EXPLANATORY MEMORANDUM TO

THE THIRD PARTIES (RIGHTS AGAINST INSURERS) REGULATIONS

2016 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) Regulations 2016 ("the Regulations") extend the circumstances in which the Third Parties (Rights against Insurers) Act 2010 ("the 2010 Act") applies to include corporate and other bodies that are subject to specified sectoral insolvency regimes or, with limited exceptions, have been dissolved. The aim is to correct omissions from the 2010 Act so that it can be brought into force.

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 includes Northern Ireland.

4. Legislative Context

4.1 The Regulations are to be made under powers in section 19 of the 2010 Act (inserted by section 19 of the Insurance Act 2015) to rectify omissions from the 2010 Act. This is the first time the power in section 19 has been exercised.

4.2 The 2010 Act (so far as it is not yet in force) is to be brought into force on such day as the Justice Secretary may by order appoint. The amendments made to the 2010 Act by section 20 and schedule 2 to the Insurance Act 2015 and by the Regulations are to come into force on the same day (Insurance Act 2015, s 23(3)(b) and regulation 1 of the Regulations respectively); the amendments made by the Regulations coming into force immediately after the amendments made by the 2015 Act. The Regulations will not be commenced earlier than three months after they have been made.

5. Extent and Territorial Application

5.1 This instrument extends to the whole of the United Kingdom.

6. European Convention on Human Rights

The Lord Faulks QC, Minister of State, Ministry of Justice, has made the following statement regarding Human Rights:

In my view the provisions of the Third Parties (Rights against Insurers) Regulations 2016 are compatible with the Convention rights.

7. Policy background

What is being done and why

7.1 Third parties legislation has existed since the 1930s. Its purpose is to protect the interests of claimants against insured persons who have a liability to the claimant but who no longer have effective control of their assets,[1] typically, because they are insolvent. Third parties legislation is so-called because the claimant is a third party in relation to the contract of insurance. The third parties legislation currently in force is the Third Parties (Rights against Insurers) Act 1930 and the Third Parties (Rights against Insurers) Act (Northern Ireland) 1930 ("the 1930 Acts"). The 1930 Acts will be repealed by the 2010 Act, which is intended to extend and improve the protection conferred by them. The basic effect of the third parties legislation is to transfer to a third party to whom the insured has incurred a liability the contractual rights of the insured against the insurer as regards that liability. This means the proceeds of the insurance policy are paid to the claimant not the creditors of the insolvent insured.

7.2 Unfortunately, following the enactment of the 2010 Act it was found, in some respects, to have a narrower scope than the 1930 Acts. The 2010 Act was therefore amended by the Insurance Act 2015 which corrected some of the omissions and added a regulation making power to the 2010 Act to enable the remaining omissions to be corrected and to assist in keeping the 2010 Act up to date in the future. The Regulations correct the remaining omissions.

7.3 To trigger the application of the 2010 Act an insured must both:

(a) incur a liability to a third party against which it is insured; and

(b) be or become a "relevant person" within the meaning of the 2010 Act.

7.4 For an insured to be or become a "relevant person" in this sense it must undergo a specified insolvency or analogous event. To be effective, the 2010 Act should therefore cover all such events. At present, although it covers the majority of such situations, it does not cover all dissolutions or any sector specific insolvency regimes, which are within the effective scope of the 1930 Acts.

7.5 The Regulations rectify this by ensuring that bodies subject to a sector specific insolvency procedure and all bodies which have been dissolved (other than unincorporated partnerships and bodies that are no longer being treated as dissolved by reason of subsequent events) will be considered "relevant persons" for the purpose of the 2010 Act.

7.6 The 2010 Act implemented recommendations of the Law Commissions and was uncontroversial. The changes made by the Regulations are technically important and will ensure that the benefits and protection of the 2010 Act are available to claimants as widely as is currently the position under the 1930 Acts.

7.7 As the then Economic Secretary to the Treasury, Andrea Leadsom MP, said during the Second Reading of the Insurance Bill:

[1] Third Parties – Rights against Insurers (Law Com 272 and Scot Law Com 184 para 1.3). The 2010 Act implements the recommendations in this report.

The Bill also contains provisions to amend the Third Parties (Rights against Insurers) Act 2010. That assists injured parties who have claims against parties that are now defunct, but when insurance was in place to cover such claims. The Bill will make it easier, for example, for mesothelioma sufferers to obtain compensation due from insolvent employers. The Government are committed to bringing the 2010 Act into force as soon as practicable, and the Bill will achieve that.

7.8 The 2010 Act also contains a number of provisions intended to facilitate the exercise by third parties of their rights. The Regulations affect two of them:

(a) Section 9(3) of the 2010 Act provides that a third party claimant does not have to satisfy a condition of the insurance policy regarding provision of information or assistance to the insurer by the insured if it cannot be fulfilled because the insured has died or is a body corporate which has been dissolved.

(b) Paragraph 3 of Schedule 1 to the 2010 Act gives a claimant a right to request information from officers, employees, insolvency practitioners or official receivers of a defunct body corporate (other than when the dissolved body had been restored or ordered to be restored to the register of companies).

The Regulations extend these two provisions to all dissolutions (other than those of unincorporated partnerships). However, by contrast with the approach to the status of "relevant person" in new section 6A (regulation 4, bodies that have been dissolved), the Regulations provide that the provisions of section 9(3) and paragraph 3 of Schedule 1 will continue to apply even where subsequent events result in the body in question being treated as if is no longer dissolved, or as if it had never been dissolved. The reason for the wider application of these provisions is that most such situations (for example, restoration to the register of companies) are temporary and is unlikely to result in there being a person who is responsible and able, on behalf of the body in question, to assist the claimant by being able to fulfil the condition or to supply the information in relation to the liability. The continued application of section 9(3) and paragraph 3 of Schedule 1 notwithstanding the renewed existence of the relevant body is therefore intended to help the claimant.

7.9 Unincorporated partnerships are excluded from the dissolution provisions in regulation 4 and the provisions of regulations 5 and 6 because they dissolve whenever there is a change in membership (for example the retirement of one partner). Such dissolutions are not necessarily an indicator of insolvency or any loss of control of assets.

Consolidation

7.10 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 Due to the limited effect of the Regulations the Department has not carried out a public consultation. It has, however, consulted the Association of Personal Injury Lawyers (APIL) and the Association of British Insurers (ABI), which are the principal organisations representing the interests of personal injury claimants and insurers, about the terms of the draft Regulations.

8.2 Both APIL and the ABI support the implementation of the 2010 Act as amended by the Insurance Act 2015 and the Regulations. Both organisations expressed general approval of the Regulations. The ABI commented that the Regulations "serve to give effect to the [2010] Act as originally intended" and APIL said "We remain supportive of the intentions behind amending the [2010] Act and the Government's aim of getting this amended as soon as possible."

8.3 Many of the bodies potentially affected by the extension of the scope of the 2010 Act to all dissolutions by the new section 6A (regulation 4) will be charities. The Charity Commission, the Office of the Scottish Charities Regulator and the Charity Commission for Northern Ireland have all confirmed to the Department that they are content with this proposal.

8.4 The 2010 Act implements recommendations of the Law Commission and the Scottish Law Commission. Both support the making of the Regulations.

8.5 The subject matter of the Regulations is insurance, which is a reserved matter in relation to Scotland and Northern Ireland and is not devolved in relation to Wales. Nonetheless, in view of the interaction of the third parties legislation with insolvency law, the Department has consulted the Accountant in Bankruptcy in Scotland, who is content with the references within the Regulations to bankruptcy and insolvency legislation in Scotland; and the Insolvency Service, part of the Department of Enterprise, Trade and Investment for Northern Ireland. We have taken their comments into account in preparing the draft Regulations.

9. Guidance

9.1 The Department will publicise the commencement of the 2010 Act as amended by the Insurance Act 2015 and the Regulations, but does not intend to issue guidance on the Regulations themselves. The publicity material relating to commencement will explain the working of the 2010 Act in general terms.

10. Impact

10.1 The impact of the Regulations on business, charities or voluntary bodies is to extend the effect of the 2010 Act to claims involving sectoral insolvency legislation and a wider range of dissolutions. This will remedy omissions from the 2010 Act and will in effect preserve the status quo so far as the scope of the third parties legislation is concerned because the scope of the 1930 Acts is wider than the 2010 Act as currently drafted and absent the amendments to be made in these Regulations. All these types of bodies may be affected as claimant, insurer or insured.

10.2 The impact on the public sector is qualitatively the same as for the private sector. However, as in the private sector the Regulations and the 2010 Act only apply where a liability is insured.

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

10.4 The costs and benefits of the Regulations are not easy to quantify. The Ministry of Justice expects that when 2010 Act, as amended by the Insurance Act 2015 and the Regulations is commenced, it will generate a small net benefit to business (mainly insurers and claimants), but that any aggregate impacts will be significantly less than £1 million per annum. We anticipate that the circumstances added by the Regulations will probably only account for a fraction of this. However, we do not know how often

these circumstances will apply; how many people will be affected when they do; or to what extent those people will then chose to benefit from the improvements made by the 2010 Act.

10.5 Claimants and insurers are expected to benefit overall from the procedural improvements in the 2010 Act (for example, the removal of the need to restore dissolved companies to the register of companies and to conduct legal proceedings against the insolvent insured and the insurer). Claimants should also benefit from the improvements to the procedure for obtaining information about the insurance policy before legal proceedings begin. This may impose some extra cost on those providing the information but we understand the information is generally provided at present on request and any reduction in misinformed claims will benefit claimants and insurers.

10.6 An impact assessment was prepared for the Bill that became the 2010 Act. It is available at: http://collections.europarchive.org/tna/20110201131113/http:/www.justice.gov.uk/publications/docs/impact-assessment-third-parties-rights-against-insurers.pdf . A further impact assessment was prepared in connection with the amendments to the 2010 Act made by the Insurance Act 2015. It is available at: http://www.legislation.gov.uk/ukia/2014/256/pdfs/ukia_20140256_en.pdf

11. Regulating small business

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

11.2 The Regulations and the 2010 Act apply equally to all businesses. The Regulations extend the circumstances in which the 2010 Act applies and slightly extend the obligation to provide information where the insured is a body that has been dissolved. Whether these changes will affect small business will depend on the circumstances of individual cases but it seems very likely that the effect of these changes on small businesses that are the insured will be effectively neutral in that their insurance policy will cover the liability in the way that was originally intended, and the effect on small businesses that are claimants will be beneficial.

11.3 A small business impact test was carried out before the 2010 Act. About 75% of the 42 consultees who responded considered the 2010 Act would either have no effect on small businesses or would be beneficial (as it would make it easier to sue insolvent but insured clients). None of the 42 had any direct experience of the 1930 Acts. Continuing to fail to implement the 2010 Act denies small businesses the benefits of the 2010 Act. As small business claimants may be claiming against small business insureds, no special procedures for small business would be appropriate.

12. Monitoring & review

12.1 In 2009 the Department envisaged reviewing the effectiveness of the 2010 Act five years after enactment. The Department now proposes doing so five years after the 2010 Act as amended by the Insurance Act 2015 and the Regulations is brought into force.

13. Contact

13.1 Paul Hughes at the Ministry of Justice Telephone: 020 3 334 39198 or email: paul.hughes@justice.gsi.gov.uk can answer any queries regarding the instrument.