EXPLANATORY MEMORANDUM TO

THE DEREGULATION ACT 2015, THE SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015 AND THE INSOLVENCY (AMENDMENT) ACT (NORTHERN IRELAND) 2016 (CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL PROVISIONS) REGULATIONS 2017

2017 No. XXXX

1. Introduction

1.1 This explanatory memorandum has been prepared by Her Majesty's Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The instrument amends financial services legislation in consequence of insolvency reforms made by the Deregulation Act 2015 and the Small Business, Enterprise and Employment Act 2015 which commenced in May or October 2015 or April 2016. The instrument also makes transitional provisions.

3. Matters of special interest to Parliament

3.1 None

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

4.1 These Regulations amend enactments in the field of financial services, for which the Treasury is responsible, in consequence of—

- certain provisions of the Deregulation Act 2015 (c. 20) and the Small Business, Enterprise and Employment Act 2015 (c. 26) ("SBEEA") which amend the Insolvency Act 1986 (c. 45) and the Company Directors Disqualification Act 1986 (c. 46); and
- certain provisions of the Insolvency (Amendment) Act (Northern Ireland) 2016 (c. 2) ("the 2016 Act") which amend the Insolvency (Northern Ireland) Order 1989.

4.2 The amended enactments apply the Insolvency Act 1986, and other companies' insolvency legislation (and equivalent enactments in Northern Ireland) in relation to banks, building societies and other financial sector institutions. These enactments include the Banking Act 2009 and the Building Societies Act 1986, and a range of other financial services primary and secondary legislation.

4.3 The reforms concern, among other things, the authorisation and regulation of insolvency practitioners; reports of office-holders on the conduct of directors of insolvent companies; empowering a liquidator to exercise powers without permission; extension of administrator's term of office; and payments to unsecured creditors in an

administration. Insolvency law reforms in Northern Ireland are limited to the authorisation and regulation of insolvency practitioners.

4.4 The reason for making these consequential amendments of financial services legislation is to ensure that the reforms to general corporate insolvency are reflected in HM Treasury's modified insolvency regimes, where general insolvency law is: (i) applied to financial institutions which are not companies; (ii) modified for other kinds of institution which are companies (particularly insurers); and (iii) applied for the purpose of special insolvency regimes created for financial institutions.

5. Extent and Territorial Application

5.1 The extent of this instrument depends on the particular regulation in question. Regulations 2 to 8, 10 and 11 extend to the whole of the United Kingdom. Regulations 9 and 12 extend to England and Wales and Scotland.

5.2 The territorial application of this instrument depends on the particular regulation in question. Generally, a regulation that extends to Northern Ireland will apply to Northern Ireland where it amends or modifies legislation that applies in Northern Ireland, and will otherwise apply to England and Wales and Scotland. Regulations 3, 4, 9 and 12 apply to England and Wales and Scotland. The transitional provision in regulations 14 to 17 apply to England and Wales and Scotland. The transitional provision in regulation 18 applies to Northern Ireland.

6. European Convention on Human Rights

6.1 The Economic Secretary to the Treasury has made the following statement regarding Human Rights:

"In my view the provisions of The Deregulation Act 2015, the Small Business, Enterprise and Employment Act 2015 and the Insolvency (Amendment) Act (Northern Ireland) 2016 (Consequential Amendments and Transitional Provisions) Regulations 2017 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 The changes to general corporate insolvency legislation enacted in the Deregulation Act 2015 and SBEEA were proposed as part of the Coalition Government's Red Tape Challenge Initiative for the purpose of simplifying and streamlining the insolvency process for companies. The changes enacted so far have been commenced in 3 tranches: May 2015, October 2015 and April 2016.

7.2 HM Treasury has a considerable volume of legislation which governs: (1) the insolvency of financial sector firms, including institutions which are not companies; and (2) special insolvency or administration regimes for banks and investment banks (whether or not they are companies) and other institutions. In both cases general corporate insolvency law has been extensively modified or applied with modifications and the relevant legislation needs to be amended to reflect the changes. The legislation applies to authorised persons under the Financial Services and Markets Act 2000, banks, building societies, friendly societies, and other mutual undertakings, certain collective investment schemes, investment firms, insurers and financial market infrastructure companies.

7.3 These Regulations make consequential amendments of this financial services legislation to take account of the reforms brought in by the Deregulation Act 2015, SBEEA and the 2016 Act. The changes include a new regime for the qualification and regulation of insolvency practitioners for personal and corporate insolvency (this is the only relevant reform enacted by the 2016 Act)) and a new power for an administrator to bring an action for wrongful or fraudulent trading where a director has caused the business of an insolvent company to trade wrongfully or fraudulently.

7.4 For further details on the reforms, see the explanatory notes accompanying Deregulation Act 2015[1], SBEEA[2] and the 2016 Act.

Consolidation

7.5 Not relevant.

8. Consultation outcome

8.1 BIS carried out extensive consultations before bringing forward the insolvency reforms in the Deregulation Act 2015 and the Small Business, Enterprise and Employment Act 2015.

8.2 The insolvency reforms were explored in a series of public consultations: the 'insolvency red tape challenge'[3]; 'transparency and trust paper'[4]; and 'strengthening the regulatory regime for insolvency practitioners'[5].

8.3 Following discussions with the regulatory authorities and the Banking Liaison Panel, the government judged that the enactments which have effect for the insolvency of financial institutions (outlined above) should be amended to reflect the reforms to general corporate insolvency law.

9. Guidance

9.1 Not relevant.

10. Impact

10.1 These Regulations ensure that the benefits of the general insolvency reforms enacted in 2015 are extended to the financial sector.

10.2 BIS undertook a full impact assessment for the changes brought in by SBEEA and the Deregulation Act 2015[6].

10.3 As these impact assessments covered the whole economy, the government has not prepared another impact assessment specifically covering the financial sector. The reforms do not require HM Treasury to make extensive changes to the way in which corporate insolvency law is applied to financial institutions and for special insolvency regimes. These Regulations will ensure that the HM Treasury legislation is aligned with general corporate insolvency law.

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[1] http://www.legislation.gov.uk/ukpga/2015/20/notes/contents
[2] http://www.legislation.gov.uk/ukpga/2015/26/notes/contents
3 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/244904/rtc-consultation.pdf
[4] https://www.gov.uk/government/consultations/company-ownership-transparency-and-trustdiscussion-paper
5https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/280880/Strengthening_the_regulatory_regime_and_fee_structure_for_insolvency_practitioners.pdf
[6] https://www.gov.uk/government/publications/small-business-enterprise-and-employment-bill-impact-assessments

11. Regulating small business

11.1 The instrument applies to specific kinds of insolvency proceeding taken with respect to banks, building societies and other kinds of financial institution, which may, but are generally unlikely to be, small businesses. In the case of a small business, it would not be in the interests of that business if the insolvency proceedings or any of its activities conducted by an insolvency practitioner, for example, were governed by different legislation.

12. Monitoring & review

12.1 This instrument does not provide for the review of the amendments it makes.

12.2 The Treasury has no formal plans to review the wider legislation on modified insolvency regimes for financial sector firms, but is likely to review it if there is a compelling case for doing so. Such a review would include a review of the effect of the relevant amendments made by these Regulations.

13. Contact

13.1 Mushtaq Ahmed at HM Treasury Telephone: 020 7270 1701 or email: mushtaq.ahmed@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.