POLICY NOTE

THE INSOLVENCY (SCOTLAND) (RECEIVERSHIP AND WINDING UP) RULES 2018

SSI 2018/347

1. The above instrument was made in exercise of the powers conferred by section 411(1)(b), (2) and (2A) of the Insolvency Act 1986. This instrument is subject to negative procedure.

Policy Objectives

2. The Insolvency (Scotland) (Receivership and Winding up) Rules 2018 ("I(S)RWUR") consolidate the procedural rules for company receivership and winding up which are currently contained in the Insolvency (Scotland) Rules 1986 ("the 1986 Rules"), together with the various amending instruments made since the 1986 Rules came into force, together with the Receivers (Scotland) Regulations 1986.

3. As well as consolidating the procedural rules, the instrument restructures the rules, inserts new provisions and amends existing provisions, to modernise the procedures for the administration of receivership and liquidation. Accordingly, the majority of the amendments do not change the law, but seek to re-state the law as it exists, to create a set of rules which are easier to apply in practice.

4. The restructuring of the rules aims to introduce consistency with the Insolvency (England and Wales) Rules 2016 (S.I. 2016/1024 as amended) which came into force on 6 April 2017. This means that insolvency practitioners and other users of the legislation would be following legislation which is consistent where possible in style and format, with streamlined and modernised insolvency procedures, irrespective of whether the insolvency appointment is for a company registered in Scotland or England and Wales.

Background

5. The Scottish corporate insolvency regime is underpinned by the Insolvency Act 1986 ("the Act"), with much of the detail set out in the 1986 Rules. The 1986 Rules set out the detailed procedure for all corporate insolvency proceedings in Scotland.

6. The insolvency reservation in Section C2 of schedule 5 to the Scotland Act 1998 results in a split in competence in this area between the UK and Scottish Parliaments. Company Voluntary Arrangements (CVAs) and administration are reserved matters while receivership (subject to minor exceptions) is a devolved matter. Company winding up is an area of mixed competence: the general legal effect of winding up is reserved to the UK Parliament but the process of winding up is excepted from the reservation. The power to make rules under section 411 of the Act is similarly split between the two administrations: insofar as the power enables the making of rules relating to receivership and the devolved aspects of winding up, it transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998. Insofar as the

power enables the making of rules relating to CVAs and administration, the power remains with the Secretary of State.

7. To facilitate rules relating to the mixed-competence area of winding up in one instrument, the Scotland Act (Insolvency Functions) Order 2018 (SI 2018/174) made under the Scotland Act 1998 made earlier this year effects a mutual transfer of the rule-making function in section 411 in the area of winding up, and enables the making of all of the rules in this area by either a Minister of the Crown or the Scottish Ministers, with the consent of the other administration where relevant. For the purposes of this project, it was agreed that the rules on winding up would be made by the Scottish Ministers, with the consent of the Secretary of State.

8. The new Scottish insolvency rules will accordingly be made up of two instruments: a Statutory Instrument – the Insolvency (Scotland) (Company Voluntary Arrangements) and Administration) Rules 2018 (S.I. 2018/1082[1]) ("I(S)CVAAR"), made by the Secretary of State - dealing with CVAs and administration; and this Scottish Statutory Instrument, the I(S)RWUR made by the Scottish Ministers - dealing with receivership and winding up.

9. The I(S)RWUR do not at this stage have effect to include rules relating to the insolvency of Limited Liability Partnerships in Scotland. Nor do they yet deal with Special Administration Regimes or other specialised insolvency regimes. The re-cast rules accordingly save the application of the 1986 Rules in respect of Limited Liability Partnerships, and provision for those areas will be made in due course

10. The Act is a large and complex piece of legislation which brought together corporate insolvency procedures and has been heavily amended. In relation to different insolvency proceedings in places there is an inconsistency between what is contained in the Act and what needs to be contained in the I(S)RWUR to supplement the Act. Users of the I(S)RWUR need to relate individual rules to the sections of the Act which it completes or complements. To assist users there are non-legislative notes in the I(S)RWUR contained in square brackets and are labelled as notes. These have a number of purposes. For example they draw the user's attention to provisions in the Act which a particular rule complements. In rule 1.2 (definitions) there are pointers to definitions found in different places in the Act which in some cases are applied by the I(S)RWUR for other purposes. There are also notes which refer the reader to things which are not in the Rules, e.g. to an article of the EU Regulation. Finally there are notes which point the user to other parts of the I(S)RWUR, such as the pointers to information required in documents by Part 1.

11. We recognise that the use of notes to such an extent is unusual, however when developing the rules stakeholders have indicated that they find these useful. This would also be consistent in format with I(S)CVAAR (and the Insolvency (England and Wales) Rules 2016).

[1] http://www.legislation.gov.uk/uksi/2018/1082/contents/made

Rationale for proposed policy changes

12. As highlighted, the first purpose of the I(S)RWUR is to consolidate the existing 1986 Rules and provide procedural rules for receivership and winding up in Scotland to better meet the needs of users, including the judiciary, insolvency office-holders, creditors and public officials.

13. The second purpose is to update the 1986 Rules in terms of their structure, language and style of drafting. Modernised language and gender neutral drafting have been used and the rules have been drafted in a simpler fashion to make them easier for users to understand and apply. Undue repetition has been avoided through the greater use of common parts that apply in relation to receivership and the different forms of winding up, such as the decision making provisions of Part 8 that will apply to decisions across different procedures in the future. Repetition has also been avoided by wider use of standard content provisions for notices and documents, building on the position adopted in the Insolvency (England and Wales) Rules 2016.

14. The third purpose is to enable the extension of modernising changes that have already been introduced in England and Wales to Scottish insolvency proceedings. In the lead up to this consolidation of the rules, work has been undertaken to amend the Act for the purposes of modernising devolved aspects of corporate insolvency in Scotland in line with amendments made in England and Wales and reserved aspects of corporate insolvency in Scotland by the Legislative Reform (Insolvency) (Miscellaneous Provisions) Order 2010 ("the 2010 LRO")[2]. This was achieved through the Public Service Reform (Insolvency) (Scotland) Order 2016 ("PSRO 2016")[3] and the Public Service Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017 ("PSRO 2017")[4]. The rules modernisation also give effect to policy changes resulting from amendments made to the Act principally by the Small, Business, Enterprise and Employment Act 2015 ("SBEE") and the Deregulation Act 2015. These changes result from deregulatory initiatives such as the UK Government's Red Tape Challenge, and many of which were put forward by a range of stakeholders. The policy impetus for all these measures was to remove unnecessary regulatory burdens to reduce the cost of administering insolvency proceedings. Reducing costs will benefit creditors in the form of improved dividend returns.

15. The development of both I(S)RWUR and I(S)CVAAR has been supported by an industry working group and this has enabled suggestions for improved and streamlined processes to be incorporated within the rules.

16. AiB is preparing, together with the UK Insolvency Service, a Table of derivations and destinations of provisions with reference to the 1986 Rules.

17. For further details on the proposed policy changes see Annex A.

[2] S.I. 2010/18.
[3] S.S.I. 2016/141
[4] S.S.I. 2017/209

Consultation

18. In late 2015 and early 2017, full public consultations were undertaken on the PSRO 2016 and PSRO 2017 to establish stakeholders' views on the proposed modernisation of the Act and 1986 Rules. This highlighted strong stakeholder support for both the modernisation of corporate insolvency processes in Scotland and the consolidation and restructuring of the 1986 Rules.

19. The project to modernise the 1986 Rules through the development of I(S)CVAAR and I(S)RWUR has been supported by an industry working group. This group has considered the draft content of both instruments at 13 working group meetings hosted since April 2016.

Impact Assessments

20. A Business and Regulatory Impact Assessment (BRIA) has been completed on the effects of the I(S)RWUR and will be published when this instrument is laid before Parliament.

The Accountant in Bankruptcy on behalf of the Scottish Government
November 2018

Summary of proposed policy changes

The I(S)RWUR make provision for the following principal changes:

Reports and accounting

The I(S)RWUR introduces a fixed reporting requirement for company voluntary liquidation and compulsory liquidation, which will remain the same regardless of whether or not proceedings have been extended or transferred to another insolvency practitioner.

The I(S)RWUR also facilitates the removal of the requirement for annual meetings in winding up procedures.

Removing meetings of creditors

Amendments made to the Act by the SBEE remove meetings as the default mechanism for seeking decisions from creditors in insolvency proceedings. In many cases the office-holder will be able to use a process of deemed consent, where they write to the creditors with a proposal.

The I(S)RWUR make provision about the type of alternative decision-making processes which may be used. The form the alternative decision-making process takes in respect of a particular decision will be at the discretion of the office-holder, but with defined exceptions.

Prescribed content

The I(S)RWUR take an approach of prescribing content for notices and documents in the rules themselves rather than in statutory forms. This builds in a significant degree of future-proofing as there will be less need for amendment to accommodate advancements in technology, business practice and to enable e-delivery.

Small debts

To receive a dividend in an insolvency, a creditor must first submit a claim to the office-holder, which must contain prescribed information, together with supporting documentation. Such claims must be scrutinised by the office-holder prior to distribution of any dividend. Provisions in the I(S)RWUR allow an office-holder to rely on information contained in a company's statement of affairs or accounting records, and to pay a dividend without the need for the creditor to submit a claim, where the debt in question is below the prescribed limit of £1,000.

Opting out of further correspondence

Currently the Act (and hence the 1986 Rules) require the office-holder to send all notices, reports etc., to all known creditors. Even where a creditor has no further

interest in a case and wants no further information on it – e.g there is little or no likelihood of a financial return – they cannot ask the office-holder to omit them from future mailings. The amendments to the Act to which the Rules give effect will allow a creditor to opt out of receiving further correspondence, relieving the office-holder of the expenses of sending notices and the creditor of the expense of dealing with them. Notices of intended dividends will not be subject to the opt-out and creditors will retain the ability to opt back in to receiving notices.

Remuneration claims process

The 1986 Rules currently require the liquidator to apply for remuneration every 6 months based on accounting periods, though they can apply to extend these periods. Often it is not commercially viable to apply for remuneration or to make applications to extend the periods every 6 months. The courts are not keen on being asked to cure defects and sometimes an application is made to extend several accounting periods in one application. The I(S)RWUR no longer requires the liquidator to claim their remuneration every 6 months or apply to court for an extension. Instead the liquidator can notify creditors through the progress report of their intention not to claim remuneration at that particular time.

Taxation of legal fees

The 1986 Rules required the liquidator to submit the accounts with respect of legal services to the auditor of the court for taxation prior to payment. This submission can be exempted with the approval of either the liquidation committee or the court. The I(S)RWUR does not in all cases require this additional taxation with the court or liquidation committee's approval for exemption. If the account has been agreed by the liquidator and the provider of the legal services they can be exempt from submission to the auditor of the court as long as they are not an associated party.

Electronic communications

Where a debtor and a creditor have been customarily corresponding electronically prior to insolvency, under the 1986 Rules an insolvency office-holder could not continue to correspond in that way without first obtaining the creditor's written consent. Under the I(S)RWUR where electronic communications were customarily used pre-insolvency, that method of communication can continue post-insolvency. This will encourage e-communication where appropriate, which is generally cheaper and speedier than traditional post.

Use of websites

At present section 246B(2) of the Act places restrictions on the use of websites to send notices or information in liquidation and receivership procedures in Scotland. Changes already introduced in England and Wales have made provision for the use of websites as a means to communicate this information. Such a provision will improve the efficiency of corporate insolvency procedures in Scotland.

The aim is to have corporate insolvency proceedings in Scotland that are efficient, cost effective and consistent with practices elsewhere in the UK and take account of

technological developments, particularly the growth in the use of electronic communication over the last 20 years. Reducing costs associated with the administration of corporate insolvency including those associated with the production and conventional delivery of information notices will result in an increase in the funds available to creditors. This might in some cases make the difference between the payment, or not, of a dividend or in other cases increase the amount of the dividend.

The I(S)RWUR permits an office-holder to put future documents for a case on a website, subject to certain exceptions. This is not currently allowed for winding up or receivership in the 1986 Rules.

Amendment to advertising requirements

The I(S)RWUR allows the office-holder more flexibility with their advertising requirements. The 1986 Rules required the office-holder to advertise in the Gazette, a newspaper or as ordered by the court. The I(S)RWUR provides the office-holder with the discretion to advertise as they think appropriate.

Replacement of verification by affidavit

At present, the Act places a requirement for the statement of affairs in receivership and winding up procedures to be verified as true by affidavit. Changes already introduced in England and Wales rely on verification by a statement of truth. Some broadly similar amendments to the procedures move to using statutory declarations (under the Statutory Declarations Act 1835).

Statement of concurrence

The I(S)RWUR has extended the use of statements of concurrence to receivership and winding up. An office-holder can require relevant parties to complete and submit a detailed statement of the company's affairs. There can be a significant number of parties and some may have a limited knowledge of the company's financial affairs. This can result in the submission of significantly different statements of affairs, which the office-holder requires to review and comment on within the reports to creditors. A statement of concurrence allows the office-holder to agree which parties are best suited to prepare and submit the statement of affairs and the other parties can confirm their agreement to its contents in its entirety or subject to specific comments on parts which they do not agree with, on an abridged document. Statements of concurrence therefore reduce the level of work required and the costs incurred by the office-holder and the relevant parties in requesting, preparing, submitting and reviewing the statement of affairs.

Removal of the restriction on remote attendance

Currently, the Act provides that during corporate insolvency processes in England and Wales, any meeting of members of a company (excluding meetings of members of the company in a members' voluntary winding up) summoned by the office-holder can be held in such a way that those attending it do not have to be present in the same place as long as they can exercise their rights to speak and vote at the meeting through the use of appropriate technological communications. This process does not apply to

companies subject to winding up or receivership in Scotland. The intention with these provisions is broadly to align the process in Scotland with England and Wales to allow remote attendance. This will provide a more efficient and cost effective process.

Statement of affairs

The I(S)RWUR has introduced a change to support more stringent protection of personal information. Statements of affairs in insolvency proceedings contain full details of all creditors, including their names and addresses, and the amounts of their claims. These details will include employees or ex-employees owed money by the insolvent company for wages or similar payments, and also customers who may have made advance payment for goods or services. In winding up the statement of affairs must be filed in the Sederunt Book record of the insolvency proceedings, which leads to those details being placed in the public domain. This has led to concerns over protection of privacy and identity theft.

New provisions require that where a statement of affairs is filed in the Sederunt Book, details of employees, ex-employees, and customers who are consumers must be contained within a separate schedule, and only a summary will be stored in the publicly available record.