up.
- “Category 2” – the removal of saving provision in relation to the procedural elements of insolvency functions as described at Point 8.6 (2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> bullets). These relate to the application for early dissolution of a company, use of web-sites and electronic communications.

*Section 18(2)(a) - policy objective intended to be secured by the provision could not be secured by non-legislative means*

8.11 The reduction of this burden caused by the current approach in PSRO 16 of applying relevant amendments to the Insolvency Act only to, as applicable, receiverships and windings up which begin after the amendments come into force cannot be achieved by non-legislative means as the burden is created by provision in PSRO 16, which requires amendment. The amendment can only be achieved by means of legislation.

*Section 18(2)(b) - effect of the provision is proportionate to the policy objective*

8.12 The effect of the provision is to apply relevant amendments made by PSRO 16 to the Insolvency Act once in force to receiverships and windings up beginning before that date as well as those commencing on or after the amendment comes into force. This is with a view in particular to ensuring that the benefit of modernised provision can generally be enjoyed in all corporate insolvency processes, regardless of whether those processes begin before or after the coming into force of the new rules with a view to facilitating more cost effective, efficient and streamlined processes. The provision is the only means by which this can be achieved.

8.13 In this context the Category 1 amendments are necessary and appropriate to provide for a clear and transparent approach to the transition from annual ‘progress’ meetings to progress reports where obligations to summon a particular meeting have arisen before the amendments come into force but the meeting has not yet been summoned or held (but does not save obligations which otherwise may have arisen in relation to holding future annual ‘progress’ meetings in the same winding up). The Category 2 amendments enable operational efficiencies to be achieved for all receiverships and windings up, as applicable, regardless of when such insolvency proceedings begin so far as the ‘procedural steps’ covered by the provisions of the Insolvency Act (as amended) arise following the date the amendments come into force.

8.14 The Scottish Ministers therefore consider the effect of this provision is proportionate to the policy objective.

*Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it*

8.15 It is in the public interest that insolvency processes and associated legislation are efficient and effective.

8.16 The Category 1 and Category 2 amendments to savings in general allow for the procedural efficiencies which the relevant amendments to the Insolvency Act made by PSRO 16 facilitate to be extended to both receiverships and windings up which begin before the amendments come into force as well as those which begin on or after that date. The potential for efficiencies will therefore apply in a significantly higher number of cases. It is not possible to say that in every case the costs saved would result in a direct increase in dividends for all creditors. However, it is the case that any cost savings would increase the funds available and that could mean higher dividends or some dividend in cases where there would not otherwise have been one. There is no adverse effect on the public interest and no parties have been identified who may be adversely affected by the amendment to the change to saving provisions. The condition is therefore satisfied.

*Section 18(2)(d) the provision does not remove any necessary protection*

8.17 In the context of ‘necessary protections’ for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of section 18(3) to (9) of the 2010 Act.

8.18 None of the section 18(3) examples of protections are affected: - (a) independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office, (b) civil liberties, (c) health and safety of persons, (d) the environment, (e) cultural heritage.

8.19 Subsections 18(4) to (6) are not applicable.

8.20 The Scottish Ministers consider that the provision does not remove any necessary protection.

*Section 18(2)(e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise*

8.21 The proposed Category 1 and Category 2 savings amendments would not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. These general considerations have been considered in the Explanatory Document accompanying PSRO 16 (in Annex A). The changes to the savings provisions result in the more efficient processes being applied to a wider range of appointments. The changes made by this Order to the savings will mean the PSRO 16 amendments apply in existing receiverships and windings up in a wider set of circumstances. Taken with these changes to the savings, that wider effect of the PSRO 16 amendments in modifying procedural provision in the Insolvency Act is to make reasonable changes to receivership and winding up processes. The changes made by this Order will be read alongside relevant provision in new ISR<sup>1</sup>.

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<sup>1</sup> New ISR will in due course include detailed transitional and savings provision to deal with on-going cases. By way of illustration only, analogous provision is made for England & Wales in schedule 2 of the Insolvency (England and Wales) Rules 2016 (S.I. 2016/1024).

*Removal or reduction of a burden under section 17*

8.22 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

8.23 The burden being reduced by this provision falls under section 17(2)(c) (an obstacle to best regulatory practice) and 17(2)(d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

8.24 The proposed amendments to the savings provisions contained within PSRO 16 are in particular to ensure that modernised provision to be made in new ISR in due course can be enjoyed in all corporate insolvency processes in Scotland, regardless of whether those processes begin before or after the coming into force of the new rules, subject to appropriate exceptions, including the transitional arrangements as can be made in the new ISR. This is in line with the starting point – including exceptions - for commencement of the new Insolvency (England and Wales) Rules 2016. This is for clarity for the end user, ensuring that new modernised rules will be applicable wherever possible, but acknowledging that there may be the need for exceptions, and with a set of transitionals and savings set out so far as possible in one place in the new Rules. This contributes to making the regulation of corporate insolvency processes transparent, accountable, proportionate and consistent.

8.25 Both the Category 1 and Category 2 amendments to the savings provisions therefore allow for a further extension of the efficiencies and reduction in administrative cost and burden as these will apply to a greater number of insolvency appointments.

## 9. THE PUBLIC SERVICES REFORM (CORPORATE INSOLVENCY AND BANKRUPTCY) (SCOTLAND) ORDER 2017 – CONSULTATION RESPONSE

9.1 This section of the document discusses the response from the 60 day consultation undertaken and minor changes made to the Order following that consultation.

9.2 An issue was raised by stakeholders concerning the wording of new section 173A of BSA 2016 and it was felt that although it closely mirrors that contained in section 372A of the Insolvency Act for England and Wales, it did not extend as far. In particular, the new section 173A does not include the words “by a firm or partnership of which the [debtor] is or was a member, or by an agent or manager for the [debtor] or for such a firm or partnership”.

9.3 The scope of the further protection of essential supplies as provided for in new section 173A(1)(b) of BSA 2016 was framed to coincide with section 222(3)(b) of BSA 2016, in terms of which the existing protection which section 222 provides for applies to requests for the giving of supply “for the purpose of any business which is, or has been, carried on by or on behalf of the debtor”. On reviewing the Order, an oversight in new section 173A(1)(b) was identified in that it should have read “the supply is for the purpose of a business which is or has been carried on by *or on behalf of* the debtor”. To rectify this oversight, new section 173A(1)(b) has been adjusted to include the wording “or on behalf of” the debtor.

9.4 It was raised that wording in new section 173A(5) was not consistent with new sections 173A(4)(b) and 173A(6). New section 173A(5) makes reference to the “sheriff” while new sections 173A(4)(b) and 173A(6) refer to the “court”. The stakeholder felt that there should be consistency in the use of terminology and raised a suggestion to refer to the “sheriff” in each section, rather than the mixed use of “court” and “sheriff”.

9.5 The rationale for the use of “sheriff” in new section 173A(5) is that it provides for the particular court to which the initial application is to be made under new section 173A(4)(b). Following the initial application, it may in any particular case and depending on the circumstances be that court (i.e. the sheriff) or another appellate court which actually grants the permission, hence the more generic reference to “court” in new sections 173A(4)(b) and 173A(6).

9.6 A stakeholder raised a question on whether new section 173A(8)(b) is necessary in Scotland, noting that the new section mirrors the corresponding provision found at section 372A(6)(b) of the Insolvency Act for the purpose of IVAs (being the broad equivalent to trust deeds in England and Wales). It was suggested that in the context of trust deeds, given their difference in structure to IVAs, in particular the fact that a trust deed which does not gain protected status continues to exist albeit without protection, this provision might be superfluous.

9.7 New section 173A of BSA 2016 reflects the policy intention to provide for further protection of essential supplies to business debtors from the point at which a trust deed granted by such debtor is granted “protected status”. In that context, new section 173A(8) provides a particular safeguard for suppliers – to broadly mirror that provided for in section 372A(6) of the Insolvency Act in England and Wales – and which may be illustrated by the following example. A debtor who is a party to a contract for the supply of essential goods or

services for the purpose of their business grants a protected trust deed (“the first trust deed”) which is granted protected status. At the point the first trust deed is granted protected status an insolvency-related term of that contract ceases to have effect by virtue of new section 173A(1) (subject to new section 173A(2)). The supplier may choose not to seek to rely on the safeguards provided for to terminate either the contract or supply. The first trust deed may run its course, come to an end and the debtor continue thereafter to run their business. The same supplier may continue to supply that business under the same supply contract. New section 173A(8) deals with the possibility that the same debtor may subsequently grant another trust deed (“the second trust deed”) which may be granted protected status and in that scenario effectively puts things back where they would have been had the insolvency-related term in the supply contract not ceased to have effect on the first trust deed being granted protected status. It does so by providing that the supply contract is treated as if immediately before the second trust deed is granted protected status, it contained an insolvency-related term identical to the term which ceased to have effect on the first trust deed being granted protected status. That ‘identical term’ will then under new section 173A(1) cease to have effect of new when the second trust deed is granted protected status but the supplier will then have the benefit of the safeguards provided for in new section 173A(3).

9.8 A concern was raised in relation to the wording in new section 173A(10) and that the current provision would create a gap in the intended protection conferred by the new provisions. The stakeholder raised that the provision defines an insolvency-related term of a contract as one which operates where a trust deed gains protected status whereas in practice, contractual terms are more likely to provide for their operation where a trust deed is ‘granted’ or entered into by the debtor rather than where the trust deed becomes ‘protected’. It was suggested that the provision should mirror this and that doing so would not affect the policy reflected in new section 173A(1) in that the provisions of the new section relating to such terms would only apply where a trust deed gains protection.

9.9 The current wording in new section 173(A)(1)(a) will, as noted by the stakeholder, provide for the cessation of effect of an insolvency-related term of a supply contract to take effect on the date on which a trust deed gains protected status. It is recognised (and reflected in section 173A(10)(c)) that an insolvency-related term in a supply contract might be framed with reference to an event occurring before a trust deed is granted protected status, for example, the prior act of granting a trust deed. At the date in which a trust deed is *granted* protected status, any such insolvency-related term will cease to have effect from that point.

9.10 In this respect proposed new section 173A follows section 372A of the Insolvency Act in relation to IVAs in England and Wales. In terms of section 372A(1)(a) of the Insolvency Act the cessation of effect of an insolvency-related term of a supply contract takes effect on approval of an IVA under Part VIII of the Insolvency Act. It is recognised (and reflected in section 372A(8)(c)) that an insolvency-related term in a supply contract might be framed with reference to an event occurring before the approval of an IVA. At the date in which an IVA is approved, any such insolvency-related term will cease to have effect from that point. The approach for Scotland in new section 173A of BSA 2016 therefore mirrors the approach for England and Wales taken in section 372A of the Insolvency Act.

9.11 As noted above, stakeholders have been consulted. One substantive response was received. A detailed reply to the stakeholder was sent setting out a response to the points raised and confirming the intention to make the minor change to proposed new section



173A(1)(b) BSA 2016 to be inserted by article 6 of the Order as described in paragraph 9.3 above. The stakeholder advised that there were no further comments.

9.12 The only other changes to the Order are non-substantive. Changes are made to the commencement provision in article 1. The effect of those changes is in particular to provide for articles 2 to 5 of the Order amending the Insolvency Act to come into force for the limited purposes described in article 1(3) of the Order, including in particular making rules under section 411 of that Act, on 1 October 2017 (rather than 26 June 2017) to reflect updated proposed timescales in relation to making the new ISR which those amendments are made in anticipation of.

9.13 In these circumstances and with reference to section 26(4) of the 2010 Act, Scottish Ministers do not consider further consultation (aside from that noted in paragraph 9.11 above) is necessary or appropriate.

## **ANNEX A**

### **EXPLANATORY DOCUMENT**

#### **THE PUBLIC SERVICES REFORM (INSOLVENCY) (SCOTLAND) ORDER 2016**

##### Contents

1. Introduction
2. Background and policy objective
3. Removal of the requirement for annual meetings in members' voluntary winding up and company voluntary winding up procedures
4. Replacement of verification by affidavit with statutory declaration for statement of affairs in receivership, company voluntary winding up and winding up by the court
5. Removal of the restriction on use of websites to send notices or information in liquidation and receivership in Scotland
6. Use of electronic forms for receiver's reports and certain liquidator appointments
7. Removal of the geographical restriction relating to a receiver dealing with a property situated out with Scotland
8. Removal of redundant receivership provision on employees' wages
9. Provision of clarity regarding the timescale within which a liquidator can apply for early dissolution of the company
10. The Public Services Reform (Insolvency) (Scotland) Order 2016 – consultation responses

## 1. INTRODUCTION

1.1 This Explanatory Document has been prepared in respect of the draft Public Service Reform (Insolvency) (Scotland) Order 2016 (“the Order”), which would be made in exercise of powers conferred by section 17 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”).

1.2 The draft Public Services Reform (Insolvency) (Scotland) Order 2016, and associated Explanatory Document, was laid in the Scottish Parliament on 30 September 2015 for the formal 60 day consultation in accordance with section 26 of the 2010 Act (“the 60 day consultation”). During this period the Accountant in Bankruptcy (“AiB”) on behalf of the Scottish Government sought views and representations from stakeholders representative of the interests affected by the proposals in the Order.

1.3 Prior to the parliamentary process for the Order, AiB had consulted on the proposals with key stakeholder groups, providing them with an opportunity to raise any concerns and engage in constructive dialogue. This process resulted in a number of stakeholder comments being reflected in the proposed draft Order as laid for consultation under section 26 of the 2010 Act.

1.4 Responses to the 60 day consultation were received from key stakeholders; the Institute of Chartered Accountants of Scotland (“ICAS”), the Association of Business Recovery Professionals (“R3”) Scottish Technical Committee, and the Law Society of Scotland. While stakeholders generally welcomed and agreed with the proposals set out in the Order, recommendations and amendments were suggested which have resulted in changes being made, though not all changes could be accommodated at this time. In accordance with section 26(4) of the 2010 Act, the key stakeholders were given a further short opportunity to comment on the revised Order. Section 10 of this document provides a detailed assessment of the 60 day consultation responses, the changes made from the proposed draft Order and the action taken.

1.5 This Explanatory Document, which is laid before the Scottish Parliament under section 25(2)(b) along with the Order, contains the details set out in section 27(1) of the 2010 Act.

1.6 The Order will amend the Insolvency Act 1986 (“the Insolvency Act”) for the purposes of modernising devolved aspects of corporate insolvency in Scotland (aspects of the process of liquidation and receivership) in line with amendments made in England and Wales and reserved aspects of corporate insolvency in Scotland by the Legislative Reform (Insolvency) (Miscellaneous Provisions) Order 2010 (“the 2010 LRO”)<sup>2</sup>. It will also make related consequential amendments including to the Small Business, Enterprise and Employment Act 2015 (“the 2015 Act”), the Limited Liability Partnerships (Scotland) Regulations 2001 (“the LLPSR 2001”), the Limited Liability Partnership Regulations 2001 (“the LLPR 2001”) and repeal section 51(2ZA) of the Insolvency Act to remove a geographical restriction relating to a receiver dealing with property related to Scotland.

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<sup>2</sup> S.I. 2010/18. Reference is also made to the Explanatory Memorandum published with the Legislative Reform Order which sets out further justification for the changes on which this note draws, available on this [link](#).

1.7 The amendments in relation to the Insolvency Act are:-

- amendment to section 92A to require a liquidator in a members' voluntary winding up ("MVWU") in Scotland to produce a progress report on certain matters for prescribed periods, then send these reports to prescribed members of the company and other interested parties;
- a related amendment to remove the section 93 requirement for annual meetings in a MVWU continuing for longer than one year;
- amendment to section 104A to require a liquidator in a company voluntary winding up ("CVWU") in Scotland to produce a progress report on certain matters for prescribed periods, then send these reports to members and creditors of the company unless they are opted out (and such other persons as may be prescribed under the Insolvency Rules under the Insolvency Act);
- a related amendment to remove the section 105 requirement for annual meetings in a CVWU continuing for longer than one year;
- repealing consequential amendments in schedule 9 to the 2015 Act which fall as a result of repealing sections 93 and 105;
- consequential amendments to schedules 2 and 3 of the LLPSR 2001 as result of repealing sections 93 and 105;
- consequential amendments to schedules 3 and 4 of the LLPR 2001 as a result of repealing sections 93 and 105;
- amendments to replace requirements for certain documents to be verified as true by affidavit and instead allow verification by a statement equivalent to a statement on oath in line with the requirement for company administration at present, which complies with the Statutory Declarations Act 1835:-
  - in a statement of affairs in a receivership (section 66)
  - in a statement as to the affairs of a company (section 95)
  - in a statement of affairs in a CVWU (section 99)
  - in a statement of affairs in a winding up by the court (section 131)
- amendment to section 246B to remove the restriction on use of websites to send notices or information in Liquidation and Receivership in Scotland;
- amendment to section 436B in order to allow a report by a receiver to be in electronic form and allow a Liquidator to make appointment under the Companies Clauses Consolidation (Scotland) Act 1845 by way of a document in electronic form;
- repeal of section 51(2ZA) to remove a geographical restriction relating to a receiver dealing with property related to Scotland;

- repeal of section 57(2D) to remove redundant provision about wages in receivership as the employment contracts to which it relates no longer exist;
- amendment to section 204(2) to allow the liquidator to apply to the court at any time for the early dissolution of the company;

1.8 Section 9 of this document is new and relates to the change in adding new article 11 of the Order following the response to the 60 day consultation (see the last bullet above and paragraph 10.2 below). What were sections 4 and 6 of the Explanatory Document for the proposed draft Order on the 60 day consultation have been omitted as a result of the change in removing the relevant provisions the reasons explained at paragraph 10.3 below.

1.9 The following provides a formal assessment of the proposed amendments against the requirements of the 2010 Act.

## 2. BACKGROUND AND POLICY OBJECTIVE

2.1 The policy objective underpinning these amendments is to modernise and align where appropriate the corporate insolvency regime in Scotland and the functions of Insolvency Practitioners operating in Scottish insolvencies with those undertaking equivalent work in England and Wales.

2.2 The Scottish corporate insolvency regime is underpinned by the Insolvency Act, with much of the detail set out in the Insolvency (Scotland) Rules 1986<sup>3</sup> (ISR). There have been changes made to the Insolvency Act, including those made by the 2010 LRO. These changes have not yet been carried across into the Insolvency Act, in relation to devolved areas of corporate insolvency (receivership and aspects of the process of winding up) although there have been regular stakeholder representations, to say that a way should be found to do this. As a consequence, changes that have predominantly introduced greater efficiency to processes in England and Wales do not yet apply in Scotland.

2.3 The Scottish Government consultation on the proposed changes which sought views from stakeholders including Recognised Professional Bodies, Law Society of Scotland and the UK Insolvency Service.

2.4 In particular, before further changes can be made to the ISR, it is necessary to first address changes needed to devolved areas of the Insolvency Act. Related changes to the ISR accompanying changes in [England & Wales are under consideration](#), and it would be useful to have a similar position in place on which to consider any necessary changes to the Scottish ISR.

2.5 The changes will where relevant affect Limited Liability Partnerships registered in Scotland as a result of the regulations on limited liability partnerships (LLPs) noted at paragraph 1.6 above. Generally in this document similar reasoning for the reasons for the provisions in the Order applies to LLPs as for companies.

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<sup>3</sup> S.I. 1986/1915 as amended.

### **3. REMOVAL OF THE REQUIREMENT FOR ANNUAL MEETINGS IN MEMBERS' AND CREDITORS' VOLUNTARY WINDING UP PROCEDURES**

3.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act (removing or reducing burdens).

#### *Introduction to and reasons for the provision*

3.2 Currently sections 93 and 105 of the Insolvency Act require the liquidator in a CVWU and MVWU in Scotland to summon annual meetings of creditors and/or members 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. Sections 92A and 104A of the Insolvency Act, changes introduced through the 2010 LRO have removed the requirement for annual meetings for liquidators of companies registered in England and Wales.

3.3 In practice, the annual meetings amount to no more than laying before the meeting a copy of the liquidator's receipts and payments account for the preceding period. These meetings are rarely attended by creditors/members so the costs of summoning and holding them are incurred to little useful purpose. The provision will remove the requirement for annual meetings in Scotland and align the procedure within England and Wales.

3.4 The 2010 LRO in introducing sections 92A and 104A requires a liquidator in a MVWU and CVWU to produce a progress report on certain matters and send these reports to prescribed members of the company and other parties. However, these provisions only apply to liquidators for companies registered in England and Wales.

3.5 Articles 5 and 6 of the Order will extend this requirement to liquidators of companies registered in Scotland.

3.6 The provision aims to implement corporate insolvency proceedings in Scotland that are efficient, cost effective and consistent with those elsewhere in the UK. Insolvency legislation provides for the fact that there will inevitably be costs and expenses incurred in the course of administering insolvency procedures and those have to be paid according to a prescribed order of priority. This means that before any creditor can receive a dividend, these priority costs must first be met in full. If these costs can be reduced the "pot" of money available to distribute to the creditors will increase accordingly. This might in some cases make the difference between the payment, or not, of a dividend or in other cases increase the amount of the dividend.

3.7 The provision will reduce the cost of insolvency procedures as the creditors and/or members will receive the same information, but in the form of a written progress report that will include a receipts and payments account, without the need for an annual meeting.

#### *Nature of the proposed amendment*

3.8 Repeal sections 93 and 105 of the Insolvency Act.

3.9 Extend the provisions of sections 92A and 104A to companies registered in Scotland.

3.10 The changes in respect of sections 92A and 104A will also have an effect where relevant to Limited Liability Partnerships registered in Scotland (this flows from the regulations on limited liability partnerships (LLPs) noted at paragraph 1.6 above). Minor consequential amendments tidy up references in those regulations.

*Section 18 preconditions*

3.11 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied<sup>4</sup>. The following sets out an assessment of this provision against the section 18(2) preconditions.

*Section 18(2)(a) - policy objective intended to be secured by the provision could not be secured by non-legislative means*

3.12 The reduction of this burden cannot be achieved by non-legislative means as the burden is created by the legislation in force, which requires amendment. The amendment can only be achieved by means of legislation.

*Section 18(2)(b) - effect of the provision is proportionate to the policy objective*

3.13 The effect of the provision is to introduce a more cost effective, efficient and streamlined process and align the Scottish insolvency administration processes to those in England and Wales. The provision is the only means by which this alignment and efficiency in process can be achieved. Scottish Ministers therefore consider the effect of this provision is proportionate to the policy objective.

*Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it*

3.14 It is in the public interest that corporate insolvency proceedings are efficient and cost effective. It is not possible to say that in every case the costs saved will result in a direct and commensurate increase in dividends for all creditors. However, it is the case that cost savings will increase the funds available in the insolvency across all cases and that will mean higher dividends in some cases, or dividends in cases, where there would not otherwise have been one.

3.15 This condition is satisfied, as although the removal of the requirement for annual meetings may impact on insolvency office-holders' fees, any such effect will be limited by the reduction in overheads and the benefits of simplification and more cost effective processes.

3.16 The amendments to the ISR, are planned to come into effect concurrently with the provisions of section 122(2) of the 2015 Act coming into force. At the same time as these amendments, it will introduce a requirement for liquidators to provide progress reports to the creditors/members including the receipts and payments account currently required to be laid before the annual meeting. As part of an initiative on the remuneration of insolvency office-

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<sup>4</sup> Or the condition in section 18(8) is satisfied; section 18(8) is not applicable as the Order does not merely restate an enactment.



holders arising out of the Rules modernisation project, this will include a requirement to provide details of the remuneration the liquidator has taken, or proposes to take, over the course of the year. These rules will also give creditors improved rights to request further information about the liquidator's remuneration and expenses and to challenge remuneration drawn by the liquidator.

3.17 In light of the new reporting regime, removing the requirement also to hold a meeting to lay an account of the conduct of the winding up is proportionate. The information will be available to the creditors/members in another form. On the face of it, the provision removes the entitlement to receive information by attending a meeting, but, that information is publicly available by virtue of section 192 of the Insolvency Act. The AiB does not impose a charge for this information, it is therefore less than the cost in time and money of attending the meeting. Moreover, in accordance with proposed changes to the Rules, the information will be provided to each creditor/member directly in the form of a progress report. Therefore, the creditors/members will continue to receive information about the conduct of the winding up and liquidators will be relieved of the necessity of calling a meeting which served little purpose.

*Section 18(2)(d) the provision does not remove any necessary protection*

3.18 In assessing 'necessary protections' for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of the provisions of subsections 18(3) to (9) of the 2010 Act.

3.19 Section 18(3) gives examples of protections, namely: - (a) the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office, (b) civil liberties, (c) health and safety of persons, (d) the environment, (e) cultural heritage (including access, through display, exhibition or otherwise, to cultural heritage). No such protections are affected by this provision.

3.20 Subsections 18(4) to (6) are not applicable to the Order.

3.21 It is not considered that any other necessary protections are removed. While provision for a meeting is removed, the requirement to hold a meeting at which an account had to be laid was intended to ensure the creditors/members were given appropriate information about the conduct of a winding up. Few creditors/members attend these meetings at present and in future information will be provided to members/creditors by a written report.

3.22 The Scottish Ministers therefore consider that the provision does not remove any necessary protection.

3.23 Creditors/members will still be able to ask questions of the liquidator concerning information contained in the receipts and payments account (to be published by the AiB under section 192 and sent to creditors/members as part of a progress report). Any general rights under the Insolvency Act to challenge the actions of the liquidator will remain unaffected by this change.

*Section 18(2)(e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise*

3.24 This condition is satisfied as the provisions does not preclude (a) office holders from choosing to hold meetings of creditors should this be considered necessary in the circumstances or (b) creditors to request that a meeting be held. Parties will not, therefore, be prevented from continuing to exercise rights or freedoms which that person might reasonably expect to continue to exercise.

3.25 Obviously as a result creditors/members will no longer have the right to attend a meeting to receive an account of the conduct of the winding up. However, given that these meetings are currently rarely attended by creditors/members and they will receive a progress report containing that information, it does not seem that the right to attend a meeting is one which creditors/members can reasonably expect to continue to exist.

*Removal or reduction of a burden under section 17*

3.26 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

3.27 The burden to be reduced by this provisions falls under section 17(2)(d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

3.28 The provision will remove costly and burdensome requirements associated with the organisation and hosting of creditors meetings. Lifting those burdens will reduce the costs of administering insolvency procedures, bringing benefits to creditors as a whole.

3.29 The amendments put forward within the Order retain all necessary requirements to keep creditors informed of the conduct of insolvency procedures.

**4. REPLACEMENT OF VERIFICATION BY AFFIDAVIT WITH STATUTORY DECLARATION FOR STATEMENT OF AFFAIRS IN RECEIVERSHIP, COMPANY VOLUNTARY WINDING UP AND WINDING UP BY THE COURT**

4.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act.

*Introduction to and reasons for the provision*

4.2 At present sections 66, 95, 99 and 131 of Insolvency Act place a requirement for the statement of affairs in receivership, MVWU, CVWU and winding up by the court procedures in Scotland to be verified as true by affidavit. Changes already introduced in England and Wales as a result of the 2010 LRO have removed this requirement in favour of verification by a statement of truth.

4.3 Articles 4, 8, 9 and 10 will broadly align procedures in Scotland to those in England and Wales, where a statement of truth in accordance with the court rules in England and Wales is used, following the model for Scotland a provision which applies as part of the procedure for administration in Scotland in Schedule B1 to the Insolvency Act, paragraph 47(5). Affidavit procedure will be replaced by a statutory statement on oath under the Statutory Declarations Act 1835. As in England and Wales, criminal penalties will accordingly apply for false statements made<sup>5</sup>. It aims to implement corporate insolvency proceedings in Scotland that are efficient, cost effective and consistent with practices elsewhere in the UK. Reducing the costs associated with the administration of corporate insolvency including those associated with the notary public witness required for an affidavit will result in an increase the funds available to creditors. This might in some cases make the difference between the payment, or not, of a dividend or in other cases increase the amount of the dividend.

*Nature of the proposed amendments*

4.4 Replace the requirement at section 66(2) of the Insolvency Act for the statement of affairs to be verified as true by affidavit and instead require it to be verified by statutory declaration.

4.5 Replace the requirement at section 95(4A) of the Insolvency Act for the statement as to the affairs of the company to be verified as true by affidavit and instead require it to be verified by statutory declaration.

4.6 Replace the requirement at section 99(2A)(b) and (e) of the Insolvency Act for the statement of affairs to be verified as true by affidavit and instead require it to be verified by statutory declaration.

4.7 Replace the requirement at section 131(2A)(b) of the Insolvency Act for the statement of affairs to be verified as true by affidavit and instead require it to be verified by statutory declaration.

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<sup>5</sup> Section 44 of the Criminal Law (Consolidation) (Scotland) Act 1995 will apply, the offence is subject to maximum sentence of imprisonment or a fine or both (rather than contempt of court for an affidavit).

*Section 18 preconditions*

4.8 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied<sup>6</sup>. The following sets out an assessment of this provision against the section 18(2) pre-conditions.

*Section 18(2)(a) - policy objective intended to be secured by the provision could not be secured by non-legislative means*

4.9 The reduction of this burden cannot be achieved by non-legislative means as the burden is created by the legislation in force, which requires amendment. The amendment can only be achieved by means of legislation.

*Section 18(2)(b) the effect of the provision is proportionate to the policy objective*

4.10 The effect of the provision is to introduce a more cost effective, efficient and streamlined process and broadly to align the Scottish insolvency processes to those in England and Wales. The provision is the only means by which this alignment and efficiency in process can be achieved.

4.11 The provision will reduce the burden and cost associated with the verification of statements of affairs in corporate insolvency proceedings.

4.12 Scottish Ministers therefore consider the effect of this provision is proportionate to the policy objective.

*Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it*

4.13 It is in the public interest that corporate insolvency proceedings are efficient and cost effective. It is not possible to say that in every case the costs saved will result in a direct and commensurate increase in dividends for all creditors. However, it is the case that cost savings will increase the funds available in the insolvency across all cases and that will mean higher dividends in some cases or dividends in cases where there would not otherwise have been one.

4.14 Notaries public, in practice usually solicitors, may lose personal income. However, the income from notarising is not large and the work can be disruptive from other more remunerated fee paying work. We do not have evidence to suggest there are objections from the legal profession for these changes. In any event, it is considered that this condition is satisfied, as the adverse effect is outweighed by the utility of the alternate provision proposed.

*Section 18(2)(d) - provision does not remove any necessary protection*

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<sup>6</sup> As above, section 18(8) is not applicable as the Order does not merely restate an enactment.

4.15 In the context of ‘necessary protections’ for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of the provisions of subsections 18(3) to (9) of the 2010 Act.

4.16 The section 18(3) examples of protections, (a) the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office, (b) civil liberties, (c) health and safety of persons, (d) the environment, (e) cultural heritage are not affected by this provision. In particular, the alternate approach proposed in the Order retains the assurance required by the courts that statements made in relation to the legal affairs of receivership and winding up are true, and appropriate sanctions are available in the case of default with no loss of evidential value in this context.

4.17 Subsections 18(4) to (6) are not applicable to the Order.

4.18 Accordingly, the Scottish Ministers consider that the provision does not remove any necessary protection.

*Section 18(2)(e) - the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise*

4.19 The provisions do not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. It makes clear that there is still a requirement for the verification to be legally appropriate. Parties will not be prevented from continuing to exercise any right or freedom. The amendment will only substitute a less onerous, but no less rigorous, form of verification.

*Removal or reduction of a burden under section 17*

4.20 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

4.21 The burden being reduced by this provisions falls under section 17(2)(d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

4.22 The provision will remove costly and burdensome requirements associated with the verification of statement of affairs. Lifting those burdens will reduce the costs of administering insolvency procedures, bringing benefits to creditors as a whole.

## 5. **REMOVAL OF THE RESTRICTION ON USE OF WEBSITES TO SEND NOTICES OR INFORMATION IN LIQUIDATION AND RECEIVERSHIP IN SCOTLAND**

5.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act.

### *Introduction to and reasons for the provision*

5.2 At present section 246B(2) of Insolvency Act places restrictions on the use of websites to send notices or information in liquidation and receivership procedures in Scotland. Changes already introduced in England and Wales as a result of the 2010 LRO have made provision for the use of websites as a means to communicate this information. The provision will improve the efficiency of corporate insolvency procedures in Scotland.

5.3 Article 12 of the Order will extend to Scotland the flexibility offered to practitioners administering corporate insolvency in England and Wales.

5.4 The provision aims to implement corporate insolvency proceedings in Scotland that are efficient, cost effective and consistent with practices elsewhere in the UK and modernise certain aspects of insolvency law to take account of technological developments, particularly the growth in the use of electronic communication over the last 20 years. Reducing the costs associated with the administration of corporate insolvency including those associated with the production and conventional delivery of information notices will result in an increase the funds available to creditors. This might in some cases make the difference between the payment, or not, of a dividend or in other cases increase the amount of the dividend.

### *Nature of the proposed amendment*

5.5 To remove the restriction on the use of websites in section 246B(2) of the Insolvency Act (and consequentially amend section 246B(3)(a)).

### *Section 18 preconditions*

5.6 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied<sup>7</sup>. The following sets out an assessment of this provision against the section 18(2) pre-conditions.

### *Section 18(2)(a) - the policy objective intended to be secured by the provision could not be secured by non-legislative means*

5.7 The reduction of this burden cannot be achieved by non-legislative means as the burden is created by reason of the requirements in the legislation to send the relevant documents or information, which requires amendment. The amendment can only be achieved by means of legislation.

### *Section 18(2)(b) - the effect of the provision is proportionate to the policy objective*

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<sup>7</sup> As above, section 18(8) is not applicable as the Order does not merely restate an enactment.

5.8 The effect of the provision is to introduce a more cost effective, efficient and streamlined process and align the Scottish insolvency administration processes to those in England and Wales, while at the same time ensuring that the relevant recipients still have access to the same documents they are currently sent. The provision is the only means by which this alignment and efficiency in process can be achieved. In accordance with the proposed ISR, recipients will retain the right to request free hard copies.

5.9 Scottish Ministers therefore consider the effect of this provision is proportionate to the policy objective.

*Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it*

5.10 It is in the public interest that corporate insolvency proceedings are efficient and cost effective. Enabling the use of websites as a means to communicate notices or information will reduce the cost and burden associated with corporate insolvency administration. Use of websites will not be compulsory for insolvency practitioners. It is not possible to say that in every case the costs saved will result in a direct and commensurate increase in dividends for all creditors. However, it is the case that cost savings will increase the funds available in the insolvency in all cases and that will mean higher dividends in some cases or dividends in cases where there would not otherwise have been one. While creditors may have to request full free documents, it is not considered that this is onerous enough to outweigh the benefits of the change. The consultation response for the 2010 LRO noted that large quantities of documents are sent out and simply binned or shredded by creditors who have no interest in their contents<sup>8</sup>.

5.11 This condition is satisfied, as there is no known adverse effect on any person affected by the provision and it is in the public interest.

*Section 18(2)(d) the provision does not remove any necessary protection*

5.12 In the context of ‘necessary protections’ for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of the provisions of sub-sections 18(3) to (9) of the 2010 Act.

5.13 None of the section 18(3) examples of protections are affected: - (a) independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office, (b) civil liberties, (c) health and safety of persons, (d) the environment, (e) cultural heritage.

5.14 Subsections 18(4) to (6) are not applicable to the Order.

5.15 No other necessary protection is removed. Save in exceptional circumstances, creditors will be sent notice regarding the availability of the documents in question on the website and the right to request a copy free of charge. The Scottish Ministers consider that the provision therefore does not remove any necessary protection.

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<sup>8</sup> 2010 LRO Explanatory memorandum, p.31, paragraph 22.

*Section 18(2)(e) - the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise*

5.16 The provision allows for practitioners to exercise some discretion in the method by which notices or information are communicated and do not preclude conventional post if required. The right to have the necessary information communicated to creditors, members and others will remain. Parties will not be prevented from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

*Removal or reduction of a burden under section 17*

5.17 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

5.18 The burden being reduced by this provisions falls under section 17(2)(d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

5.19 The provision will remove costly and burdensome requirements associated with communicating notices and information using conventional means. Lifting those burdens will reduce the costs of administering insolvency procedures, bringing benefits to creditors as a whole.



## 6. USE OF ELECTRONIC FORMS FOR RECEIVER'S REPORTS AND CERTAIN LIQUIDATOR APPOINTMENTS

6.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act.

### *Introduction to and reasons for the provision*

6.2 Section 436 of the Insolvency Act makes provision for “things in writing” to include documents in electronic form. However, section 436B(2)(b) and 436B(2)(e) of Insolvency Act exclude the report by a receiver (in terms of section 67(2) of that Act) and the provisions of a winding up of a company in Scotland in relation to the Companies Clauses (Consolidation (Scotland) Act 1845 (in terms of section 111(4) of the Insolvency Act). As a consequence of the current provisions, receivers and liquidators involved in insolvency proceedings in Scotland are precluded from including electronic documents as “things in writing” for the purposes of the Insolvency Act.

6.3 Article 13 will extend the flexibility offered to practitioners administering corporate insolvency in England and Wales for utilising electronic documentation in proceedings.

6.4 The provision aims to implement corporate insolvency proceedings in Scotland that are efficient, cost effective and consistent with practices elsewhere in the UK and modernise certain aspects of insolvency law to take account of technological developments, particularly the growth in the use of electronic communication over the last 20 years. Reducing the costs associated with the administration of corporate insolvency including those associated with the use of electronic documentation will result in an increase the funds available to creditors. This might in some cases make the difference between the payment, or not, of a dividend or in other cases increase the amount of the dividend.

### *Nature of the proposed amendment*

6.5 To omit paragraph (b) section 436B(2) of the Insolvency Act (receiver's report).

6.6 To omit paragraph (e) section 436B(2) of the Insolvency Act (arbitration under the Companies Clauses Consolidation (Scotland) Act 1845).

### *Section 18 preconditions*

6.7 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied<sup>9</sup>. The following sets out an assessment of this provision against the section 18(2) pre-conditions.

### *Section 18(2)(a) - the policy objective intended to be secured by the provision could not be secured by non-legislative means*

6.8 The reduction of this burden cannot be achieved by non-legislative means as the burden is created by reason of the legislation in force, which requires amendment to make the position clear. Provision elsewhere in the Insolvency Act makes provision for certain

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<sup>9</sup> As above, section 18(8) is not applicable as the Order does not merely restate an enactment.

things to be done electronically, creating a doubt for certain remaining provisions without express provision. Accordingly, the amendment can only be achieved by means of legislation.

*Section 18(2)(b) - the effect of the provision is proportionate to the policy objective*

6.9 The effect of the provision is to introduce a more cost effective, efficient and streamlined process and align the Scottish insolvency administration processes to those in England and Wales. The provision is the only means by which this alignment and efficiency in process can be achieved. It is considered that both of these cases are appropriate for electronic provision to be possible. The provision merely allows a choice of the method of doing the relevant thing. There is no obligation on the relevant office-holder to use electronic means.

6.10 Scottish Ministers therefore consider the effect of this provision is proportionate to the policy objective.

*Section 18(2)(c) the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it*

6.11 It is in the public interest that corporate insolvency proceedings are efficient and cost effective. Enabling “things in writing” to be in electronic form will reduce the cost and burden associated with corporate insolvency administration. It is not possible to say that in every case the costs saved will result in a direct and commensurate increase in dividends for all creditors. However, it is the case that cost savings will increase the funds available in the insolvency across all cases and that will mean higher dividends in some cases or dividends in cases where there would not otherwise have been one. The rules in the ISR will mean that those affected will have consented to use of the provisions.

6.12 This condition is satisfied, as there is no known adverse effect on any person affected by the provision and it is in the public interest.

*Section 18(2)(d) the provision does not remove any necessary protection*

6.13 In the context of ‘necessary protections’ for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of the provisions of sub-sections 18(3) to (9) of the 2010 Act.

6.14 None of the section 18(3) examples of protections are affected by this provision.

6.15 Subsections 18(4) to (6) are not applicable.

6.16 For the reasons indicated above, no other necessary protections are removed. The Scottish Ministers consider that the provision does not remove any necessary protection.

*Section 18(2)(e) - the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise*

6.17 The provision allows for practitioners to exercise some discretion in the method by which notices or information are produced and do not preclude the use of non-electronic means if required. Recipients will consent under the ISR to receiving electronic communications at an appropriate address. Parties will not therefore be prevented from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

*Removal or reduction of a burden under section 17*

6.18 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

6.19 The burden being reduced by this provisions falls under section 17(2)(d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

6.20 The provision will remove potential unnecessarily costly and burdensome requirements associated with communicating notices and information using conventional means. Lifting those burdens will reduce the costs of administering insolvency procedures in some cases, bringing benefits to creditors as a whole.

## 7. **REMOVAL OF THE GEOGRAPHICAL RESTRICTION RELATING TO A RECEIVER DEALING WITH A PROPERTY SITUATED OUTWITH SCOTLAND**

7.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act.

### *Introduction to and reasons for the provision*

7.2 At present, stakeholders have argued that section 51(2ZA) of the Insolvency Act creates uncertainty about the effectiveness of a floating charge granted by a Scottish company in certain circumstances since it restricts the ability of a receiver appointed to a Scottish company to deal with assets outwith Scotland. It is also argued that as a result in practice a lender's means of enforcement is removed otherwise than by winding up the company, which increases the expense of the process. It is said that there is a potential impact on lending to Scottish companies.

7.3 Article 2 will remove the current restriction in section 51(2ZA) facing a receiver appointed to a Scottish company in dealing with assets outwith Scotland.

7.4 The provision aims to implement receivership proceedings in Scotland that are effective, efficient and cost effective. Reducing costs associated with the process of receivership and having access to additional assets outwith Scotland will result in an increase in the funds available to creditors. The provision increases the potential for a creditor to pursue receivership rather than the more costly winding up process. This might in some cases make the difference between the payment, or not, of a dividend or in other cases increase the amount of the dividend.

### *Nature of the proposed amendment*

7.5 To remove section 51(2ZA) of the Insolvency Act.

### *Section 18 preconditions*

7.6 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied<sup>10</sup>. The following sets out an assessment of this provision against the section 18(2) pre-conditions.

### *Section 18(2)(a) - the policy objective intended to be secured by the provision could not be secured by non-legislative means*

7.7 The reduction of this burden cannot be achieved by non-legislative means as the burden is created by reason of the legislation, which requires amendment. This amendment can only be achieved by means of legislation.

### *Section 18(2)(b) - the effect of the provision is proportionate to the policy objective*

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<sup>10</sup> As above, section 18(8) is not applicable as the Order does not merely restate an enactment.

7.8 The effect of the provision is to introduce an effective, efficient and cost effective process. The provision aims to ensure that the receivership can have effect in the most cost effective manner possible, taking account of feedback from expert stakeholders. The removal has been consulted on and is supported by stakeholders, including the judges of the Court of Session who formerly agreed with creating the restriction in 2011<sup>11</sup>. The provision is the only means by which this alignment and efficiency in process can be achieved.

7.9 Scottish Ministers therefore consider the effect of this provision is proportionate to the policy objective.

*Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it*

7.10 It is in the public interest that receivership is effective, efficient and cost effective. Enabling company insolvency in Scotland to be administered through a receivership process even where floating charge exists over a property outwith Scotland will allow a more cost effective process. It is not possible to say that in every case the costs saved will result in a direct and commensurate increase in dividends for all creditors. However, cost savings will increase the funds available which may mean higher dividends in some cases or dividends in cases where there would not otherwise have been one.

7.11 This condition is satisfied, as there is no known adverse effect on any person affected by the provision and it is in the public interest.

*Section 18(2)(d) - the provision does not remove any necessary protection*

7.12 In the context of ‘necessary protections’ for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of the provisions of sub-sections 18(3) to (9) of the 2010 Act.

7.13 None of the section 18(3) examples of protections: (a) the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office (b) civil liberties, (c) health and safety, (d) the environment, (e) cultural heritage are affected by this provision.

7.14 Subsections 18(4) to (6) are not applicable to the Order.

7.15 No other necessary protection is removed. The court will continue to supervise the receivership under the general rules which the Scottish courts apply to receivership in Scotland, applying the general rules of jurisdiction and conflict of laws rules in international private law more widely. The Scottish Ministers consider that the provision does not remove any necessary protection.

*Section 18(2)(e) - the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise*

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<sup>11</sup> Section 51(2ZA) was inserted by SSI 2010/140.

7.16 For the reasons noted at paragraph 9.15 parties will not therefore be prevented from continuing to exercise any right or freedom which that person might reasonable expect to continue to exercise.

*Removal or reduction of a burden under section 17*

7.17 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

7.18 The burden being reduced by this provisions falls under section 17(2)(d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

7.19 The provision will enable receivership proceedings to take place under the most effective and efficient process. It will do so to the extent of removing the restrictions of receivership in respect of property outwith Scotland.

## 8. **REMOVAL OF REDUNDANT RECEIVERSHIP PROVISION ON EMPLOYEES' WAGES**

8.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act.

### *Introduction to and reasons for the provision*

8.2 Article 3 repeals one element of the priority given to employees' wages in receivership, as the type of employment contract to which it relates no longer exists.

8.3 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.

8.4 So as not to discriminate against employees on these schemes, section 57(2D) of the Insolvency 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.

8.5 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. Article 3 accordingly repeals that provision to simplify the legislation.

### *Nature of the proposed amendment*

8.6 To remove section 57(2D) of the Insolvency Act.

### *Section 18 preconditions*

8.7 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied<sup>12</sup>. The following sets out an assessment of this provision against the section 18(2) pre-conditions.

### *Section 18(2)(a) - the policy objective intended to be secured by the provision could not be secured by non-legislative means*

8.8 This provision has no effect and merely tidies up redundant provision. Accordingly it cannot be achieved by non-legislative means.

### *Section 18(2)(b) - the effect of the provision is proportionate to the policy objective*

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<sup>12</sup> As above, section 18(8) is not applicable as the Order does not merely restate an enactment.

8.9 The provision is redundant. Accordingly, its removal has no effect which is proportionate to the policy objective of simplifying the legislation.

*Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it*

8.10 The provision as redundant is of no effect. There is no adverse effect on any person so a fair balance is struck.

*Section 18(2)(d) - the provision does not remove any necessary protection*

8.11 In the context of ‘necessary protections’ for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of subsections 18(3) to (9) of the 2010 Act. The provision has no effect so no protection is removed, including none of the section 18(3) examples: (a) the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office (b) civil liberties, (c) health and safety, (d) the environment, (e) cultural heritage. Subsections 18(4) to (6) are not applicable. No other necessary protection is removed. The provision does not remove any necessary protection.

*Section 18(2)(e) - the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise*

8.12 As noted, the provision as redundant is of no effect. No one is prevented from exercising any right or freedom they might reasonably expect to continue to exercise.

*Removal or reduction of a burden under section 17*

8.13 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

8.14 The burden reduced by this provisions falls under section 17(2)(c) (obstacle to best regulatory practice) and (d) (obstacle to efficiency, productivity or profitability) of the 2010 Act. The provision will have the modest benefit of simplifying the legislation by removing a redundant provision.



9. **APPLICATION BY A LIQUIDATOR FOR THE EARLY DISSOLUTION OF THE COMPANY**

9.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act.

*Introduction to and reasons for the provision*

9.2 Currently where it appears to the liquidator that the realisable assets of the company are insufficient to cover the expenses of the winding up, the liquidator can apply to the court for the early dissolution of the company, rather than convening a final meeting of creditors. These meetings are rarely attended by creditors so the costs of summoning and holding them may in some cases be incurred to little useful purpose.

9.3 There is also variation in the interpretation between different courts of the timing of when this application should be made.

9.4 The proposed amendment in article 11 will bring clarity and consistency between the courts in Scotland and will align the wording with the equivalent section of the Insolvency Act (section 202) in England and Wales.

*Nature of the proposed amendment*

9.5 To insert the words “at any time” in section 204(2).

*Section 18 preconditions*

9.6 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied<sup>13</sup>. The following sets out an assessment of this provision against the section 18(2) pre-conditions.

*Section 18(2)(a) - the policy objective intended to be secured by the provision could not be secured by non-legislative means*

9.7 The reduction of this burden cannot be achieved by non-legislative means. The burden arises out of doubts arising in the context of the current legislation about when an application for early dissolution can take place. As the burden is created by reason of the legislation, this amendment can only be achieved by means of legislation.

*Section 18(2)(b) - the effect of the provision is proportionate to the policy objective*

9.8 The effect of the provision is to clarify the existing law so it is beyond doubt on the face of the legislation that an application can be made to the court for early dissolution at any time, notwithstanding the rest of the liquidation process. It does not remove the discretion of the court as to whether and on what terms early dissolution should be granted.

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<sup>13</sup> As above, section 18(8) is not applicable as the Order does not merely restate an enactment.

9.9 Scottish Ministers therefore consider the effect of this provision is proportionate to the policy objective. The provision has been consulted on and is supported by the key stakeholders.

*Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it*

9.10 It is in the public interest that liquidation is efficient and cost effective. Enabling the liquidator to apply for early dissolution of the company can remove the need to convene a final meeting of the creditors in cases where this is not appropriate or cost effective. This applies to cases where there is no prospect of a dividend to the creditors so there will be no adverse effect on them. As noted, the courts would retain the ability to refuse any application if they deemed it was not appropriate and the liquidators would require to seek their discharge and the subsequent dissolution of the company by other means.

9.11 This condition is satisfied, as there is no known adverse effect on any person affected by the provision and it is in the public interest.

*Section 18(2)(d) - the provision does not remove any necessary protection*

9.12 In the context of ‘necessary protections’ for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of the provisions of sub-sections 18(3) to (9) of the 2010 Act.

9.13 None of the section 18(3) examples of protections: (a) the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office (b) civil liberties, (c) health and safety, (d) the environment, (e) cultural heritage are affected by this provision.

9.14 Subsections 18(4) to (6) are not applicable to the Order.

9.15 No other necessary protection is removed. The court will continue to supervise the liquidation under the general rules which the Scottish courts apply to liquidation in Scotland, applying the general rules of jurisdiction and conflict of laws rules in international private law more widely. The Scottish Ministers consider that the provision does not remove any necessary protection.

*Section 18(2)(e) - the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise*

9.16 For the reasons noted at paragraph 9.14 parties will not therefore be prevented from continuing to exercise any right or freedom which that person might reasonable expect to continue to exercise.

*Removal or reduction of a burden under section 17*

9.17 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by

the order would remove or reduce any burden or burdens within the meaning of section 17(1).

9.18 The burden reduced by this provisions falls under section 17(2)(c) (obstacle to best regulatory practice) and (d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

9.19 The provision will have the modest benefit of clarifying the interpretation of the legislation by the Scottish courts.

## 10. THE PUBLIC SERVICES REFORM (INSOLVENCY) (SCOTLAND) ORDER 2016 – CONSULTATION RESPONSE

10.1 This section of the document discusses the response from the 60 day consultation and the changes made to the Order.

10.2 An issue was raised by stakeholders concerning the application of the Order to Limited Liability Partnerships (“LLPs”). It was felt that the position was unclear and as a result, stakeholders may require to seek legal advice or direction from the courts. The position is that where relevant the amendments made by the Order do apply to LLPs 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 Insolvency Act 1986, 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 1986 Act. For clarity, this information has been added to the Explanatory Note which accompanies the Order. Also, minor consequential amendments and repeals are proposed to tidy up references in the Limited Liability Partnership Regulations 2001 and the Limited Liability Partnership (Scotland) Regulations 2001 following the changes made by the Order, and this is now reflected at article 7(2) and (3) of the Order.

10.3 A change to section 204 of the 1986 Act was suggested in order to clarify that an application under that section for early dissolution of a liquidation can be made at any time. It was said that there can be variation as to how this provision is interpreted across different sheriff courts, with different practices developing in relation to the circumstances when early dissolution can be applied for (see section 9 of this Document above). Having considered this matter, and as the wording “at any time” is used in the equivalent provision for England and Wales at section 202 of the 1986 Act, the recommendation has been accepted and is included in the Order at article 11.

10.4 As was indicated in the initial proposed Explanatory Document, 3 of the proposed changes from the initial draft of the Order, as laid in October 2015, are due to be superseded by the coming into force of the provisions in the Small Business, Enterprise and Employment Act 2015 (“the 2015 Act”). In view of the likely timings of the commencement of those provisions and feedback from stakeholders, the original commencement dates for the main articles of the Order have been changed from 1 October 2016 to allow for greater flexibility and pegged to the commencement of the relevant provisions of the 2015 Act – in the interests of certainty, specifically section 122(2) which abolishing requirements to hold certain meetings in company insolvency. The result of this is that former article 8 (members’ voluntary winding up: notice of creditors’ meeting by means other than post), article 10 (creditors’ voluntary winding up: notice of creditors’ meeting by means other than post), and article 13 (remote attendance at meetings; winding up in Scotland and receivership) from the initial draft of the Order have now been removed.

10.5 Reference is also made to the Order, which contains minor drafting changes, following comments made, including to clarify the commencement provisions.

10.6 The savings arrangements on the application of the amendments contained in the Order was an issue raised by some respondents to the consultation. It was suggested that the savings provisions within the Order could be reviewed and amended so that they could be

utilised to the fullest possible extent, and not be limited to new appointments. It was thought allowing the use of the provisions irrespective of when the case commenced would introduce significant advantages and efficiencies into a greater number of insolvency proceedings. However, given that the purpose of the Order is to align the corporate insolvency regime in Scotland with that in England and Wales, and as the corresponding provisions in England and Wales did not have effect on insolvency processes which had already begun, this could in some cases have an effect on the rights of parties, the savings provisions as drafted are deemed appropriate. It is further thought appropriate not to change the savings arrangements on the basis of the general principle of ensuring effects on claims are predictable by parties entering into legal relations.

10.7 It was suggested by consultees that an additional amendment should be introduced to provide a specific power in legislation for a liquidator in a court winding up to seek the direction of the court, as is provided for in voluntary winding up at section 112 of the 1986 Act. In order to achieve this at present in a court winding up, the provisions at section 169(2) of the 1986 Act give the liquidator the same powers as a trustee in a bankrupt estate. It was suggested that the introduction of specific powers without reference to the Bankruptcy (Scotland) Act 1985 would bring clarity and cost savings. The Scottish Government considers this a matter which requires more careful consideration, given the wide scope of the effect of section 169(2), and issue about its effect<sup>14</sup>. It may also in that light raise issues relating to competence and reserved/devolved powers, as well as consideration with the court authorities about related provision in court rules. As such, and due to the timescales involved for the Order, such provision has therefore not been included. However, the Scottish Government is keen to convene a Working Group for the purposes of the modernisation of the insolvency rules for Scotland, and this is a matter which could be explored further by the Group, in addition to the modernisation of the Insolvency Rules made under the 1986 Act.

10.8 It was also suggested that in order to achieve a more efficient appointment procedure in relation to receivers, and particularly joint receivers, who may be in different locations, consideration should be given to allow the appointment document to be authenticated electronically. This would suggest an amendment to section 53(1) of the 1986 Act and a consequential amendment to section 436B(2)(a). However, the current reference in section 53(1) is to an instrument “subscribed” in accordance with the Requirements of Writing (Scotland) Act 1995. It is understood that in practice the instrument takes the form of a traditional (paper and wet ink signature) document<sup>15</sup>. In the Requirements of Writing (Scotland) Act 1995 ‘subscription’ is used in relation to traditional documents with the equivalent term used for electronic documents being ‘authentication’. Enabling the instrument to be entered into as a full electronic document will involve discussion and work with the registrar of companies to ensure that provision for an instrument of appointment in electronic form would work for practical purposes. In these circumstances, there are no changes to section 53(1) or repeal of section 436B(2)(a) of the 1986 Act in this Order at this time. However, given that the Scottish Government is keen to convene a Working Group for the purposes of the modernisation of the insolvency rules for Scotland, that Group could consider this issue, and the necessary discussions could be undertaken. If then, in due

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<sup>14</sup> discussed in the Inner House of the Court of Session in *Joint Liquidators of the Scottish Coal Co Ltd, Noters* (2014) S.C. 372.

<sup>15</sup> Rule 3.1. of the Insolvency Rules 1986 as amended in any event provides for a written docquet on the instrument of appointment.

course, changes to section 53 were considered necessary or appropriate, these could be made at a later date, including by a future Public Services Reform Order if appropriate.

10.9 The Insolvency Amendment (Scotland) Rules 2014<sup>16</sup> introduced rule 4.68B to the Insolvency (Scotland) Rules 1986, which deals with unclaimed dividends to remove references to the Bankruptcy (Scotland) Act 1985 from the 1986 Rules. It was said in one consultation response that rule 4.68B set out similar provisions to section 193 of the 1986 Act, which required reference to section 58 of the Bankruptcy (Scotland) Act 1985. It was therefore suggested that there was tension between primary and secondary legislation, and that section 193(3) of the 1986 Act may need to be repealed. However, it is not considered that there is a difficulty with the substance of section 193(3), and it is considered that any necessary change would be a change to the insolvency rules, where indeed it is considered that a change is required to be made. That being the case, this is a matter which can be considered when modernising the rules themselves.

10.10 It was suggested that the provisions for prosecution of delinquent directors in liquidations should be extended to appointments other than liquidations, it being in the public interest for such activities to be reported no matter the insolvency procedure. However, this is something that was considered to be out with the scope of the Order, particularly where it appears that there are no equivalent provisions in England and Wales. Although this is something which could be considered further in future, and if amendments were necessary or appropriate, it may be possible to take those forward at a later point. In any event, Scottish Ministers could not make changes for Scotland in the context of Company Voluntary Arrangements and administrations as they are reserved matters, so action would only be possible in relation to receivership. Further, as was noted by the stakeholder, there are other mechanisms in place for reporting in this context such as the Company Directors Disqualification Act 1986. There is also nothing to stop a receiver reporting matters to the police or other relevant authorities should the office-holder consider that it is appropriate to do so in any particular case.

10.11 A recommendation was made that the amendments brought about by the Scotland Act 1998 requiring filing requirements to the Registrar of Companies and Financial Services Authority (now the Financial Conduct Authority) to be made to AiB, should be revoked. The requirements in some instances were said to result in additional costs being incurred by way of double filing, while it creates uncertainty for creditors and other stakeholders as to where information is held. There were also concerns about a lack of transparency in relation to Scottish corporate insolvency procedures as filings made with AiB are not available via a public register. However the changes to filing requirements at the time of devolution reflects the divide between the reserved and devolved aspects of insolvency, with devolved functions transferred to an office-holder within the Scottish Administration; AiB. Given the policy reasoning behind these provisions as part of the devolution settlement, the Scottish Government do not consider it appropriate to introduce such changes in the present Order.

10.12 A stakeholder raised for consideration the possibility of making changes to the law regarding the powers of a liquidator to disclaim onerous property following the decision in *Joint Liquidators of the Scottish Coal Co Ltd, Noters (2014) S.C. 372*, particularly as specific provision is provided for a liquidator to disclaim onerous property in sections 178 to 182 of the 1986 Act in relation to companies being wound up in England and Wales. Until

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<sup>16</sup> SSI 2014/114.

the Scottish Coal case it was thought that provisions within the 1986 Act which conferred the same powers of a trustee on a liquidator provided a way for a liquidator in Scotland to address the issues in sections 178 to 182 of the 1986 Act in a Scottish winding up. However, amending the law here raises some particularly significant policy and legal issues which would have to be fully considered. As a consequence, and in these circumstances, the view was taken that it was not appropriate to consider this matter as part of the Order. Instead, this is something which would merit more detailed future consideration.

10.13 Following the Bankruptcy and Diligence etc. (Scotland) Act 2007, which replaced “Permanent Trustee” with “Trustee”, it was highlighted that any such references in the 1986 Act should be updated accordingly. This issue has been recognised, and will be addressed by the Order under section 104 of the Scotland Act 1998 planned in consequence of the consolidating Bankruptcy (Scotland) Bill currently before the Scottish Parliament, meaning that there is no requirement to include such amendments in the Order.

10.14 It was suggested that further consideration should be given to aspects of section 440 of the 1986 Act which would benefit from amendment or repeal in conjunction with the development of the new insolvency rules for Scotland (in particular the fact that section 246 of the 1986 Act on the unenforceability of liens on books etc. against a liquidator does not extend to Scotland). The position is that as section 440 is the extent provision, it will require to be considered in connection with any wider proposed amendment of the 1986 Act. Consideration will be given to this issue in due course.

10.15 A number of recommendations from stakeholders concerned disentangling provisions in the 1986 Act from provisions in the Bankruptcy (Scotland) Act 1985. While a broader objective of making the 1986 Act stand independently of the 1985 Act for ease of use is supported, it is felt that this work falls beyond the remit of the Order. The objective is to amend the 1986 Act before modernised insolvency rules for Scotland are made in order to align the relevant provisions on receivership and the process of winding up in Scotland with the equivalent provisions for England and Wales. Further, removing references to the 1985 Act from the 1986 Act and replacing them with self-contained provisions requires careful consideration, and it was felt that the necessary consideration would result in a delay to the Order, putting at risk the overall aim of modernised Insolvency Rules for Scotland coming into force at the same time, or not long after, updated rules for England and Wales. If this project is subject to delay such that it will create a significant on-going mismatch between the rules North and South of the border, this would be considered more detrimental than retaining references to the 1985 Act in the 1986 Act. However, disentangling the 1985 Act references is something which does have merit, and the Scottish Government is therefore keen to give this matter further consideration. As such, it would seem appropriate that the Working Group which AiB is convening as part of the modernisation of the insolvency rules for Scotland should be tasked with considering the proposed disentangling of the 1985 Act and the 1986 Act in more depth, with a view to assessing whether that might be possible at a later date.

10.16 With regards to disentangling, it was specifically suggested that at section 101(4) of the 1986 Act the reference to powers and duties of commissioners on a bankrupt’s estate should be removed, with the reference being only to such powers and duties as may be conferred on the liquidation committee by the rules. However no action is taken on this point for the purpose of the Order, as it is an issue which is made clear by the provision in the Insolvency Rules 1986. The powers conferred are clear because they have to be

provided for in the rules, so an amendment here would only be a change to the enabling power – there is no lack of clarity on the powers available. A change to the scope of the powers to make the rules has to be considered more carefully for what it should cover.

10.17 In accordance with section 26(4) of the 2010 Act, as noted above the key stakeholders were then given a further short opportunity to comment on the revised Order and the proposed changes. One stakeholder indicated they were content and no objections or further representations were received.