

SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 10: INSOLVENCY

Regulation of insolvency practitioners: amendments to existing regime

Section 137: Recognised professional bodies: recognition

776. This section replaces section 391 of the Insolvency Act 1986. It relates to the recognition of professional bodies and sets out the way in which a body may apply to the Secretary of State to become a Recognised Professional Body ('RPB'). It requires that, going forward, RPBs rules and practices for authorising and regulating insolvency practitioners ('IPs') are designed to ensure that the regulatory objectives (as set out in section 138) are met.
777. Currently, the Insolvency Act does not prescribe the way in which a body may make an application for recognition, this section inserts new section 391A which provides for an application process.
778. This section will not affect the recognition of any current RPBs under the existing section 391.

Section 138: Regulatory objectives

779. This section inserts new sections 391B and 391C into the Insolvency Act 1986.
780. These new sections define the meaning of regulatory functions and regulatory objectives which will apply to RPBs. At present, these do not exist in law.
781. The introduction of regulatory objectives will provide RPBs with a framework within which to carry out their activities. Regulatory objectives are intended to encourage consistency of approach, and to provide a reference point for discussions between IPs and RPBs, and between RPBs and the Secretary of State "oversight" regulator.
782. New section 391B sets out that RPBs must act and carry out their functions in a way that is compatible with the regulatory objectives.
783. The regulatory objectives are set out in new section 391C and are intended to ensure that:
- i. the RPBs have a system of regulating IPs that:
 - a. delivers fair treatment for persons affected by an IPs' acts and omissions;
 - b. reflects the regulatory principles: that the RPB's regulatory activities are transparent, accountable, proportionate, consistent and targeted; and

- c. ensures consistent outcomes;
- ii. the RPBs are encouraging an independent and competitive IP profession, whose members deliver high quality services at a fair and reasonable cost, act with transparency and integrity and consider the interests of creditors in the case;
- iii. IPs seek to maximise returns to creditors and are prompt in making those returns; and
- iv. the public interest is protected and promoted during the insolvency process.

Section 139: Oversight of recognised professional bodies

- 784. RPBs are bodies, or professional organisations, who authorise IPs to act. They regulate these IPs by maintaining and enforcing rules for securing that those who they permit to act, are fit and proper persons to do so and have the correct levels of education, experience and practical training. The RPBs also have the power to discipline members. A body may be recognised by the Secretary of State pursuant to section 391(1) or (2).
- 785. This section introduces new sections 391D to 391K to the Insolvency Act 1986. These sections set out the way in which the Secretary of State will be able to sanction RPBs and also the appeals process available to them.
- 786. New sections 391D and 391E of the Insolvency Act 1986 will allow the Secretary of State to issue directions to an RPB; they set out what sort of requirements the directions may impose and the procedure for issuing such directions. The Secretary of State would consider using the power to direct an RPB to take such steps as the Secretary of State considers will counter any adverse impact of a failure to act compatibly with the objectives, mitigate its effect or prevent its occurrence or recurrence. An example which might prompt a direction might be if the RPB has failed to address the Secretary of State concerns following a review of the way the RPB handles complaints or an RPB's failure to carry out a targeted monitoring visit of its IPs where the Insolvency Service has requested that it be done.
- 787. These sections set out the procedure and the way in which the Secretary of State may direct a recognised body to act following an act or omission which has resulted in one or more of the regulatory objectives not being complied with or which has an unfavourable impact on those objectives. The Secretary of State must give at least 28 days notice to the RPB of the proposed direction. The RPB will have the opportunity to make written representations to the Secretary of State, which must be considered before a direction is imposed.
- 788. New sections 391F, 391G, 391H and 391I concern the ability of the Secretary of State to impose a financial penalty on an RPB if it has failed to comply with a direction imposed under section 391D, or any other requirement imposed on it under the Insolvency Act 1986 or secondary legislation made under that Act, and it is appropriate to impose a financial penalty. Such a penalty should deter future transgressions. Any sums paid over to the Secretary of State under this provision will be paid into the Consolidated Fund. There is no financial limit on the penalty. Before imposing a financial penalty, the Secretary of State must give at least 28 days notice of the proposed financial penalty, during which time the RPB can make written representations to the Secretary of State. Before imposing any penalty, the Secretary of State must have considered any such representations.
- 789. An RPB may appeal a financial penalty on a number of grounds. These grounds are set out in new section 391H and include that the Secretary of State was not acting within his powers; that the RPB had in fact complied with the requirement – that is the financial penalty should not have been imposed; the correct procedure had not been followed; the amount of the penalty was unreasonable; or that the time given to pay was unreasonable.

790. New sections 391J and 391K introduce a reprimand as a sanction available to the Secretary of State. This means that the Secretary of State will be able to publish a statement reprimanding a RPB for an act or omission which has an adverse impact on one or more of the regulatory objectives. This provision enables the Secretary of State to publicly register his disapproval of a RPB's act or omission if it has (or has had) an adverse impact on the regulatory objectives. The RPB must have been given at least 28 days notice of the Secretary of State's proposal to use the power under this section and the Secretary of State must consider any written representations that are made by the RPB ahead of publishing the reprimand.
791. New section 415(1B) clarifies that the fee the Secretary of State is able to charge the RPBs for the maintenance of their recognition can include, but is not limited to, the costs in connection with a direction issued to an RPB under sections 391D and E, a reprimand to an RPB given under sections 391J and K and revocation of an RPB's recognition, where it has been requested under section 391N.

Section 140: Recognised professional bodies: revocation of recognition

792. This section introduces new sections 391L, 391M and 391N to the Insolvency Act 1986. It relates to removal of an RPB's recognition and subsequently, its ability to regulate and approve a person to act as an insolvency practitioner. The revocation of the recognition to authorise insolvency practitioners can be at the instigation of the Secretary of State (section 391L) or at the instigation of the RPB itself (section 391N). At present, revocation of recognition is the only sanction available to the Secretary of State.
793. Currently, the Secretary of State is not required to follow a statutory procedure before revoking an RPB'S recognition. The new sections inserted by this section introduce the conditions to be met before a revocation order is made, the procedure to be followed and the date from which a revocation order comes into effect. This section allows for two types of revocation order: a revocation order and a partial revocation order. Partial revocation of a body's recognition will mean that the RPB is no longer recognised as capable of providing IPs with both full and partial authorisation, only as capable of providing partial authorisations of the kind specified. Full authorisation enables individuals to act in relation to both company and personal insolvency, whilst partial authorisation enables individuals to act only in relation to either company or personal insolvency.

Section 141: Court sanction of insolvency practitioners in public interest cases

794. This section introduces new sections 391O, 391P, 391Q and 391R to the Insolvency Act 1986. These new sections introduce the power for the Secretary of State to apply to the court for a direct sanctions order against an IP when it is in the public interest for the Secretary of State to take such action.
795. New section 391O sets out the sanctions that the court may impose, if certain conditions set out in new section 391Q are satisfied (see below), which include requiring the relevant RPB to take the necessary steps to ensure that:
- i. the IP is no longer authorised to act as such;
 - ii. the IP is no longer fully authorised to act, but may be partially authorised to act as specified;
 - iii. the IP's authorisation is suspended;
 - iv. other restrictions (as specified in the court order) are placed on the IP while so acting; and
 - v. the IP repays part of what he/she has received or expects to receive as remuneration from a particular case to particular creditor(s).

796. The Secretary of State will not be able to seek a direct sanctions order against an IP whose authorisation to act as an IP is or was granted by the Department of Enterprise, Trade and Investment in Northern Ireland. This is because the Secretary of State is not responsible for overseeing the regulation of such IPs.
797. New section 391P sets out that the Secretary of State should only apply to the court for a direct sanctions order if it appears to the Secretary of State that it would be in the public interest for the order to be made. As part of its consideration of the application, the court will have regard to what, if any, disciplinary action the relevant RPB may have taken against the IP.
798. New section 391Q sets out the conditions that must be satisfied before a court will impose a direct sanctions order. Of these conditions the first must be satisfied (that is that the person acting as an IP has not complied with the rules of their profession) and at least one other. The other conditions include: that the person is not a fit and proper person to act as an IP; the person is not a fit and proper person to act as a fully authorised IP (but could be to partially act); that a loss has been suffered to creditors as a result of the IP's failure to comply with the rules of their profession.
799. New section 391R allows the Secretary of State to give a direction to the relevant RPB, in relation to a person acting as an IP who is authorised by them, to impose any sanction available under a direct sanctions order, provided the IP has consented to this. This would occur instead of the Secretary of State applying to the court for a direct sanctions order. The conditions set out in 391Q also apply to a direct sanctions direction.

Section 142: Power for Secretary of State to obtain information

800. This section introduces new section 391S to the Insolvency Act 1986 which gives the Secretary of State the power to require information from specified people to enable the Secretary of State to carry out functions under Part 13 of the Insolvency Act 1986.
801. The people that the Secretary of State can in writing require information from are:
- i. an RPB;
 - ii. any individual who is or has been authorised to act as an IP; and
 - iii. any person who is connected to such an individual.
802. A person 'connected' to the IP in question includes an employee of that individual, a person who acted on that IP's behalf in any other way and; the employer of the IP.

Section 143: Compliance orders

803. This section introduces new section 391T into the Insolvency Act 1986. It will allow the Secretary of State to make an application to the court if it appears that an RPB has failed to comply with a requirement imposed under Part 13 of the Act or that any person has failed to comply with a requirement under section 391S.
804. This section will apply to an RPB which has failed to comply with, for example, a direction imposed under new section 391D or to a person who has failed to provide the Secretary of State with the information required under new section 391S.