EXPLANATORY MEMORANDUM TO

THE THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT 2010 (CONSEQUENTIAL AMENDMENT OF COMPANIES ACT 2006) REGULATIONS 2018

[Year] No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Third Parties (Rights against Insurers) Act 2010 (Consequential Amendment of Companies Act 2006) Regulations 2018 ("the Regulations") will give an insurer of a company that has been dissolved for more than six years a right to restore the company to the register of companies in order to take legal proceedings to recover contributions from other persons who are also liable for a personal injury in respect of which the insurer has paid out damages.

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 The Regulations will be made under section 19 of the Third Parties (Rights Against Insurers) Act 2010 ("the 2010 Act") as inserted by section 19 of the Insurance Act 2015. Section 19(8) of the 2010 Act provides that regulations made under it may include consequential, incidental, supplementary, transitional, transitory or saving provision. The Regulations will amend section 1030(1) of the Companies Act 2006, to effect a consequential change to the 2006 Act that should have been made when the 2010 Act and the amendments made to it by the Third Parties (Rights Against Insurers) Regulations 2016 ("the 2016 Regulations") came into force on 1 August 2016. Because the Regulations are correcting that error in the 2016 Regulations, a copy will be provided free of charge to all known recipients of the 2016 Regulations.

4.2 The amendment to section 1030(1) is consequential on the change introduced by the new section 6A of the 2010 Act (inserted by the 2016 Regulations). The effect of the new section is to create a new avenue by which an insurer of a dissolved company can be *directly* required to bear an insured loss owed to an injured party, and this affects the insurer's rights of subrogation. The amendment made by the Regulations ensures that the same subrogation result is produced for direct claims (against insurers under the new section 6A) as is already produced for *indirect* claims (where the person who suffered the loss claims against the insured wrongdoer and the insurer pays for the

loss). Further detail about the relationship of this change to the 2016 Regulations is provided in paragraphs 7.12 and 7.13 below.

5. Extent and Territorial Application

5.1 The extent of this instrument is the whole of the United Kingdom.

5.2 The territorial application of this instrument is the whole of the United Kingdom.

6. European Convention on Human Rights

6.1 The Parliamentary Under-Secretary for Justice, Lucy Frazer QC MP, has made the following statement regarding Human Rights:

"In my view the provisions of The Third Parties (Rights against Insurers) Act 2010 (Consequential Amendment of Companies Act 2006) Regulations 2018 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 The Regulations will give insurers, who have paid an award of damages on behalf of a dissolved company and are seeking contributions towards the cost of the award from other persons, typically other insurers, the right to restore the dissolved company to the register of companies, irrespective of when the company was dissolved. This change is necessary because, at present, insurers seeking such contributions can only restore a company within six years of its dissolution.

7.2 The need for this change has arisen because of the interaction of the 2010 Act, which came into force on 1 August 2016, the 2016 Regulations, the Companies Act 2006 and, in some cases, the Compensation Act 2006.

7.3 Section 3 of the Compensation Act 2006 makes any defendant to a personal injury claim for exposure to asbestos liable for the whole of the loss to the claimant, irrespective of whether other persons might also have caused the injury, but preserves the right of the defendant to seek contributions from other people liable for the same loss.

7.4 The 2010 Act applies where an insured person incurs a liability to another and is or becomes a "relevant person" (by falling within the insolvency and similar circumstances listed in sections 4 to 7 of the 2010 Act). These circumstances were extended by the 2016 Regulations to include among other entities, dissolved companies whenever they were dissolved. A dissolved company can therefore be relevant person.

7.5 Where a relevant person owes a liability, the 2010 Act transfers the rights of the relevant person under its insurance contract to the person owed the liability. This enables that person to enforce those rights directly against the insurer. Previously, under the Third Parties (Rights against Insurers) Act 1930, which was repealed by the 2010 Act, the injured person had first to establish the liability of the relevant person, before he or she could enforce the insurance contract against the insurer. In cases where the relevant person was a dissolved company, claimants had therefore to apply to the court to restore the company to the register (Companies Act 2006, s.1029) in order to establish liability and to open the way to proceedings against its insurer.

Applications for restoration in these cases were not subject to any time limit (Companies Act 2006, s 1030(1)).

7.6 An insurer who pays damages to the claimant is, by common law, subrogated to the rights of the insured in relation to the claim. In an insurance context, subrogation is an insurer's right to take over the claim of its insured against a third party responsible, or jointly responsible, for the loss so as to recover the insurer's outlay or part of it. This means that once an insurer has paid out under an insurance contract, the insurer can "step into the shoes" of the insured. The doctrine of subrogation is very well established and has for a long time been an essential part of the operation of the insurance system, where it is well known, well understood and widely relied on.

7.7 In the case of a relevant person that was a dissolved company the insurer can then take legal action in the name of the company against others, who are liable in respect of the same damage, for a contribution (Civil Liability (Contribution) Act 1978, s.1). In the case of the claims affected by section 3 of the Compensation Act 2006, these would typically be other employers who might also have been responsible for exposing the claimant to asbestos (and through them their insurers).

7.8 At common law, a subrogated claim cannot be brought in the name of a non-existent plaintiff unless a legal assignment of the claim had been taken.[1] Without the benefit of a pre-existing legal assignment, the insurer must therefore restore the dissolved company to the register to pursue the actions by subrogation. Such actions are not personal injury actions. Applications for restoration to the register must therefore be made within six years of the dissolution of the company in question (Companies Act 2006, s 1030(4)). Before the 2010 Act came into force, insurers were able to rely on the restoration effected by the claimant to enable them to bring an action for contributions.

7.9 In cases where the personal injury does not become apparent within that period, as, for example, occurs in relation to mesothelioma and other asbestos related illnesses, an insurer who has paid out damages will not be able to restore the company to the register. This will prevent it from taking legal proceedings in the name of the company to enforce its right to contributions.

7.10 The changes made by the 2010 Act have therefore had the unintended consequence that insurers are in some cases no longer able to enforce the payment of contributions, which are properly due to them.

7.11 The amendment made by the Regulations addresses this problem by adding a further purpose for which an application to restore a company may be made under section 1030(1) of the Companies Act 2006: namely, for an insurer bringing proceedings against a third party in the name of the restored company in respect of that company's liability for damages for personal injury.

7.12 As noted in paragraph 4.2 above, the effect of this amendment is to create a new avenue by which an insurer can be required to bear an insured loss. That new avenue relates to loss suffered as a result of the acts or omissions of a company now dissolved, and takes the form of allowing the person who suffered the loss to claim for the loss directly against the insurer. Where legislation creates a new avenue by which an insurer can be required to bear an insured loss, the issue of the right of

[1] *Smith (Plant Hire) Ltd v Mainwaring* [1982] 2 Lloyds Rep 244

subrogation for insurers affected by that new avenue is implicitly bound up in the creation of that new avenue – because of the accepted and settled central role played by subrogation in the operation of the insurance system. Provision about subrogation is accordingly capable of being consequential on provision creating new rights for third parties against insurers; and the provision in the Regulations simply ensures that the same subrogation result is produced for direct claims (against insurers under the new section 6A) as is already produced for indirect claims (where the person who suffered the loss claims against the insured wrongdoer and the insurer pays for the loss). For indirect claims, the subrogation result is produced because the person who has suffered the loss must have the insured restored to the register but is not time-barred in doing this (thereby enabling the insurer to be subrogated to the rights of the insured to seek a contribution from others jointly liable); while for the direct claims, the subrogation result is produced by the insurer, under the proposed amendment, being able to get the insured restored to the register without being time-barred in doing this.

7.13 The impact of the amendment made by the Regulations on insurers is that all insurers end up (or remain) in the same position that they would be in if an indirect claim were brought. This impact is not considered to be a significant impact, whereas there would be a significant impact on insurers were the amendment not made - the inability of insurers to exercise their subrogation rights in these circumstances will otherwise have unintended policy consequences in the long term.

Consolidation

7.14 The Regulations amend the 2010 Act. As it is likely that insolvency law will continue to develop and further amendments will need to be made to the 2010 Act in due course to keep up to date with these changes the Ministry of Justice has no plans at present to consolidate the amendments to the 2010 Act.

8. Consultation outcome

8.1 The department has not carried out any public consultation regarding the proposed amendment. A number of insurers have, however, drawn the need for the amendment to the attention of the department.

9. Guidance

9.1 The department does not intend to issue any guidance concerning the proposed amendment.

10. Impact

10.1 The impact on business, charities or voluntary bodies is limited to the restoration of an effective means of enforcing a right acquired by subrogation. The only bodies to be affected are insurers who are seeking to enforce or who would be liable to pay a contribution towards damages for personal injury. As all insurers might fall into either category the effect of the regulation is to enable the cost of damages to be distributed as the law intended without any additional overall cost on insurers. No impact is expected on charities or voluntary bodies.

10.2 There is no impact on the public sector other than the processing of applications for court orders to restore companies to the register made possible by the regulations. The expense of these applications will be recovered through court fees. The cost to

Companies House of processing court orders for restoration is expected to be negligible.

10.3 An Impact Assessment has not been prepared for this instrument as because the amounts involved fall below the threshold at which an assessment has to be prepared.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 The effect of this legislation will be monitored as part of the post-implementation monitoring and review of the 2010 Act generally. This will be assessed in 2020/2021 when the 2010 Act has been in force for five years. No separate monitoring or review is planned.

13. Contact

13.1 Paul Hughes at the Ministry of Justice Telephone: 07580 906942 or email: paul.hughes@justice.gsi.gov.uk can answer any queries regarding the instrument.