EXPLANATORY MEMORANDUM TO

THE CORPORATE INSOLVENCY AND GOVERNANCE ACT 2020 (CORONAVIRUS) (AMENDMENT OF SCHEDULE 10) REGULATIONS 2021

2021 No. 1029

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument makes provision to introduce new tapering measures restricting the use of winding up petitions with effect from 1 October 2021. This instrument implements these measures to 31 March 2022.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The instrument is made using the power to introduce certain temporary provisions in section 20 of the Corporate Insolvency and Governance Act ("the CIG Act").

3.2 The power to introduce insolvency measures under section 20 of the CIG Act may only be used if the Secretary of State considers it expedient for purposes related to an effect of Coronavirus and is subject to criteria and restrictions set out in sections 21 and 22 of the CIG Act which must be complied with for the measures to be introduced. These include that the power may only be used in specific circumstances including to help to reduce the number of corporate entities entering insolvency or restructuring proceedings, mitigate the effect in a rise in case numbers and mitigate the impact of corporate insolvency on business, for example through constraints on people' ability to work, or public health constraints. The Secretary of State must be satisfied that the use of the power is urgent and proportionate.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England, Wales and Scotland.

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5. European Convention on Human Rights

5.1 The Minister for Climate Change and Corporate Responsibility, Lord Callanan, has made the following statement regarding Human Rights:

"In my view the provisions of Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) Regulations 2021 are compatible with the Convention."

6. Legislative Context

6.1 The CIG Act makes both permanent and temporary changes to the corporate insolvency landscape, as well as changes to the law relating to the governance and regulation of companies and other entities. The provisions concerning corporate governance, and some of the provisions concerning corporate insolvency, are intended to be temporary. These temporary provisions are designed to help UK companies and other entities during the difficult time caused by coronavirus. The CIG Act, most recently amended by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) (No. 2) Regulations 2021 (S.I. 2021/718), provides that some of the temporary insolvency measures, including those restricting the use of statutory demands and issuing of winding up petitions, will automatically expire on 30 September 2021 unless regulations are made to prolong the period within which those provisions have effect.

6.2 The power to introduce new provisions to replace the current temporary provisions is given by section 20 of the CIG Act.

6.3 This instrument is the fourth exercise of the power given by section 41(1)(b) of the CIG Act. The instrument prolongs the duration of one of the four temporary provisions specified in section 41(2), specifically: Schedule 10 (winding-up petitions: Great Britain). The instrument provides that the measures contained in Schedule 10 are to expire on 31 March 2022.

7. Policy background

What is being done and why?

7.1 The CIG Act included temporary measures restricting the use of statutory demands and company winding up petitions to protect businesses affected by restrictions introduced in response to the Coronavirus pandemic. These measures placed a high bar for creditors seeking issue a winding up petition and have been extended several times. As restrictions on businesses have now been removed the current measures are to be replaced with new tapering measures, that will help business get back to normal without facing a "cliff edge" following withdrawal of the current provisions.

Explanations

What did any law do before the changes to be made by this instrument?

7.2 The current temporary insolvency measures introduced by the CIG Act placed restrictions on the use of statutory demands and company winding up petitions and are currently due to expire on 30 September 2021.

Why is it being changed?

7.3 The reason for introducing these temporary insolvency measures is to create a tapering effect when current temporary insolvency measures lapse at the end of September and protect companies from aggressive creditor enforcement as the economy opens up whilst allowing business to get back to a more normal way of working. This will enable companies that are viable but cash poor due to recent trading restrictions to make use of the range of tools available to them and where appropriate to work out a rescue, and non-viable companies that cannot be saved to exit the marketplace with their productive assets recycled to the economy.

What will it now do?

7.4 The new targeted temporary measures to support viable businesses until 31 March 2022 are:

(a) A new requirement for creditors to demonstrate that they have sought to negotiate repayment of a debt, before seeking to wind a company up. A creditor must send a notice to the company giving it 21 days to respond with proposals for paying the debt. Creditors will be required to confirm to the court that they have sent the notice, whether they have received any proposals from the company, and (if so), state why they are not satisfactory. In exceptional circumstances the 21-day response period can be shortened if the court agrees.

(b) The debt owed must be at least £10,000.

(c) Petitions cannot be brought in respect of a commercial rent debt until end of March 2022 unless the creditor can prove that the non-payment of the debt is not related to the pandemic. The Ministry for Housing, Communities and Local Government has extended the moratorium on the forfeiture of commercial tenancies until 25 March 2022 to allow time for the implementation through primary legislation of a rent arbitration scheme, and this carve out serves to not undermine this scheme before it is implemented.

7.5 Where a petition is already in place under the present rules the court's discretion to allow a petition to be withdrawn will only be exercised where it is satisfied by evidence that there has been full compliance with Rule 7.13 of the Insolvency Rules 2016.

7.6 It is recognised that these temporary measures are a significant intervention into the normal working of insolvency law, in particular the rights of creditors, therefore the Government will keep these temporary measures under constant review whilst they remain in force.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 Not applicable.

10. Consultation outcome

10.1 There has been no public consultation in relation to this instrument, however Government has engaged informally with a range of stakeholders.

11. Guidance

11.1 The Insolvency Service issues regular bulletins to interested parties; these will be used to raise awareness of the further extension at the time of laying this instrument.

12. Impact

12.1 There will be a positive impact on all businesses, charities or voluntary bodies that may be subject to a winding-up petition due to their inability to pay debts as a result of coronavirus, as creditors will need to contact them seeking their repayment

proposals before presenting a winding up petition, giving essential breathing space to them to negotiate with their creditors or seek a rescue plan, or both. There will be additional positive impact for SMEs who are more likely to have creditors with a value of less than £10,000. There will be an adverse impact on those creditors that have outstanding debts owed to them by a company as they will temporarily be unable to present a winding up petition unless they are able to demonstrate that they have fulfilled the criteria. There will also be an adverse effect upon creditors who are owed commercial rent debts. However, the Government assesses this temporary rebalancing of risk as an appropriate intervention, alongside the Government's wider fiscal support and other regulatory interventions.

12.2 The impact on the public sector falls on public sector creditors such as HMRC and local authorities that use winding up petitions to enforce national and local taxation and other related debts. However, the Government has assessed that any impact is an appropriate temporary intervention alongside with the Government's wider interventions.

12.3 An impact assessment has not been prepared for this instrument as it falls under the Civil Contingencies Exclusion and the administrative requirement to account for the impact of the measures on the Business Impact Target required by the better regulation framework will be done at the appropriate time. A full impact assessment was carried out for the CIG Act which considered costs & benefits in a steady state economy: https://publications.parliament.uk/pa/bills/cbill/58-01/0128/IA200519.pdf.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise the regulatory burdens on small businesses though it is expected that smaller sized businesses are more likely to benefit from the restrictions this instrument temporarily imposes.

14. Monitoring & review

14.1 The instrument does not include a statutory review clause; however, the Government will continue to monitor the need for these measures. The legal effect of the provisions in this instrument will automatically expire on the date that is specified in the instrument itself. At the time that the provisions are due to expire it will be necessary to review whether the provision made by this instrument continues to be necessary and whether to re-exercise the power so as to further prolong the duration of the temporary provision.

15. Contact

15.1 Louise Chester at the Insolvency Service (Telephone: 0300 304 8357 or email: louise.chester@insolvency.gov.uk) can answer questions about these regulations.

15.2 Angela Crossley, Director of Strategy, Policy and Analysis at the Insolvency Service can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Minister for Climate Change and Corporate Responsibility, Lord Callanan at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.