EXPLANATORY MEMORANDUM TO

THE INSOLVENCY (SCOTLAND) RULES 2018 (MISCELLANEOUS AMENDMENTS) RULES 2019

2019 No. 1059 (S. 3)

1. Introduction

1.1 This explanatory memorandum has been prepared by The Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument makes miscellaneous amendments to reserved and devolved legislation to ensure that UK primary and secondary legislation which extends to Scotland and refers to the Insolvency (Scotland) 1986 Rules, ("the 1986 Rules") now refers to the Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018 and the Insolvency (Scotland) (Receivership and Winding up) Rules 2018 which together replaced the 1986 Rules.

2.2 The instrument makes minor corrections to the Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules, (S.I. 2018/1082) and to the Insolvency (Scotland) (Receivership and Winding up) Rules 2018 (SSI 2018/347)

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The instrument contains one amendment to Scottish primary legislation, the Bankruptcy (Scotland) Act 2016. The department is aware of the JCSI's concerns in relation to its reliance on section 411 of the Insolvency Act 1986 to amend primary legislation, as expressed in the JCSI's Fourth Report in the Session 2017-9. However, we consider the powers in section 411(2)(b), which enable the making of incidental and supplemental provisions, do extend to amending primary legislation. It is accepted the question would be beyond doubt if the legislation had clearly stated a power to amend primary legislation, but it is understood this was not necessarily the prevailing practice at the time the 1986 Act was drafted. The changes are minor and incidental, covering one reference to the Insolvency (Scotland) Rules 1986 and we consider an amendment is preferable to the alternative of leaving readers to rely on section 17(2) of the Interpretation Act 1978 (repeal and re-enactment).

3.2 In the preamble of the instrument we have cited section 379(1)(b) and 2(b) of the Financial Services and Markets Act 2000 ("the 2000 Act") (provision carrying into effect the provisions of Part 24 of the 2000 Act, with respect to the winding up of insurers, or relating to a prescribed list of matters). This is cited as an enabling power following amendment to rule 18 of the Insurers (Winding up) (Scotland) Rules 2001. The amendment appears in rule 3(3) of the instrument and amends a rule that carries into effect provisions of Part 24 of the 2000 Act, specifically section 376. Section

379(2)(b) of the 2000 Act (winding up rules relating to the apportionment, between assets of different classes or descriptions, of the costs, charges and expenses of the winding up) is also cited as an enabling power as an amendment is made to rule 24 of the Insurers (Winding up) (Scotland) Rules 2001, which appears at rule 3(5) of the instrument. Rule 24 includes provision on the apportionment, between assets of different classes or descriptions, of the costs, charges and expenses of winding up.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.3 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is Scotland.

4.2 The territorial application of this instrument is Scotland.

5. European Convention on Human Rights

5.1 Kelly Tolhurst at the Department for Business, Energy and Industrial Strategy has made the following statement regarding Human Rights:

"In my view the provisions of the [the Insolvency (Scotland) Rules 2018 (Miscellaneous Amendments) Rules 2019 are compatible with Convention rights."

6. Legislative Context

6.1 The instrument makes miscellaneous amendments to legislation that refers to the 1986 Rules. The 1986 Rules provide the procedural framework for corporate insolvency proceedings in Scotland. These have been superseded by the Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018, laid before Parliament on the 15th October 2018 and which came into force on the 6th April 2019, revoking the 1986 Rules. The Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018 relate to reserved matters and an equivalent Scottish Statutory Instrument, the Insolvency (Scotland) (Receivership and Winding up) Rules 2018 was laid on the 14th November 2018 by the Scottish Government and also came into force on 6th April 2019 in relation to rules for winding up and receivership, which are devolved. Legislative competence for winding up is split and accordingly, an order under sections 63 and 108 of the Scotland Act 1998 was made (The Scotland Act 1998 (Insolvency Functions) Order 2018) to allow for either the Scottish Ministers or a UK Minister to make rules on winding up, with consent from the other if necessary.

7. Policy background

What is being done and why?

7.1 Following the commencement of the modernised insolvency rules for England and Wales (SI 2016/1024 as amended) on 6 April 2017, a similar exercise was undertaken to modernise and consolidate the rules for Scotland which came into force on the 6th April 2019.

7.2 Amendments to other legislation that refer to the 1986 Rules are necessary in order to fully and consistently implement the new Scottish rules so that Scotland mirrors changes already implemented in England and Wales.

7.3 The instrument also takes the opportunity to make corrections and clarifications to rules 2.7(3)(d), 3.35(1)(f)(i), 3.41(1)(a), 3.67(2)(d) and 3.115(4)(a) to the Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules, (2018/1082). Minor amendments are also made to the Insolvency (Scotland) (Receivership and Winding up) Rules 2018, specifically in relation to rule 3.11(3) and Schedule 2.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

9.1 Not applicable

10. Consultation outcome

10.1 The instrument has not been subject to a formal public consultation because it makes only minor and technical amendments and modifications. However, The Insolvency (England and Wales) Rules 2016 came into force in England and Wales on 6 April 2017 following extensive consultation and approval by the Insolvency Rules Committee. The new Scottish rules are closely modelled on the Insolvency (England and Wales) Rules 2016 and this instrument has been developed in consultation with Scottish Government officials

11. Guidance

11.1 The Department does not propose to issue any guidance in relation to this instrument.

12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because no impact on the private or voluntary sectors is foreseen.

13. Regulating small business

13.1 The legislation is deregulatory and applies to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The Department of Business, Energy and Industrial Strategy does not currently plan to undertake a review of the measures introduced in this instrument, as this instrument makes no substantive changes to the existing primary legislation.

15. Contact

15.1 Maya Patel at the Insolvency Service Telephone: 0207 596 6121 or email: Maya.Patel@insolvency.gov.uk can be contacted with any queries regarding the instrument.

15.2 Dean Beale, Director of Strategy and Change at the Insolvency Service can confirm that this Explanatory Memorandum meets the required standard.

15.3 Kelly Tolhurst MP at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.