

SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 10: INSOLVENCY

Administration

Section 127: Extension of administrator's term of office

733. Administration is an insolvency proceeding where the affairs, business and property of the company are managed by an administrator. The primary aim of an administration is to ensure the company's survival as a going concern, and failing that to achieve a better result for the company's creditors than would be likely if the company was wound up. An administrator may be appointed by the company, directors or a qualifying floating charge holder by giving notice and filing prescribed documents at court. Alternatively, an administrator may be appointed by the court on application by the company, directors or creditors.
734. This section amends paragraph 76 of Schedule B1 to the Insolvency Act 1986 and like that Schedule applies to England and Wales and Scotland. The amendment extends the maximum time period creditors may consent to an extension of an administration to a specified period not exceeding one year.
735. Administration automatically ends after one year, a feature designed to emphasise that the administrator should progress matters expeditiously to allow for the swift resolution of the administration. Administration may already be extended by the court or with the consent of creditors. Currently paragraph 76(2)(b) of Schedule B1 to the Insolvency Act 1986 provides that an administration may be extended with the consent of creditors for a specified period not exceeding six months.
736. This section will come into force at the end of the period of two months beginning with the day on which the Bill becomes an Act.

Section 128: Administration: payments to unsecured creditors

737. This section amends Part II and Schedule B1 of the Insolvency Act 1986 to provide that the court's permission is not required where the administrator makes the prescribed part payment to unsecured creditors. This will apply to England and Wales and Scotland.
738. In administration and insolvent liquidations (creditors' voluntary and court winding up) proceedings, part of a company's net property must be set aside for a payment to unsecured creditors, and this is known as the prescribed part.
739. In an administration, the office holder must seek the court's permission before making payments to unsecured creditors. The reason for this is that where there are funds left over after secured creditors have been paid, the office holder should consider whether

the administration should be converted into a creditors' voluntary liquidation, a process which provides for increased engagement of unsecured creditors. The requirement to seek the court's permission has been widely interpreted as applying to payments made to unsecured creditors from the prescribed part.

740. A similar amendment is made to the process whereby the administration may be converted to a creditors' voluntary liquidation to reflect that a prescribed part payment should not trigger this change.
741. This section will come into force at the end of the period of two months beginning with the day on which the Bill becomes an Act.

Section 129: Administration: sales to connected persons

742. The section creates a power for the Secretary of State to make regulations prohibiting or imposing conditions on sales, disposals or, hiring out of the assets or business of the company in administration to connected parties.
743. The power to make regulations will enable the Secretary of State to:
- i. prohibit sales
 - ii. allow sales to take place subject to the imposition of restrictions or conditions.
 - iii. provide for the requirement to obtain approval from the court, the creditors of the company, or other person of a description specified in the regulations.
744. The section targets the restriction on 'connected persons' – which is where a person or the company purchasing the business has a relationship with the insolvent company. This includes directors, shadow directors or their associates. Associate captures, amongst other connections, where the person buying the company is the spouse, civil partner, relation of, or in business partnership with those acting as directors of the insolvent company.
745. The section also captures where common individuals exercise control over both companies. The existing legislative definition of 'control' of a company includes those persons who are not directors but whom the directors are accustomed to acting in accordance with their instructions.

Section 130: Attachment of floating charges on administration (Scotland)

746. Administration is an insolvency proceeding where the affairs, business and property of the company are managed by an administrator. The primary aim of an administration is to ensure the company's survival as a going concern, and failing that to achieve a better result for the company's creditors than would be likely if the company was wound up. An administrator may be appointed by the company, directors or a qualifying floating charge holder by giving notice and filing prescribed documents at court. Alternatively, an administrator may be appointed by the court on application by the company, directors or creditors.
747. This section amends paragraph 115 of Schedule B1 to the Insolvency Act 1986 and like that paragraph forms part of the law of England and Wales and Scotland. The amendment inserts a trigger point for the crystallisation of a floating charge in Scotland which is activated when the court gives permission to an administrator to make a distribution to a creditor of the company who is neither secured nor preferential.
748. A payment to a floating charge-holder can only be made once the charge has attached or crystallised over the assets covered by the charge. In England and Wales, this 'crystallisation trigger' can be contractual but in Scotland the trigger points are provided for in statute, and it is not competent for parties to provide by contract for a floating charge to attach.

*These notes refer to the Small Business, Enterprise and Employment
Act 2015 (c.26) which received Royal Assent on 26 March 2015*

749. Currently paragraph 115 provides that in Scotland a floating charge attaches to the property which is subject to the charge at the point when an administrator files a notice at Companies House stating that the company has insufficient property to make a payment to unsecured creditors, thereby crystallising the charge.
750. This works well in cases where only payments to the holder of a floating charge are expected. However, it does not work in cases where there are also likely to be payments to unsecured creditors.
751. This is because the order of priority in insolvency proceedings requires that holders of floating charges be paid in full before any funds are returned to non-preferential unsecured creditors. However, as stated above, for payments to floating charge-holders to be made in Scottish administrations, the charge must have first attached to the assets. This attachment cannot happen in cases where the administrator wishes to distribute to unsecured creditors, as the statutory trigger is the filing of a notice by the administrator stating that there is insufficient property held by the company for such payments to be made. In such cases, it is necessary for the administrator to put the company into liquidation (which is another statutory route to crystallise the charge), before distributing the funds to floating charge-holders and unsecured creditors. This section will avoid the need for such action.