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DRAFT SCOTTISH STATUTORY INSTRUMENTS

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**2016 No.**

**REGULATORY REFORM**

**INSOLVENCY**

**COMPANIES**

**The Public Services Reform (Insolvency) (Scotland) Order 2016**

*Made* - - - - - *2016*

*Coming into force*

*in accordance with article 1(2) and  
(3)*

*1st April 2016*

*otherwise in accordance with article  
1(4)*

The Scottish Ministers make the following Order in exercise of the powers conferred by section 17(1) and (9) of the Public Services Reform (Scotland) Act 2010(a) and all other powers enabling them to do so.

The Scottish Ministers consider that the conditions in section 18(2) of that Act are satisfied.

The Scottish Ministers have consulted in accordance with section 26 of that Act.

The Scottish Ministers have laid a draft of this Order and an explanatory document before the Scottish Parliament in accordance with section 25(2)(b) of that Act.

In accordance with section 25(2)(c) of that Act, a draft of this Order has been approved by resolution of the Scottish Parliament(b).

**Citation, commencement and interpretation**

**1.**—(1) This Order may be cited as the Public Services Reform (Insolvency) (Scotland) Order 2016.

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(a) 2010 asp 8. The effect of sections 14 to 30 and schedule 5 and 6 of the Act has been extended by virtue of section 134(4) and S.S.I. 2015/234.

(b) Section 25(2)(c) has been modified by paragraph 5 of schedule 3 of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10).

- (2) Subject to paragraphs (3) and (4), this Order comes into force on 1st April 2016.
- (3) Articles 4 to 13 come into force on 1st April 2016 insofar as they enable the making of—
- (a) rules under section 411 of the Act; or
  - (b) any other subordinate legislation under the Act.
- (4) Insofar as not already in force, articles 4 to 13 come into force on the day appointed for the coming into force, for all remaining purposes, of section 122(2) of the 2015 Act in Scotland(a).
- (5) In this Order—
- (a) “the Act” means the Insolvency Act 1986(b); and
  - (b) “the 2015 Act” means the Small Business, Enterprise and Employment Act 2015(c).

### *Receivership*

#### **Removal of restriction on appointment of receiver to property in Scotland**

2. In section 51 of the Act (power to appoint receiver) repeal subsection (2ZA)(d).

#### **Receiver as agent of company - treatment of liabilities relating to contracts of employment**

3. In section 57 of the Act (agency and liability of receiver for contracts) repeal subsection (2D)(e).

#### **Verification of company’s statement of affairs**

4. In section 66(2) of the Act (company’s statement of affairs) for “be verified by affidavit” substitute “contain a statutory declaration”.

### *Winding up*

#### **Members’ voluntary winding up: progress report to company**

- 5.—(1) In section 92A of the Act (progress report to company (England and Wales))(f)—
- (a) in subsection (1) repeal “where the company is registered in England and Wales”; and
  - (b) in the section title repeal “(England and Wales)”.
- (2) Repeal section 93 of the Act (general company meeting at each year’s end (Scotland))(g).
- (3) In Schedule 10 of the Act (punishment of offences), repeal the entry relating to section 93(3).

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(a) Sections 122 to 126 (position of creditors) and schedule 9 (abolition of requirements to hold meetings; opted out creditors) of the 2015 Act came into force on 26th May 2015 for purposes in respect of enabling regulations, rules or orders or preparing and issuing guidance (see S.I. 2015/1329).

(b) 1986 c.45.

(c) 2015 c.26 (“the 2015 Act”).

(d) Section 51(2ZA) was inserted by article 2(b) of S.S.I. 2011/140.

(e) Section 57(2D) was inserted by section 3(4) of the Insolvency Act 1994 (c.7).

(f) Section 92A was inserted by article 6(1) of S.I. 2010/18, amended by section 136(2) of the 2015 Act and is prospectively amended by paragraph 16 of Schedule 9 of the 2015 Act.

(g) Section 93 was amended by article 6(2) of S.I. 2010/18 and is prospectively amended by paragraph 17 of Schedule 9 of the 2015 Act.

### **Creditors' voluntary winding up: progress report to company and creditors**

**6.**—(1) In section 104A of the Act (progress report to company and creditors (England and Wales))(a)—

- (a) in subsection (1), for “Where the company is registered in England and Wales the” substitute “The”; and
- (b) in the section title repeal “(England and Wales)”.

(2) Repeal section 105 of the Act (meetings of company and creditors at each year's end (Scotland))(b).

(3) In Schedule 10 of the Act, repeal the entry relating to section 105(3).

### **Consequential amendments and repeals**

**7.**—(1) In the 2015 Act, repeal paragraphs 17 and 28 of Schedule 9.

(2) In the Limited Liability Partnerships (Scotland) Regulations 2001(c)—

- (a) in Schedule 2 (provisions of the Act which apply to limited liability partnerships as they apply to companies)—
  - (i) for “93” substitute “92A”; and
  - (ii) for “105” substitute “104A”; and
- (b) in Schedule 3 (modifications to provisions of the Act) omit the entries for sections 93 and 105.

(3) In the Limited Liability Partnerships Regulations 2001(d)—

- (a) in Schedule 3 (modifications to provisions of the Act) omit the entries for sections 93 and 105; and
- (b) in Schedule 4 (provisions of the Act not applied in Scotland because they are applied by the Limited Liability Partnerships (Scotland) Regulations 2001)—
  - (i) for “93” substitute “92A”; and
  - (ii) for “105” substitute “104A”.

### **Members' voluntary winding up: verification of statement as to company's affairs**

**8.** In section 95(4A) of the Act (liquidator's verification of statement as to company's affairs)(e)—

- (a) repeal “be verified by the liquidator”;
- (b) in paragraph (a), after “Wales,” insert “be verified by the liquidator”; and
- (c) in paragraph (b), for “by affidavit” substitute “contain a statutory declaration by the liquidator”.

### **Creditors' voluntary winding up: verification of statement of affairs**

**9.** In section 99(2A) of the Act (directors' verification of statement as to company's affairs)(f)—

- (a) repeal “be verified by some or all of the directors”;

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(a) Section 104A was inserted by article 6(3) of S.I. 2010/18, amended by section 136(3) of the 2015 Act and is prospectively amended by paragraph 27 of Schedule 9 of the 2015 Act.

(b) Section 105 was amended by article 6(4) of S.I. 2010/18 and is prospectively amended by paragraph 28 of Schedule 9 of the 2015 Act.

(c) S.S.I. 2001/128.

(d) S.I. 2001/1090.

(e) Section 95(4A) was inserted by article 5(2)(b) of S.I. 2010/18.

(f) Section 99(2A) was inserted by article 5(3)(b) of S.I. 2010/18.

- (b) in paragraph (a), after “Wales,” insert “be verified by some or all of the directors”; and
- (c) in paragraph (b), for “by affidavit” substitute “contain a statutory declaration by some or all of the directors”.

#### **Court winding up: verification of statement of affairs on investigation**

- 10.** In section 131(2A) of the Act (company’s statement of affairs)(a)—
- (a) repeal “be verified by the persons required to submit it”;
  - (b) in paragraph (a), after “Wales,” insert “be verified by the persons required to submit it”;
  - and
  - (c) in paragraph (b), for “by affidavit” substitute “contain a statutory declaration by the persons required to submit it”.

#### **Application for early dissolution of the company**

- 11.** In section 204(2) of the Act (early dissolution: Scotland)(b) for “he may apply” substitute “the liquidator may at any time apply”.

#### *Miscellaneous*

#### **Use of websites**

- 12.** In section 246B of the Act (use of websites)(c)—
- (a) repeal subsection (2); and
  - (b) in subsection (3)(a) after “administrator,” insert “receiver (appointed under section 51),”.

#### **References to things in writing: receiver’s report and provisions of Companies Clauses Consolidation (Scotland) Act 1845**

- 13.** In section 436B(2) of the Act (references to things in writing)(d) repeal paragraphs (b) and (e).

#### *Savings*

#### **Savings**

**14.** Where a receiver is appointed in respect of a company under section 51 of the Act(e) before 1st April 2016, that section continues to have effect on and after 1st April 2016 as if the amendment made in article 2 had not been made.

**15.—(1)** Where this article applies, subject to article 1(3) the Act continues to have effect on and after the day mentioned in article 1(4) as if the amendments made by articles 4 to 6 and 7(2) to 13 had not been made.

(2) This article applies where, in a receivership, a receiver is appointed in respect of a company under section 51 of the Act before the day mentioned in article 1(4).

(3) This article applies where a company goes into liquidation upon a resolution for voluntary winding up passed before the day mentioned in article 1(4).

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(a) Section 131(2A) was inserted by article 5(4)(b) of S.I. 2010/18.  
(b) Section 204(2) is prospectively amended by paragraph 50 of Schedule 9 of the 2015 Act.  
(c) Section 246B was inserted by article 3(1) of S.I. 2010/18.  
(d) Section 436B was inserted by article 4(1) of S.I. 2010/18.  
(e) Section 51 was amended by the Enterprise Act 2002 (c.40), Schedule 17, paragraph 13, the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3), section 3, the Bankruptcy and Debt Advice (Scotland) Act 2014 (asp 11), schedule 4, paragraph 1 and article 2 of S.S.I. 2011/140.

(4) This article applies where—

- (a) there is an application for the appointment of a provisional liquidator under section 135 of the Act; or
- (b) a company goes into liquidation on the making of a winding up order,

on a winding up petition presented before the day mentioned in article 1(4).

(5) This article applies where—

- (a) there is an application for the appointment of a provisional liquidator under section 135 of the Act; or
- (b) a company goes into liquidation on the making of a winding up order,

on a winding up petition presented on or after the day mentioned in article 1(4) if, at the time the winding up petition is presented, the company is in liquidation upon a resolution for voluntary winding up passed before the day mentioned in article 1(4).

(6) In this article—

“resolution for voluntary winding up” includes a resolution which is deemed to occur by virtue of—

- (a) paragraph 83(6)(b) of Schedule B1 of the Act (administration); or
- (b) an order made following conversion of administration or a voluntary arrangement into winding up by virtue of Article 37 of Council Regulation (EC) No. 1346/2000 on insolvency proceedings<sup>(a)</sup>; and

“winding up petition” includes an administration application under paragraph 12 of Schedule B1 to the Act which the court treats as a winding up petition under paragraph 13(1)(e) of that Schedule.

St Andrew’s House,  
Edinburgh  
Date

*Name*  
Authorised to sign by the Scottish Ministers

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<sup>(a)</sup> OJ L 160, 30.6.2000, p.19. Article 37 of Council Regulation (EC) No. 1346/2000 is replaced from 26th June 2017 by Article 51 of EU Regulation (EU) 2015/848 of the Council and the Parliament on insolvency proceedings (OJ L 141, 5.6.2015, p.19).

## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order is made under section 17 of the Public Services Reform (Scotland) Act 2010. It amends the Insolvency Act 1986 (“the Act”) and the Small Business Enterprise and Employment Act 2015 (“the 2015 Act”). Articles 2 and 3 come into force on 1st April 2016, as do the other amendments for the limited purpose of allowing subordinate legislation to be made, including corporate Insolvency Rules under section 411 of the Act.

The amendments in articles 4 to 13 come fully into force on the day to be appointed for the coming into force, for all remaining purposes, of section 122(2) of the 2015 Act in Scotland (abolition of requirements to hold meetings – decisions by creditors and contributories and deemed consent procedure).

Article 2 amends the rules on appointment by a floating charge holder (or by a court on the application by a floating charge holder) of a receiver of property of an incorporated company, other than a company which the Court of Session has jurisdiction to wind up. It removes the restriction requiring such an appointment to be only in respect of property situated in Scotland.

Article 3 repeals an element of the priority given to employees’ wages in receivership, as the type of employment contract to which it relates no longer exists. A company can continue to trade under the direction of the receiver, usually pending sale of the business or assets, at which point the receiver is personally liable for certain debts incurred by the company which are payable ahead of the fees of the receiver. For an employee to become entitled to have wages paid as an expense, the insolvency practitioner would have to adopt their contract. As well as including salary for actual days worked, the definition of wages extends to cover payment for holiday entitlement, absence and payment in lieu of holiday. Certain employment contracts (‘year-in-hand’ schemes) earned an employee holiday entitlement for the year ahead. Social security legislation provides that this holiday is counted as accrued in the year it was earned. In order not to discriminate against employees on these schemes, section 57(2D) of the Act provides that “wages or salary” includes, in respect of a holiday period, a sum which would be treated as earnings for that period for the purposes of an enactment about social security. This enables a claim for this earned holiday entitlement to be made after receivership. This provision is redundant as ‘year in hand’ schemes are no longer legally possible since the coming into force of the Working Time Regulations 1998 (S.I. 1998/386).

Articles 4, 8, 9 and 10 remove requirements (in 4 sections of the Act) for documents to be sworn by affidavit and replaces them with requirements for the documents to contain a statutory declaration. Provision for statutory declarations is made in the Statutory Declarations Act 1835 (c.62).

Articles 5 and 6 replace provision for the general meeting of the company and meeting of creditors at year’s end for both members’ voluntary winding up (see section 93 of the Act) and creditors’ voluntary winding up (see section 105 of the Act) with progress reports to the company and to the company and creditors respectively. The effect is that the requirement imposed on liquidators to summon annual meetings of members and creditors for the purpose of laying an account of the liquidator’s acts and dealings and of the conduct of the winding up during the preceding year is replaced with a requirement to provide a progress report relating to matters prescribed in the Insolvency Rules 1986(a) to the members and creditors of the company as the case may be (sections 92A and 104A of the Act). Article 7 makes repeals in the 2015 Act and about limited liability partnerships in consequence of articles 5 and 6.

Article 11 clarifies that an application for early dissolution of a company under section 204(2) of the Act can be made at any time after the appointment of a liquidator.

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(a) S.I. 1986/1915, as amended.

Article 12 applies provisions in the Act relating to communications and meetings in insolvency proceedings to receivership and winding up in Scotland. It applies section 246B (use of websites) where a company is wound up in Scotland or a receiver is appointed under section 51 of the Act (power to appoint receiver under the law of Scotland). Section 246B allows an office-holder to use a website as a means of sending documents and information to others in the course of insolvency proceedings.

Article 13 amends section 436B (references to things in writing) of the Act which provides that references in the Act to documents or information “in writing” include documents or information in electronic form. The amendment applies section 436B in relation to a receiver’s report under section 67(2) of the Act and, in the case of a winding up of a company registered in Scotland, section 111(4) (regarding provisions of Companies Clauses Consolidation (Scotland) Act 1845).

Articles 14 and 15 contain savings provision in relation to the introduction of the amendments made by the Order.

The amendments made to the Act by this Order apply to limited liability partnerships by virtue of:—

- regulation 5(1) of the Limited Liability Partnership Regulations 2001 (S.I. 2001/1090), which apply Part IV of the First Group of Parts, and the Third Group of Parts, of the Act, and
- regulation 4(1) and schedule 2 of Limited Liability Partnership (Scotland) Regulations 2001 (S.S.I. 2001/128) which apply sections 50 to 52, 55 to 58, 63 to 66 and 91 to 93, 95, 104 to 105 and 131 of the Act.

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