EXPLANATORY MEMORANDUM TO

THE ENTERPRISE AND REGULATORY REFORM ACT 2013 (CONSEQUENTIAL AMENDMENTS) (BANKRUPTCY) AND THE SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015 (CONSEQUENTIAL AMENDMENTS) REGULATIONS 2016

2016 No. XXXX

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills in conjunction with the Insolvency Service and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Enterprise and Regulatory Reform Act 2013 (Consequential Amendments) (Bankruptcy) and the Small Business, Enterprise and Employment Act 2015 (Consequential Amendments) Regulations 2016 (the "Regulations") make amendments to Acts of Parliament and subordinate legislation that are required in connection with the introduction of a new bankruptcy debtor application process and changes made to the requirements for insolvency office-holders to report on the conduct of company directors.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

Other matters of interest to the House of Commons

3.2 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this instrument would not be within the devolved legislative competence of any of the Northern Ireland Assembly as a transferred matter, the Scottish Parliament or the National Assembly for Wales if equivalent in relation to the relevant territory were included in an Act of the relevant devolved legislature.

4. Legislative Context

4.1 Section 71 of the Enterprise and Regulatory Reform Act 2013 (the ERR Act) amends the Insolvency Act 1986 to provide for a new process by which an individual applies for their own bankruptcy in England and Wales. These Regulations make the necessary consequential amendments to Acts of Parliament and subordinate legislation.

4.2 The following statutory instruments are also relevant to the implementation of the debtor bankruptcy application process and will come into force on or before 6th April 2016: The Enterprise and Regulatory Reform Act 2013 (Commencement No. 9 and Savings Provisions) Order 2016; The Insolvency (Amendment) Regulations 2016; and The Insolvency Proceedings (Fees) (Amendment) Order 2016.

4.3 Section 107 of the Small Business, Enterprise and Employment Act 2015 (the SBEE Act) revokes Section 7(3) of the Company Directors Disqualification Act 1986 and replaces it with Section 7A. The provisions concern the requirements for an office-holder to report on the conduct of directors of an insolvent company.

4.4 These Regulations make amendments to the Insolvency Act 1986 and the Limited Liability Partnerships Regulations 2001. The effect of these amendments is that the Secretary of State retains specific vires to make rules about reports on the conduct of directors and the Insolvent Companies (Reports on Conduct of Directors) (England and Wales) Rules 2016 and the Insolvent Companies (Reports on Conduct of Directors) (Scotland) Rules 2016 will apply to LLPs.

5. Extent and Territorial Application

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

5.2 The territorial application of this instrument is set out in Section 3 under "Other matters of interest to the House of Commons".

6. European Convention on Human Rights

6.1 The Secretary of State for Business, Innovation and Skills has made the following statement regarding Human Rights:

The provisions the Enterprise and Regulatory Reform Act 2013 (Consequential Amendments) (Bankruptcy) and the Small Business, Enterprise and Employment Act 2015 (Consequential Amendments) Regulations 2016 are compatible with the Convention rights.

7. Policy background

Enterprise and Regulatory Reform Act 2013

7.1 Currently when a debtor wishes to apply for their own bankruptcy they present a petition to court. Under the new process the debtor will submit an online application to the Adjudicator (an official based in the Insolvency Service) which will take the courts out of the debtor bankruptcy process. The Department believes that the new procedure will decrease the stigma associated with bankruptcy and improve accessibility for debtors who may be discouraged from entering into a court process. For individuals who do not have digital skills or access to the internet, they can use the assisted digital process with the help of a financial intermediary.

7.2 The cost of a bankruptcy application will be lower than a bankruptcy petition and can be paid by the debtor in instalments, which makes the process more accessible to individuals in financial difficulties. Introducing an electronic process will free up court resources and lead to savings for Government, individuals and business.

Small Business, Enterprise and Employment Act 2015

7.3 Currently an office holder of an insolvent company is required to report to the Secretary of State on the conduct of its directors within 6 months of insolvency. Reports where an office-holder alleges misconduct are reviewed and investigated by the Secretary of State and may lead to disqualification proceedings against the directors.

7.4 Section 107 SBEEA contains provisions that shorten the period to 3 months, thus alerting the Secretary of State (SoS) at an earlier stage to director misconduct and enabling a move to a more responsive, intelligence-led enforcement process.

Consolidation

7.5 None.

8. Consultation outcome

8.1 The consultation paper 'Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up' was published on 7 November 2011. The consultation document proposed the removal of the courts from the order-making process in debtor and creditor bankruptcy and company winding up applications in cases where the making of the order was not in dispute. The consultation closed on 31 January 2012 and the summary of consultation responses was published in September 2012.

8.2 The consultation asked both general and specific questions about an Adjudicator located within the Insolvency Service making winding-up and bankruptcy orders on third party applications. In total, 79 responses were received from a variety of interested parties including creditors, money advisors, insolvency practitioners, accountants and other Government departments.

8.3 The responses showed general support for reform of the debtor bankruptcy petition process but little support for introducing an administrative regime to replace the court-based petition process for creditor petition bankruptcy or company winding up. 86% of respondents were in favour of the introduction of an Adjudicator to make a bankruptcy order administratively.

8.4 The introduction of an electronic application process and an electronic payment facility received support. One of the main reasons given was that instalment payments may help more debtors access the debt relief from bankruptcy.

9. Guidance

9.1 Guidance on the new procedure will be published on www.gov.uk replacing the existing guidance on the debtor petition process.

9.2 The Insolvency Service is also liaising with HM Courts and Tribunal Service (HMCTS) and the debt advice sector, including the Money Advice Service, the Money Advice Trust and Citizens Advice, to ensure that existing guidance is updated.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

Enterprise and Regulatory Reform Act 2013

11.1 The legislation deals with individuals applying for bankruptcy and does not impose any new regulation on small businesses.

Small Business, Enterprise and Employment Act 2015

11.2 The legislation applies to activities undertaken by insolvency-office holders who may be small businesses. Changes to the reporting process include replacing the need to submit statutory forms with electronic submission in line with the Government's Digital Strategy which will reduce the cost of reporting misconduct.

12. Monitoring & review

12.1 These Regulations make consequential amendments as a result of changes to the way in which a debtor may apply for bankruptcy, which were introduced by the ERR Act and changes to the conduct reporting regime introduced by SBEE Act.

12.2 These Regulations make changes to primary and secondary legislation that reflect changes to the Insolvency Act 1986 and the Company Directors Disqualification Act 1986 made by the ERR and SBEE Acts. Monitoring and review of these Regulations will be undertaken as part of the overall review of measures contained in the Acts and associated secondary legislation.

12.3 Furthermore, it is intended to include in the Insolvent Companies (Reports on Conduct of Directors) Rules 2016 and the Insolvent Companies (Reports on Conduct of Directors) (Scotland) Rules 2016 a review provision under section 28 of the SBEE Act.

13. Contact

13.1 Sam Roberts at the Insolvency Service. Telephone: 020 7291 6822 or email: sam.roberts@insolvency.gsi.gov.uk can answer any queries regarding the instrument.