EXPLANATORY MEMORANDUM TO

THE SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015 (CONSEQUENTIAL AMENDMENTS, SAVINGS 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 This instrument amends financial services legislation either in consequence of, or to save it from, provisions of the Small Business, Enterprise and Employment Act 2015 ("SBEEA") which amend the Insolvency Act 1986 and came into force in England and Wales only on 6 April 2017.

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

4. Legislative Context

4.1 These Regulations amend primary and subordinate legislation for which HM Treasury is responsible to take account of insolvency law reforms enacted in sections 122 to 126 of, and Schedule 9 to, the Small Business, Enterprise and Employment Act 2015 ("SBEEA"). The Regulations make amendments, savings and transitional provisions in consequence of these reforms, which introduce new procedures for creditors' decisions and allow creditors to opt out of receiving creditors' notices.

4.2 The amendments are made under sections 159(1), (2) and (9) and 161(2) of SBEEA. They amend enactments which apply the Insolvency Act 1986 (and equivalent enactment in Northern Ireland) in relation to banks, building societies and other financial sector institutions. The amended 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 reason for making the amendments is to ensure that the enactments concerned will have effect compatibly with developments in general insolvency law where it 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.

4.4 Some amendments implement the reforms in financial services legislation. Others save such legislation from the reforms, while their impact is assessed and decisions

are made about implementation. Also, as the reforms operate by reference to new rules in the Insolvency (England and Wales) Rules 2016, which also came into force on 6 April 2017, savings are needed for legislation which does not apply insolvency rules (like building societies) or under which there are special rules (which will also need to be amended). This also means that it is necessary in some legislation to make savings for Scotland for the time being.

5. Extent and Territorial Application

5.1 The extent of a provision of these Regulations depends on the extent of the enactment which is amended by that provision. Regulations 2, 3 to 6, 8, 9 and 10, 13 and 14 extend to the whole of the United Kingdom. Regulations 11, 12 and 15 extend to England and Wales and Scotland. Regulation 7 extends to England and Wales.

5.2 The territorial application of a provision of these Regulations depends on the territorial application of the amendment made by that provision. Generally, a regulation that extends to Northern Ireland will apply to Northern Ireland where it amends or modifies legislation that applies in NI, and will otherwise apply to England and Wales and Scotland. Regulations 3, 5, 6, 13 and 14 apply to England and Wales and Scotland. The transitional provisions in regulations 16 to 22 apply to England and Wales and Scotland. The saving provisions in regulations 23, 24 and 25 apply to England and Wales.

6. European Convention on Human Rights

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

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

7. Policy background

What is being done and why

7.1 General insolvency law (corporate and individual) has been recently been reformed by the Deregulation Act 2015, the Small Business, Enterprise and Employment Act 2015, and the Insolvency (Amendment) Act (Northern Ireland) 2016. Most of the reforms were commenced in May and 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 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 HM Treasury's legislation was amended to reflect the reforms which were commenced in May and October 2015 and April 2016. The remaining reforms, which relate to the Government's reforms to modernise insolvency law in the Small

Business, Enterprise and Employment Act 2015, came into force on 6 April 2017. They remove physical meetings of creditors as the default method of obtaining a decision and provide for opting-out of the receipt of notices. There has also been a redraft of the underlying insolvency rules (in England and Wales) to make them easier to understand and more modern.

7.4 These Regulations amend certain enactments of HM Treasury's modified insolvency regimes in consequence of the remaining reforms which came into force on 6 April 2017. These reforms include:

- Removal of physical meetings of creditors as the default position for making decisions in insolvency proceedings for companies and individuals. This has the potential to reduce costs, as physical meetings are often mere formalities and are poorly attended.
- Allowing creditors to opt not to receive certain notices. Creditors are kept informed of the decisions and progress reports of the administrator or liquidator through notices. They will now have the choice to opt out of the receipt of notices.
- A redraft of the insolvency rules in England and Wales includes rules needed to give effect to the new statutory procedures.

7.5 Amendments to HM Treasury's modified insolvency regimes will ensure the benefits of these general insolvency reforms are extended to the financial sector. Given the considerable volume of legislation relating to the insolvency of financial sector firms, it was not possible to implement all of the reforms in England and Wales by 6 April 2017.

7.6 This instrument therefore takes a staggered approach to the amendment of the Treasury's financial services legislation, disapplying the reforms for the majority of its special insolvency regimes. Disapplying the reforms will maintain the coherence of the legislation relating to the insolvency of financial institutions, while work is undertaken to consider the application of the reforms.

7.7 For the small number of regimes where it is relatively simple to implement the reforms, this instrument aligns HM Treasury's regimes with the reforms. For example, this instrument amends the Financial Market Infrastructure (FMI) administration regime in line with the reforms, as special rules are being drafted in a separate set of amendments. The reforms have also been implemented for financial institutions which are companies (i.e. insurance companies) and individuals to which HM Treasury's legislation applies company and individual insolvency law with modifications.

Consolidation

7.8 Not relevant.

8. Consultation outcome

8.1 The Department for Business, Innovation and Skills (BIS) carried out extensive consultations before bringing forward the insolvency reforms in the Small Business, Enterprise and Employment Act 2015.

8.2 The reforms on creditor meetings and notices were explored in the 'insolvency red tape challenge' document[1]. The information received during this consultation was used in the refinement of the policies and as part of the impact assessment process to quantify costs and savings as accurately as possible.[2]

9. Guidance

9.1 Not relevant.

10. Impact

10.1 Where the reforms have been reflected in HM Treasury's modified insolvency regimes (e.g. for FMI administration), these Regulations ensure that the benefits of the general insolvency reforms commenced in April 2017 are extended to the financial sector. BIS undertook a full impact assessment for the changes brought in by SBEEA and the Deregulation Act 2015[3]. As these impact assessments covered the whole economy, including the familiarisation costs to business, HM Treasury has not prepared another impact assessment specifically covering the financial sector.

10.2 Where the general insolvency reforms which commenced in April 2017 have been disapplied for HM Treasury's modified insolvency regimes, these Regulations will not have any impact on business.

10.3 This instrument has no impact on the public sector, charities or, voluntary bodies.

11. Regulating small business

11.1 This 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 insolvency proceedings or any of its activities conducted by an insolvency practitioner were governed by different legislation. Therefore, no specific action is proposed to apply these regulations differently to small businesses.

12. Monitoring & review

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

12.2 HM 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 Laura Mountford at HM Treasury Telephone: 02072706358 or email: Laura.Mountford1@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.

---

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/244904/rtc-consultation.pdf

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418432/IA_insolvency_processes_final.pdf

[3] https://www.gov.uk/government/publications/small-business-enterprise-and-employment-bill-impact-assessments